

1 DYER BREGMAN FERRIS WONG & CARTER, PLLC
2 3003 North Central Avenue
3 Suite 2600
Phoenix, AZ 85012
(602) 254-6008

4 Rick K. Carter #012660
rkcarter@dbfwclegal.com
5 Matthew A. Klopp #023313
mklopp@dbfwclegal.com
6 Stockton D. Banfield #027789
sdb@dbfwclegal.com
7 Joseph R. Rainey #037536
jrrainey@dbfwclegal.com
8 *Attorneys for Plaintiffs*

9
10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF NAVAJO**

12 GORDON GROSS and LILIANA
13 GROSS, husband and wife; 854 PINE
14 CREEK, LLC, an Arizona limited liability
15 company; BALD EAGLE RETREAT,
16 LLC, an Arizona limited liability company;
17 1501 RAINBOW VIEW, LLC, an Arizona
18 limited liability company; LAKESIDE
19 FAMILY INVESTMENTS, LLC, an
20 Arizona limited liability company,
21 STEVEN A. KERNAGIS AND SANDRA
22 K. KERNAGIS, trustees of THE STEVEN
AND SANDRA KERNAGIS TRUST
DATED MARCH 17, 2014; THOMAS P.
ZEHRING AND JEANNETTE ROSE
ZEHRING, trustees of THE ZEHRING
LIVING TRUST DATED MARCH 1,
2001; JEANNETTE ZEHRING;
RONALD D. KYER, JR. and DESIREE
KYER, husband and wife,

23 Plaintiffs,

24 v.

25 THE SHORES AT RAINBOW LAKE
26 COMMUNITY ASSOCIATION, an
Arizona nonprofit corporation,

27 Defendant.
28

No.: S0900CV202200042

**OBJECTION TO FORM OF
JUDGMENT**

Re: Defendant's Proposed Amended Final
Judgment

1 Pursuant to Rule 58(a)(2), Plaintiffs submit their Objection to the proposed
2 Amended Final Judgment lodged by Defendant on April 21, 2023.¹ As discussed below,
3 the Court should **not** enter the form of amended judgment proposed by Defendant because:

- 4 (1) the proposed form of amended judgment violates the uniformity
5 requirement for reciprocal deed restriction and will create “a
6 patchwork quilt of different restrictions,” *Raimey v. Ditsworth*, 227
7 Ariz. 552, 556, ¶8, 261 P.3d 436, 440 (App. 2011) (quoting *Riley v.*
8 *Boyle*, 6 Ariz.App. 523, 526, 434 P.2d 525, 528 (1967));
- 9 (2) the proposed form of amended judgment goes beyond permissible
10 blue-penciling by adding provisions concerning enforcement, *Varsity*
11 *Gold, Inc. v. Porzio*, 202 Ariz. 355, 358, ¶12, 45 P.3d 352, 355 (App.
12 2002) (“Arizona courts may ‘blue pencil’ a restrictive covenant by
13 eliminating grammatically severable, unreasonable terms, [but] the
14 court cannot add provisions or rewrite them”);
- 15 (3) the proposed form of amended judgment omits Plaintiffs, Ronald D.
16 Kyer, Jr. and Desiree Kyer; and
- 17 (4) the proposed form of amended judgment not only dismisses the claims
18 asserted in this case but any claims that could have been asserted even
19 though the issue of whether res judicata is an applicable defense to
20 any as-of-yet-unasserted claims cannot be decided prospectively.

21 Concurrently with this Objection, Plaintiffs have lodged their own proposed form of
22 Amended Final Judgment.

23 MEMORANDUM OF POINTS AND AUTHORITIES

24 As the Court will recall, Defendant was initially ordered to lodge a proposed form
25 of judgment in the September 14th ruling on summary judgment. Defendant failed to
26 comply with the Court’s directive. Defendant later appealed this Court’s Final Judgment

27 ¹ Although the Notice of Lodging indicates that it was filed on April 13th and emailed to
28 Plaintiffs’ counsel on April 20th, Defendant served its copy by email on April 21st, which
email further indicated that the Notice was lodged on that date (April 21st). Although
Plaintiffs are reluctant to file Objection and lodge a competing form of Amended Final
Judgment prior to the issuance of the Mandate for a variety of reasons, Plaintiffs do so to
avoid any later argument that it failed to timely object/propose a competing form of
amended judgment. Notwithstanding these early filings, Plaintiffs respectfully submit that
the Court would be well-served to wait until the Mandate is issued prior to taking action.

1 only to seek dismissal of *its own appeal* for lack of jurisdiction. Now, before the Court of
2 Appeals has even issued its Mandate (which, as the Court is aware, officially returns
3 jurisdiction over this matter with instructions to this Court as to further proceedings),
4 Defendant has lodged a form of amended judgment. However, regardless of whether
5 Defendant acts too late or too early with respect to the form of judgment in this case,
6 Defendant is never Goldilocks.

7
8 **A. Arizona law requires that deed restrictions be uniform.**

9 Under Paragraph 2 of Defendant’s proposed amended judgment, different lots/lot
10 owners will be treated differently with respect to the First Amendment to the Amended and
11 Restated Declaration of Covenants, Conditions, and Restrictions for The Shores at
12 Rainbow Lake, recorded with the Recorder of Navajo County, Arizona at Reception No.
13 2021-04383 (the “First Amendment”) depending upon the date title was acquired. Setting
14 aside the practical problems this poses (for example, how are owners who initially took
15 title as individuals and later transferred to an LLC to be treated), Defendant would have
16 this Court impose deed restrictions in a way that is not uniform in contravention of clear
17 Arizona law (as well as common sense).

18 In fact, Defendant’s position is similar to the invalidated homeowners’ association
19 from *Dreamland Villa Community Club v. Raimey*, 224 Ariz. 42, 226 P.3d 411 (App. 2010)
20 that, after losing in the Court of Appeals (based on reasoning upheld in the *Kalway* opinion
21 relied upon by this Court), argued that the ruling applied only to the parties in the lawsuit.
22 In a subsequent appeal, the Court of Appeals rejected this argument and clarified that deed
23 restrictions must apply uniformly to avoid inconsistency that would upset the order of the
24 subdivision at issue:

25 The lot of one homeowner cannot be considered separate and apart
26 from its relation to all lots within a subdivision. *See Camelback Del*
27 *Este Homeowners Ass’n v. Warner*, 156 Ariz. 21, 27, 749 P.2d 930,
28 936 (App. 1987) (concluding that “unless otherwise provided for in
the restrictions themselves, any amendment to restrictive covenants
must apply to every lot”); *La Esperanza Townhome Ass’n, Inc. v. Title*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Sec. Agency of Ariz., 142 Ariz. 235, 239, 689 P.2d 178, 182 (App. 1984) (finding that “restrictions and conditions can only be changed uniformly”); *Riley v. Boyle*, 6 Ariz. App. 523, 526, 434 P.2d 525, 528 (1967) (**allowing a majority of homeowners to impose restrictions on some, but not all lots, “could easily result in a patchwork quilt of different restrictions ... and completely upset the orderly plan of the subdivision”**). Therefore, to ensure uniformity in the application of deed restrictions, *Raimey’s* holding necessarily applies to all homeowners within the Six Sections.

Raimey, 227 Ariz. at 556, ¶8, 261 P.3d at 440 (emphasis added); see also *Scholten v. Blackhawk Partners*, 184 Ariz. 326, 909 P.2d 393 (App. 1995) (holding that finding as to enforceability of amendments is applicable to all homes within the community).

Here, Defendant’s proposed amended judgment will create just the sort of “patchwork quilt of different restrictions” that will “completely upset the orderly plan of the subdivision” that the Court of Appeals warned against. Practically, this is unworkable as Defendant (as well as any other owner who is entitled to enforce the deed restrictions pursuant to the community’s governing documents) must undertake a title review to determine when a neighbor may have taken title to determine whether subsection (A) of the First Amendment is enforceable. To the extent that Defendant may try to argue that its proposed amended judgment is uniform as it seeks to impose the same operative title date for purposes of enforcement, Defendant overlooks that *Raimey* is concerned with uniformity in result on the ground (pun intended). Finally, it is contrary to common sense and the purpose of negative reciprocal restrictions that they would apply to anything other than all (unless they were expressly intended to apply differently in the restriction itself).

B. The proposed amended judgment goes beyond permissible “blue penciling.”

As referenced above, Paragraph 2 of the proposed amended judgment includes language as to enforceability of subsection (A) of the First Amendment depending upon the date the owner took title. While Defendant has not sought to include that language directly into the interlineated First Amendment, Defendant has included that language (which does **not** appear in the First Amendment) in the form of judgment that operates in

1 conjunction with the First Amendment. In other words, Defendant has indirectly sought to
2 add language to the First Amendment by including it in the form of amended judgment.

3 Arizona law is clear that, “while Arizona courts may “blue pencil” a restrictive
4 covenant by eliminating grammatically severable, unreasonable terms, the court cannot add
5 provisions or rewrite them.” *Varsity Gold, Inc.*, 202 Ariz. at 358, ¶12, 45 P.3d at 355 (App.
6 2002). Defendant’s proposed amended judgment engages in just this sort of impermissible
7 addition/rewriting that goes beyond what blue penciling allows – the striking of severable
8 provisions. In other words, the only thing the Court can do is *strike* subsection (A) of the
9 First Amendment. It cannot include any further language (even if in the accompanying
10 judgment) that adds to or rewrites what is stricken.

11
12 **C. Defendant has omitted two Plaintiffs.**

13 Defendant has omitted Plaintiffs Ronald D. Kyer, Jr. and Desiree Kyer who were
14 added to this lawsuit in the First Amended Complaint.

15
16 **D. Defendant seeks a prospective ruling as to res judicata.**

17 As previously noted in the record, Plaintiffs have voluntarily dismissed or are
18 otherwise not pursuing Count II. Although that disposition of Count II is evident in the
19 record, the Court of Appeals believes that the judgment must reflect that final disposition.
20 Paragraph 5 of Defendant’s proposed amended judgment notes that all claims asserted are
21 dismissed. But it goes further by dismissing (with prejudice) all claims that Plaintiffs *could*
22 *have* asserted. This prospective ruling on a potential res judicata defense is inappropriate
23 and could operate to bar claims that have nothing to do with the captioned action.

24 For example, one plaintiff could have a cognizable claim against Defendant for
25 personal injury suffered at the common area facilities maintained by Defendant. Under
26 Defendant’s proposed amended judgment, that claim would be barred. The list of potential
27 claims that *could have been* asserted (perhaps by permission and not by right) is limitless.
28 Suffice it to say, the only claims that need to be dismissed are the ones alleged in this

1 action. To the extent that claims arise later, Defendant can raise any defenses it believes it
2 may have then (including res judicata).

3 DATED this 26th day of April, 2023.

4 DYER BREGMAN FERRIS WONG &
5 CARTER, PLLC.

6 By /s/ Matthew A. Klopp
7 Rick K. Carter
8 Matthew A. Klopp
9 Stockton D. Banfield
10 Joseph R. Rainey
11 *Attorneys for Plaintiffs*

12 ORIGINAL electronically filed via TurboCourt
13 this 26th day of April, 2023.

14 COPIES emailed and mailed
15 this 26th day of April, 2023 to:

16 Jack Cunningham
17 Jim Csontos
18 JENNINGS HAUG KELEHER McLEOD LLP
19 2800 North Central Avenue, Suite 1800
20 Phoenix, Arizona 85004
21 *Attorneys for Defendant*

22 By: /s/ Kay Spates

23
24
25
26
27
28