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9  
10 **SUPERIOR COURT OF ARIZONA**  
11 **NAVAJO COUNTY**

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

Plaintiffs,

vs.

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

Defendant.

Case No.: S0900CV202200042

**REPLY SUPPORTING ENTRY OF  
FINAL JUDGMENT**

1 Plaintiffs previously submitted to the Court a document Plaintiffs labeled as a  
2 “judgment.” The Arizona Court of Appeals determined the document lodged by Plaintiffs was,  
3 in fact, not a judgment as that word is used at [Rule 54\(a\)](#). A judgment is an order from which  
4 an appeal can be taken. Rainbow Lake now requests the Court correct Plaintiffs’ error.

5 Rainbow Lake requests the Court utilize a form of judgment from which an appeal lies  
6 that also complies with the Arizona Supreme Court’s blue-pencil rule. A form of such a rule-  
7 compliant and Arizona Supreme Court-compliant judgment is lodged with this Motion and  
8 attached as Exhibit A, hereto.<sup>1</sup> This Reply is fully supported by the accompanying  
9 Memorandum of Points and Authorities.

## 10 MEMORANDUM OF POINTS AND AUTHORITIES

### 11 I. Introduction

12 On September 14, 2022, this Court issued its Order on the issues raised by the parties’  
13 cross motions for partial summary judgment. Because the cross motions for *partial* summary  
14 judgment did not address all the claims Plaintiff alleged in their original or amended complaint,  
15 at the time of the Court’s September 14, 2022, Order, it was impossible to enter a judgment from  
16 which an appeal lies.

17 Notwithstanding the impossibility of entering judgment when other claims remained  
18 pending, on October 4, 2022, Plaintiffs rushed in and asked the Court to sign a form of judgment  
19 that made no mention of if or how the Court adjudicated Plaintiffs’ other claims, including the  
20 claim for monetary damages.

21 In Rainbow Lake’s October 24, 2022, Objection to Form of Judgment, Rainbow Lake  
22 pointed out how, “without something more, an order granting of cross motions for partial  
23 summary judgment would not, on its face, resolve the entire dispute.”  
24

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25 <sup>1</sup> The judgment attached as Ex. A is identical to the form of Amended Final Judgment submitted  
26 on April 24, 2023, other than having added the two additional Plaintiffs, Ronald and Desiree Kyer, in  
the caption.

1 On November 10, 2022, the Court gave Plaintiffs another opportunity to avoid error by  
2 asking if Plaintiffs were sure a judgment that did not adjudicate all claims as Rainbow Lake  
3 requested could be entered. On November 23, 2022, Plaintiffs ignored controlling case law and  
4 repeated their erroneous position that it was unnecessary for a judgment to include an  
5 adjudication of all claims.

6 The Court of Appeals determined Plaintiffs were and had always been incorrect when  
7 asking the trial court to enter an improper form of judgment. The document Plaintiffs prepared  
8 was not a “judgment” because no appeal from that document was possible. The Court of  
9 Appeals has no jurisdiction over any attempted appeal from the document Plaintiffs erroneously  
10 thought was a judgment.<sup>2</sup>

11 Yet, in their Objection to Form of Judgment, Plaintiffs claim Rainbow Lake should have  
12 rushed in with its own form of judgment after the Court entered its order on the cross motions  
13 for *partial* summary judgment. Rainbow Lake believes two wrongs would not make a right, or  
14 in this case, would not turn a premature non-judgment into a judgment.

15 Rainbow Lake requests the Court ignore Plaintiffs’ prior incorrect and unsupported  
16 arguments to the contrary and enter a judgment that complies with [Rule 54\(a\)](#) and the on-point  
17 Arizona Supreme Court opinions. Such a form of an Amended Final Judgment is lodged with  
18 this Motion and attached as Exhibit A.

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24 <sup>2</sup> Because the Court of Appeals never had jurisdiction to hear the defective appeal, the superior  
25 court never lost jurisdiction. *See Bank of N.Y. Mellon v. Dodev*, 246 Ariz. 1, 7-8, ¶ 20, (App. 2018)  
26 (recognizing when the appellate court declines “jurisdiction to hear an appeal based on the lack of a final  
appealable order[,] . . . the appeal was not ‘properly invoked,’ and the superior court never lost  
jurisdiction”).

1 **II. Legal Analysis**

2 **A. No judgment was possible after the September 14, 2022 Order.**

3 Although Plaintiffs lodged a form of order after the September 14, 2022, Order on the  
4 cross motions for *partial* summary judgment, no judgment was possible at that time. This Court  
5 signed Plaintiffs’ judgment without changes, exactly as Plaintiffs requested.

6 The Court of Appeals determined the document Plaintiffs called a “judgment” was not  
7 actually a “Judgment” *i.e.*, an order from which an appeal lies as defined by [Rule 54\(a\)](#)  
8 (“Judgment” as used in these rules includes a decree and any order from which an appeal lies.”).  
9 Plaintiffs’ mistake caused delay and added cost to this proceeding.

10 **B. Rainbow Lake could not lodge an impossible judgment.**

11 Plaintiffs claim in their April 26, 2023, Objection that Rainbow Lake was required to  
12 lodge a judgment after the Court’s order on the cross motions for partial summary judgment.  
13 Plaintiffs do not describe how it was possible to have the Court sign an order “from which an  
14 appeal lies” at that time. Plaintiffs acknowledge their claims listed in their Motion for Partial  
15 Summary Judgment (pp. 2-3) were still (and are still) pending.

16 Just because Plaintiffs attempted the impossible by lodging a document that was not an  
17 order from which an appeal lies does not mean Rainbow Lake should have made the same  
18 mistake. “Two wrongs do not make a right.” [Waid v. Bergschneider](#), 94 Ariz. 21, 26 (1963).  
19 Plaintiffs claim that Rainbow Lake should have done the impossible is an ignorant argument  
20 offered without legal support.

21 **B. Plaintiffs’ agreement to dismiss all remaining claims.**

22 After the entry of the September 14, 2022, Order, this action was poised to move forward  
23 on Plaintiffs’ other claims, including the claim for monetary damages and their claim that the  
24 three out of four sections of the amendment this Court found valid in the September 14, 2022,  
25 Order could still be invalid for other reasons.

1 That changed when Plaintiffs disclosed their intent to dismiss all remaining claims. The  
2 first indication of this intent was when Plaintiffs lodged a form of judgment that included [Rule](#)  
3 [54\(c\)](#) language. However, merely including [Rule 54\(c\)](#) language was not a clear, judicial  
4 admission of an intent to dismiss the remaining claims. So, on November 10, 2022, this Court  
5 issued its Order directing Plaintiffs to confirm that they intended to dismiss all remaining claims.

6 On November 23, 2022, Plaintiffs filed their Notice and specifically confirmed they  
7 agreed to dismiss all remaining claims. The Court was able to treat Plaintiffs' statement as a  
8 [Rule 41](#) request to dismiss the remaining claims.

9 **C. A final judgment became possible after November 23, 2022.**

10 In anticipation of Plaintiffs' agreement to dismiss all remaining claims, Rainbow Lake  
11 lodged a proper form of judgment that mirrored the Court's September 14, 2022, determination  
12 that 3 out of the 4 sections of the Amendment were valid and enforceable *and* also stated all of  
13 Plaintiffs' other claims were dismissed. Rainbow Lake lodged the correct form of judgment  
14 with its October 24, 2022, objection. The judgment lodged by Rainbow Lake addressed each  
15 and every claim asserted by Plaintiffs and was unmistakably a judgment as that term is defined  
16 by [Rule 54\(a\)](#). But Plaintiffs demanded their erroneous form of judgment be used. And now  
17 the parties are back before the Court to correct Plaintiffs' error.

18 **D. Rainbow Lake's lodging of a form of judgment was timely.**

19 Plaintiffs incorrectly claimed and still claim Rainbow Lake could have provided the  
20 Court with an order from which an appeal lies (i.e., a "judgment") after the motions for partial  
21 summary judgment were considered and before Plaintiffs agreed to dismiss all remaining claims.  
22 Plaintiffs were wrong. Entry of a judgment was not possible until Plaintiffs agreed to dismiss  
23 all remaining claims and the Court included an order of dismissal with prejudice of the  
24 remaining claims. *See* Court of Appeals Order proving that point.

25 Rainbow Lake correctly waited until *after* Plaintiffs stated an intent to dismiss all  
26 remaining claims before lodging a form of judgment that specifically adjudicated all of

1 Plaintiffs' claims. Without Plaintiffs' agreement to dismiss all remaining claims, and this  
2 Court's order of dismissal, a judgment was not possible. The Court of Appeals' Order  
3 invalidating Plaintiffs' premature "judgment" validates Rainbow Lake's approach.

4 After Plaintiffs told the Court of their intent to dismiss all remaining claims (*see*  
5 November 23, 2022 Notice), [Rule 41](#) requires all remaining claims be dismissed by order of the  
6 trial court in an order "signed by a judge[.]"

7 The form of judgment Rainbow Lake lodged on October 24, 2022, as updated in Exhibit  
8 A, includes a written order which is to be signed by the Court dismissing Plaintiffs' other claims.  
9 Thus, [Rule 41](#) would be satisfied, and the Court of Appeals would easily conclude that [Rule](#)  
10 [54\(a\)](#) is also satisfied because the judgment would be an order from which an appeal lies.

11 **E. Entering the correct judgment.**

12 Now is the time to correct the errors caused by Plaintiffs. The Court can do so by first  
13 using a form that creates a final, appealable judgment. Exhibit A is such a form because it  
14 specifically addresses each of Plaintiffs' claims.

15 The Court should (must) follow the Arizona Supreme Court, which held, "If an  
16 amendment is invalid, we 'blue pencil' the amended CC&Rs, striking severable  
17 provisions." [Kalway v. Calabria Ranch Hoa, Ltd. Liab. Co.](#), 252 Ariz. 532, 537 (2022); *see*  
18 *also* [Valley Med. Specialists v. Farber](#), 194 Ariz. 363, 372 (1999) ("Arizona courts will 'blue  
19 pencil' restrictive covenants, eliminating grammatically severable, unreasonable provisions.").  
20 The Arizona Supreme Court's holdings would also satisfy Plaintiffs' agreement found in the  
21 Severability clause which mandates the same result.<sup>3</sup>

22 Rainbow Lake contends the doctrine of *stare decisis* requires that "once a point of law  
23 has been established, it must be followed by all courts of lower rank in subsequent cases where  
24 the same legal issue is raised." [Francis v. Ariz. DOT](#), 192 Ariz. 269, 271 (App. 1998). When

25 <sup>3</sup> **"Severability.** Any determination by any court of competent jurisdiction that any provision of  
26 this Declaration is invalid or unenforceable shall not affect the validity or enforceability of any of the  
other provisions hereof." 2001 Covenants, at Section 9.4.

1 in doubt, this Court should follow the Arizona Supreme Court – which requires application of  
2 the blue-pencil rule. That is better than Plaintiffs’ alternative, which is to ignore the Arizona  
3 Supreme Court or their written agreement – an argument that is presented without citations to  
4 supporting authorities.

5 **III. Conclusion**

6 Plaintiffs’ objections to the form of judgment Rainbow Lake lodged were misplaced.  
7 Plaintiffs’ same arguments are what led to the Court of Appeals having to consider the same  
8 issues Rainbow Lake raised before, and is why the parties are back before this Court to correct  
9 Plaintiffs’ mistake.

10 The form of judgment Rainbow Lake lodged provides the relief the Court intended when  
11 entering its September 14, 2022, Order on the cross motions for partial summary judgment.  
12 Specifically, the form of judgment finds in favor of Rainbow Lake on section 2.30(B)(C) and  
13 (D) of the 2021 amended declarations, as provided at p. 13/13 of the September 14, 2022, Order.

14 The form of judgment attached as Exhibit A employs the Arizona Supreme Court’s blue-  
15 pencil rule to strike the 18 words in Section 2.30(A) the Court found unenforceable against  
16 Plaintiffs. *Id.* The form of judgment also includes an express, written order of the Court  
17 dismissing all remaining claims.

18 Rainbow Lake therefore requests the Court enter a proper judgment, one that complies  
19 with [Rule 41](#), [Rule 54](#) and the express directions of the Arizona Supreme Court.<sup>4</sup> The judgment  
20 lodged would be final and subject to appeal, which by definition makes this document lodged  
21 by Rainbow Lake an actual judgment. *See* [Rule 54\(a\)](#).

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25 <sup>4</sup> To avoid potential claims to the contrary, by lodging a form of judgment that provides for the  
26 relief allowed by the Court’s September 14, 2022 Order, and acknowledges Plaintiffs’ agreement to  
dismiss remaining claims, Rainbow Lake is not waiving rights to post-judgment relief, including appeal.

1 RESPECTFULLY SUBMITTED this 3rd day of May, 2023.

2 JENNINGS HAUG KELEHER MCLEOD LLP

3  
4 /s/ James L. Csontos

James L. Csontos

5 Attorneys for Defendant The Shores at Rainbow  
6 Lake Community Association, an Arizona  
7 nonprofit corporation

8  
9  
10 ELECTRONICALLY FILED  
11 this 3rd day of May, 2023,

12 AND A COPY e-mailed to:

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26 /s/ Sylvia Aguayo

4519-0040

# **EXHIBIT A**

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8 Attorneys for Defendant

9 **SUPERIOR COURT OF ARIZONA**

10 **NAVAJO COUNTY**

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12 husband and wife; 854 PINE CREEK, LLC,  
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18 LLC, an Arizona limited liability company;  
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21 SANDRA KERNAGIS TRUST DATED  
22 MARCH 17, 2014; THOMAS P. ZEHRING  
23 and JEANNETTE ROSE ZEHRING, trustees  
24 of the ZEHRING LIVING TRUST DATED  
25 MARCH 1, 2001; and JEANNETTE  
26 ZEHRING; RONALD D. KYER, JR. and  
DESIREE KYER, husband and wife,

Plaintiffs,

vs.

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

Defendant.

Case No.: S0900CV202200042

**AMENDED FINAL JUDGMENT**

1 This matter having come before the Court on the Cross-Motions for Partial Summary  
2 Judgment of Plaintiffs, the Court having heard oral argument on the Cross-Motions on July 19,  
3 2022, and being fully advised in the premises and for the reasons more fully set forth in the  
4 Court's September 14, 2022, Ruling on Motion and Cross Motion for Summary Judgment;

5 **IT IS ORDERED, ADJUDGED AND DECREED** as follows:

6 1. The First Amendment to the Amended and Restated Declaration of Covenants,  
7 Conditions and Restrictions for The Shores at Rainbow Lake, executed on February 26, 2021,  
8 and recorded with the Navajo County Recorder on March 3, 2021, at Instrument No. 2021-04383  
9 (the 2021 Amendment), which amended by replacement Section 2.30 of the Amended and  
10 Restated Declaration of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake  
11 recorded with the Navajo County Recorder on September 6, 2001, at Instrument No. 2001-17716  
12 **is valid** as to the replacement as shown in the 2021 Amendment of Section 2.30(B), (C) and (D).

13 2. The First Amendment to the Amended and Restated Declaration of Covenants,  
14 Conditions and Restrictions for The Shores at Rainbow Lake, executed on February 26, 2021,  
15 and recorded with the Navajo County Recorder on March 3, 2021, at Instrument No. 2021-04383  
16 (the 2021 Amendment), which amended by replacement Section 2.30 of the Amended and  
17 Restated Declaration of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake  
18 recorded with the Navajo County Recorder on September 6, 2001, at Instrument No. 2001-17716  
19 **is invalid** as against owners who took title on or before March 3, 2021, as to the replacement as  
20 shown in the 2021 Amendment of Section 2.30(A).

21 3. A copy of the First Amendment to the Amended and Restated Declaration of  
22 Covenants, Conditions and Restrictions for The Shores at Rainbow Lake, executed on February  
23 26, 2021, and recorded with the Navajo County Recorder on March 3, 2021, at Instrument No.  
24 2021-04383 with the portion found by this Court to be invalid as to owners who took title on or  
25 before March 3, 2021, shown as ~~STRICKEN~~ is attached to this Judgment as Exhibit A.



# **EXHIBIT A**

2021-04383  
Page 1 of 4  
Requested By: LAWYERS TITLE PINETOP - 230 E  
WHITE  
Navajo County Recorder - Michael Sample  
03-03-2021 08:07 AM Recording Fee \$30.00

**RECORDED AT THE REQUEST OF:**

**Frank M. Smith & Associates, Inc.**

**WHEN RECORDED MAIL TO:**

**The Shores at Rainbow Lake  
c/o Frank M. Smith & Associates  
4756 Buck Springs Road  
Pinetop, AZ 85935**

---

**DO NOT REMOVE THIS COVER SHEET. IT IS NOW PART OF THE RECORDED DOCUMENT.**

**DOCUMENT TO BE RECORDED:**

**Covenants, Conditions and Restrictions Amendment**

REC-17

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**FIRST AMENDMENT  
TO AMENDED AND RESTATED DECLARATION  
OF COVENANTS, CONDITIONS AND RESTRICTIONS  
FOR  
THE SHORES AT RAINBOW LAKE**

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**FIRST AMENDMENT TO  
AMENDED AND RESTATED DECLARATION  
OF COVENANTS, CONDITIONS AND RESTRICTIONS  
FOR  
THE SHORES AT RAINBOW LAKE**

WHEREAS, that certain Amended and Restated Declaration of Covenants, Conditions and Restrictions for The Shores at Rainbow Lake recorded on September 6, 2001 at Document No. 2001-17716 in the official records of Navajo County, Arizona ("Declaration"), in Article 9, Section 9.2, provides that its terms and conditions may be amended by Owners representing not less than sixty-seven percent (67%) of the total votes in each class of membership;

NOW, THEREFORE, Owners representing not less than sixty-seven percent (67%) of the total votes in the Class A Membership and Owners representing at least sixty-seven percent (67%) of the total votes in the Class B Membership have provided their written consent to adopt the following amendment to the Declaration:

1. Article 2, Section 2.30 shall be deleted in its entirety and replaced with the following:

2.30. Leasing of Lots.

~~(A) After December 31<sup>st</sup>, 2021, no Lot may be leased for a term of less than thirty (30) days.~~

(B) No portion of a Lot may be leased, other than the entire Lot, and then only to a Single Family. For purposes of this Section 2.30, a Single Family may not consist of more than four (4) individuals who are unrelated by blood, marriage or legal adoption.

(C) An Owner who leases his Lot shall provide the following information to the Association at least ten (10) days before the commencement of the lease term:

- (i) the commencement date and expiration date of the lease term;
- (ii) the names and contact information of any adults occupying the Lot during the lease term; and

(iii) the address and telephone number at which the Owner (or Owner's agent) can be contacted by the Association during the lease term.

(D) Any agreement for the lease of a Lot shall provide that the terms of such lease shall be subject in all respects to the provisions of the Project Documents and that any failure by the Lessee to comply with the terms of the Project Documents shall be a default under the lease. Any Owner who leases a Lot must provide the Lessee with copies of this Declaration, the Architectural Committee Rules and the Association Rules and is responsible for assuring the Lessee's compliance therewith. The Owner shall be liable for any violation of this Declaration, the Architectural Committee Rules or the Association Rules by the Lessees or other persons residing in the Lot and their guests or invitees and, in the event of any such violation, the Owner, upon demand of the Association, shall immediately take all necessary actions to correct any such violations.

2. Except as amended by this instrument, the Declaration shall remain in full force and effect.

The undersigned certifies that this First Amendment to the Declaration was duly adopted by the written consent of Owners representing at least sixty-seven percent (67%) of the total votes in each class of membership on the 26<sup>th</sup> day of February, 2021.

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

By: [Signature]  
Its: President

STATE OF ARIZONA )  
 ) ss.  
COUNTY OF NAVAJO )

This instrument was acknowledged before me this 26<sup>th</sup> day of February, 2021, by Richard B. Whipple in his capacity as President of The Shores at Rainbow Lake Community Association for the purposes stated herein.

Victoria M. Hewitt  
Notary Public  
My Commission Expires: May 18, 2022

