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10 **THE SUPERIOR COURT OF ARIZONA**

11 **COUNTY OF NAVAJO**

12 Gordon Gross and Liliana Gross, husband
and wife *et al.*,

13 Plaintiffs,

14 vs.

15 The Shores at Rainbow Lake Community
16 Association, an Arizona nonprofit
corporation,

17 Defendant.

Case No.: S0900CV202200042

**REPLY IN SUPPORT OF MOTION
FOR NEW TRIAL**

18
19 **I. INTRODUCTION**

20 In the Response, Plaintiffs correctly note this Court was divested of jurisdiction as a result
21 of the December 29, 2022 Notice of Appeal. The reason the Notice of Appeal was filed prior to
22 the Court considering the Motion for New Trial is as explained in the December 29, 2022 Notice
23 to the Court about how the notice of entry of judgment served as required by [Rule 58\(c\)\(2\)\(C\)](#)
24 provided a December 6, 2022 date of entry of judgment, but the Public Access to Court
25 Information docket shows the Judgment was filed on December 1, 2022, which is a possible
26

1 date for entry of judgment. See [Rule 58\(b\)\(2\)\(A\)](#) (“A judgment . . . is entered *when the clerk files*
2 *it.*”)

3 As soon as the Court of Appeals assigns its case number to the appeal (which still has not
4 yet happened), a Motion to Revest Jurisdiction will be filed to allow the Court to reclaim
5 jurisdiction and rule on the pending Motion for New Trial.

6 Out of concern that the response and reply deadlines on a motion filed in the trial court
7 continue to run after the trial court is divested of jurisdiction, this Reply is filed.

8 **II LEGAL ANALYSIS**

9 **A. Following the Arizona Supreme Court is Best Practice.**

10 In the Motion for New Trial, at p. 4, is found a citation to [Kalway v. Calabria Ranch](#)
11 [HOA, LLC](#), 252 Ariz. 532, 537 ¶ 8 (2022) in which the Court held “If an amendment is invalid,
12 we ‘blue pencil’ the amended CC&Rs, striking severable provisions.” The Court then followed
13 its holding by “Applying the blue pencil rule” to “strike unauthorized terms from several
14 amendments.” [Kalway](#) 252 Ariz. 532, 539, ¶ 21. The Motion for New Trial described how
15 complying with the Arizona Supreme Court’s holding is important because “Any other rule
16 would lead to chaos in our judicial system.” [Francis v. Arizona Department of Transportation](#),
17 192 Ariz. 269, 271 (App. 1998). See Motion, p. 8, lines 17-19.

18 In the Response, Plaintiffs ask this Court to overlook the holding of [Kalway](#). Plaintiffs
19 claim Defendants should have lodged a form of judgment earlier, at a time when Plaintiffs’ other
20 claims were pending and entry of judgment would be premature. Plaintiffs argue Defendants
21 were therefor barred from objecting to Plaintiffs’ form of judgment or providing a blue-pencil
22 form of judgment in compliance with [Kalway](#), as Defendant did on October 24, 2022, more than
23 a month before entry of Plaintiffs’ form of judgment. Plaintiffs cite no legal authorities in
24 support of their argument. See Response, p. 4.

25 Plaintiffs’ Response completely fails to address their written agreement to sever invalid
26 sections from valid sections. Plaintiffs’ express agreement states:

1 **Severability.** Any determination by any court of competent jurisdiction that any
2 provision of this Declaration is invalid or unenforceable shall not affect the validity
3 or enforceability of any of the other provisions hereof.

4 Plaintiffs did not mention this agreement in their Response or explain why they breached
5 their agreement by lodging a form of judgment finding the entire 2021 Amendment invalid.

6 When the Kalway Court held “If an amendment is invalid, we ‘blue pencil’ the amended
7 CC&Rs, striking severable provisions,” the “we” included the not just the seven justices on the
8 Arizona Supreme Court but all other judges in the Courts of Appeals and Superior Courts. “Any
9 other rule would lead to chaos in our judicial system.” Francis v. Arizona Department of
10 Transportation, *supra*. Plaintiffs’ request that this Court ignore the Arizona Supreme Court
11 must be rejected. The Kalway holding matches Plaintiffs’ express written agreement to not
12 allow any small invalidity “affect the validity or enforceability of any of the other provisions.”

13 Plaintiffs’ claim that the form of judgment lodged by Plaintiffs (1) invalidates the entire
14 Amendment but (2) permits the Association to conduct a new election on a new amendment to
15 pass (again) the provisions the Court found valid. Plaintiffs claim allowing the Association to
16 pass (again) the valid sections is required (by no agreement or authority). Plaintiffs therefore
17 claim it is perfectly correct to leave the 2nd, 3rd and 4th sections of the Amendment found valid
18 by the Court’s order invalid and unenforceable by the Court’s entry of judgment. Plaintiffs cite
19 no authority for using a form of judgment that fails to comply with the blue pencil rule.

20 This Court should embrace, adopt and follow the Arizona Supreme Court in using the
21 “blue pencil” method of striking the 18 words the Court found unenforceable. Plaintiffs provide
22 no legal basis for any other result.

23 **B. Entering a Judgment Earlier was Impossible.**

24 Plaintiffs use **underlined and bold** language to make their point of why Kalway’s
25 holding should be ignored. Response, p. 4. Plaintiffs claim because Defendant did not lodge a
26 form of judgment after the Court issued a decision on cross-motions for partial summary
judgment, Defendant was barred from ever lodging a form of judgment or objecting to Plaintiffs’

1 form of judgment. Notwithstanding the **bold and underlined language**, Plaintiffs cite no legal
2 authority in support their argument.

3 Plaintiffs may not understand what a judgment is. A judgment is “any order from which
4 an appeal lies.” [Rule 54\(a\)](#).

5 After the decision on the cross-motions for partial summary judgment, other undecided
6 claims remained including Plaintiffs’ claims that the contractually valid portions of the
7 amendment could still be found invalid because of alleged voting irregularities¹ and plaintiffs
8 claim to recover money damages.² The order granting partial summary judgment on the limited
9 issue of contract validity is not the type of order from which an appeal lies. [Santa Maria v.](#)
10 [Najera](#), 222 Ariz. 306, 307 (App. 2009) (“The partial summary judgment entered in this case
11 was not a final judgment because it left undecided the counterclaim and two of the complaint's
12 five causes of action[.]”)

13 The term “judgment” means any order from which an appeal lies. Plaintiffs have not
14 explained how a “judgment” could be entered after the order granting partial summary judgment
15 (in part to both parties). That order did not resolve all claims of one or more parties. The order
16 did not resolve a separate claim, counterclaim or crossclaim. Plaintiffs correctly do not suggest
17 that the limited issue of contract validity allowed for entry of judgment under [Rule 54\(b\)](#) in a
18 case where Plaintiffs continued to contest validity under their theory of voting irregularities and
19 damages that flowed from the allegedly invalid provisions.

20 [Rule 54\(b\)](#) would not permit the entry of partial judgments where that would result in
21 “splitting a cause of action and deciding appellate cases piecemeal. See [Marshall v. Williams](#),

23 ¹ See “Improper tactics used to ‘Pass’ the Amendment,” p. 6 of original Complaint, p. 7 of
24 First Amended Complaint. See also para. 74 of original Complaint and para 75 of First Amended
Complaint.

25 ² See original Complaint, p. 14, para. (b) and First Amended Complaint, p. 14, para. (b)
26 alleging how Plaintiffs suffered “compensatory, incidental and consequential” monetary
damages.

1 128 Ariz. 511, 513 (App. 1981) (*quoting Page v. Preisser*, 585 F.2d 336 (8th Cir. 1978)). “An
2 adjudication of only one of a number of theories of a single claim cannot by the addition of Rule
3 54(b) language be transformed into a single, whole, and appealable determination.” *Marshall v.*
4 *Williams*, 128 Ariz. at 514. Plaintiffs are correct not to claim a [Rule 54\(b\)](#) judgment was
5 appropriate. Defendant agrees and would not lodge an erroneous [Rule 54\(b\)](#) judgment with the
6 remaining claims still undecided.

7 Likewise, a [Rule 54\(c\)](#) judgment was not available after the Court decided the cross-
8 motions for partial summary judgment. Something more was needed. The “more” was a
9 resolution, one way or the other, of Plaintiffs’ remaining claims.

10 In its Order dated November 10, 2022, the Court asked Plaintiff to verify what other
11 claims remained and if they “are, in fact, abandoning all claims not addressed in the Motion and
12 Cross-Motion for Summary Judgment.” Plaintiffs’ November 23, 2022, Notice listed the other
13 claims left unresolved by the Court’s Order, and included Plaintiffs’ statement that they *would*
14 be dismissing these claims. *See* November 23, 2022, Notice.

15 Before this case could be ready for a “judgment,” defined as an order from which an
16 appeal lies, the Court must adjudicate the remaining claims. Plaintiffs agreed on November 23,
17 2022 that “they *would*, in fact, be voluntarily dismissing those other claims not addressed in the
18 Motion and Cross-Motion for Summary Judgment. *See* Notice, p. 2, lines 14-15.

19 As [Rule 41\(1\)\(A\)\(ii\)](#) allows, Defendant also agreed to a stipulation of dismissal with
20 prejudice. *See* October 24, 2022, Objection to Form of Judgment, pp. 2-3. [Rule 41\(1\)\(A\)\(ii\)](#)
21 therefore required the dismissal of all remaining claims be “by order.” “The order may be signed
22 by a judge, an authorized court commissioner, the clerk, or a deputy clerk.” If the Court enters
23 an order dismissing Plaintiffs’ remaining claims with prejudice, only then would entry of a [Rule](#)
24 [54\(c\)](#) judgment be appropriate.

25 Defendant lodged a final judgment that included the Court’s express adjudication of each
26 and every claim alleged in the Complaint. *See* October 24, 2022, Objection to Form of Judgment,

1 pp. 2-3. The October 24, 2022 date was still too early because the Court was not convinced
2 Plaintiffs intended to abandon their remaining claims until receipt of Plaintiffs' November 23,
3 2022 Notice.

4 The only conclusion is Defendant lodged a form of judgment one month before the Court
5 received Plaintiffs' confirmation that the case reached a point when a judgment could be entered.
6 Plaintiff does not explain how a form of judgment lodged one month before the Court received
7 Plaintiffs' express agreement to dismiss its remaining claims was too late – or how that would
8 justify Plaintiffs' request that the Court not follow the Kalway holding by applying the blue-
9 pencil rule.

10 **C. An Order of Dismissal Signed by Court is Required.**

11 In the Motion for New Trial, Defendant described how using the proper form (whether
12 that by quoting the language of Rule 54(b) or 54(c)) is not a substitute for the court actually
13 adjudicating each claim, one way or the other. Without the proper form *and* the proper
14 substance, a Judgment is not final, subject to execution, or appealable. Madrid v. Avalon Care
15 Ctr.-Chandler, L.L.C., 236 Ariz. 221, 224 ¶ 6 (App. 2014) (“As statement that a judgment is
16 final pursuant to Rule 54(c) when, in fact, claims remain pending does not make a judgment
17 final and appealable.”)

18 In this matter, the form of judgment offered by Plaintiffs included Rule 54(c) language.
19 Yet, the form of judgment lodged did not say what happened to Plaintiffs' remaining claims.
20 Were the remaining claims adjudicated *for or against* Defendant? The judgment does not say.
21 If the remaining claims were adjudicated in favor of Defendant, were the claims dismissed with
22 prejudice? Were the claims dismissed without prejudice? Plaintiffs' Response ignores these
23 unanswered questions and does not describe how the Court stated its resolution of Plaintiffs'
24 remaining claims.

25 Rule 41(1)(A)(ii) tells the parties how Plaintiffs' claims can be dismissed. First, this
26 rule requires Plaintiffs and Defendant to agree to the dismissal. If this agreement is signed by

1 all parties, then dismissal is by written order. “The order may be signed by a judge, an
2 authorized court commissioner, the clerk, or a deputy clerk.” [Rule 41\(1\)\(A\)\(ii\)](#). The form of
3 judgment lodged by Defendant included such an order.

4 The Motion for New Trial at pages 5-6 cites a list of examples of how judgements reciting
5 [Rule 54\(b\)](#) or [54\(c\)](#) language were found *not* to be valid judgments because the substance did
6 not match the form of judgment. Plaintiffs cite no authorities and give no example of a Court
7 not mentioning what happened to the remaining claims when signing a Rule 54(c) judgment.
8 *See* Response, pp. 4-5.

9 Following the Arizona Supreme Court and Court of Appeals authorities and Rule 41 is
10 the best practice. Notwithstanding Plaintiffs’ unsupported argument to the contrary, the Court
11 must adjudicate all claims, one way or the other. If Plaintiffs’ claims are to be dismissed,
12 dismissal is by written order signed by the judge. *See* [Rule 41](#). Once the claims are dismissed,
13 then it is proper to make a [Rule 54\(c\)](#) finding in a judgment.

14 **D. Defined terms are subject to change.**

15 In the Motion for New Trial, Defendant described how the Court’s September 14, 2022,
16 Order looked at how the 2001 Covenants defined the term “Single Family” and concluded
17 placing the definition in the Covenants provided “sufficient notice to future owners that the
18 Association intends to be able to define the term in the future.” *See* Order, p. 12.

19 The Motion for New Trial asked the Court to apply the same logic to how the Covenants
20 defined leasing as not “considered a trade or business within the meaning of this section.” *See*
21 Section 2.18 of Original Covenants (i.e., 2001 First Amendment). Because all leasing was
22 defined as not “a trade of business,” this definition was “sufficient notice to future owners that
23 the Association intends to be able to define the term in the future.” The first section of the 2021
24 amendment redefined what is not “considered a trade or business” by carving out what Arizona
25 statutes describe as transient lodging – which is rental of lodging for less than a 30-day term.

1 After the 2021 Amendment, leasing other than for transient lodging was not “considered a trade
2 or business.”

3 In their Response, Plaintiffs claim “Redefining terms is not foreseeable.” *See* Response,
4 p. 5. Plaintiffs offer no other reason why the original definition of all leasing would not be
5 considered “a trade or business” was not sufficient notice that the Covenants could be changed
6 to define how all leasing, other than for transient lodging, would not be considered “a trade or
7 business.”

8 The Court was correct to find that defining a term in the Covenants provided “sufficient
9 notice to future owners that the Association intends to be able to define the term in the future.”
10 *See* Order, p. 12. Plaintiffs did not file a Cross-Motion for New Trial to challenge this finding.
11 Defendant’s Motion for New Trial merely asked the Court to take the next logical step.
12 Plaintiffs’ Response offers no legitimate argument for why the next logical step would not be to
13 find valid the redefinition of when leasing is not “considered a trade or business” to carve out
14 leasing for transient lodging.

15 **III. CONCLUSION**

16 Defendant’s Motion for New Trial is filled with citations to controlling Arizona
17 authorities provided for the purpose of seeking a judgment that matches the requirements of
18 Arizona law. Plaintiffs’ Response lacks a discussion of the authorities cited in the Motion and
19 lacks citation to *any* authorities stating different rules of law. Plaintiffs believe using **bold and**
20 **underlined** statements are a substitute for citations to legal authorities.

21 Plaintiffs’ form of judgment did not comply with the blue pencil rule required by *Kalway*
22 or by the express terms of Plaintiffs’ written agreement as contained in the Covenants. Plaintiffs
23 do not dispute this fact or disagree with how easy this could be corrected.

24 Plaintiffs’ form of judgment does not say who won the other claims alleged in the
25 Complaint. If Plaintiffs claims were to be dismissed, Plaintiffs’ form of judgment does not state
26

1 the Court's determination of if the remaining claims were dismissed with or without prejudice.
2 Again, Plaintiffs do not dispute this fact or disagree with how easy this could be corrected.

3 After the Court of Appeals reverts jurisdiction with this Court, Defendants request the
4 Court use a form of judgment complying with the blue pencil rule. Defendants request the Court
5 tell the parties how the Court resolved Plaintiffs' other claims, such as by a written order stating
6 all other claims were dismissed with prejudice. Defendant will be happy to re-lodge a form of
7 judgment that complies.

8 Defendants also respectfully requests the Court reconsider its decision on the
9 unenforceability of Section 2.3(A) of the First Amendment and determine, for the same reasons
10 other sections of the First Amendment were found enforceable, Section 2.3(A) is enforceable.

11 DATED this 23rd day of January 2023.

12 JENNINGS HAUG KELEHER McLEOD LLP

13
14 /s/ James L. Csontos

15 Jack R. Cunningham

16 James L. Csontos

17 Attorneys for The Shores at Rainbow Lake
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1 Copy of the foregoing mailed
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