

1 Jack R. Cunningham (No. 004961)
Email: jrc@jhkmlaw.com

2 James L. Csontos (No. 010823)
E-mail: jlc@jhkmlaw.com

3 **JENNINGS HAUG KELEHER MCLEOD LLP**
4 2800 N. Central Avenue, Suite 1800
5 Phoenix, AZ 85004-1049
6 Telephone: 602-234-7800
7 Facsimile: 602-277-5595

8 AZTurboCourt E-service and
9 Court Documents: doCKET@jhkmlaw.com

10 *Attorneys for Defendant*

11 **SUPERIOR COURT OF ARIZONA**
12 **NAVAJO COUNTY**

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

Plaintiffs,

vs.

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

Defendant.

Case No.: S0900CV202200042

**DEFENDANT'S OBJECTION TO
PLAINTIFFS' FORM OF
JUDGMENT**

(Assigned to Hon. Michala M. Ruechel)

1 Defendant The Shores at Rainbow Lake Community Association (“Rainbow Lake”)
2 objects to Plaintiffs’ form of judgment because the form of judgment submitted by Plaintiffs
3 still fails to include a dismissal of all remaining claims and still fails to follow Arizona Supreme
4 Court requirements, and thus will not correct the problem the Court of Appeals found wrong
5 with the prior form of judgment lodged by Plaintiff.

6 **A. This Court Must Adjudicate All Claims.**

7 The Court of Appeals determined the previous “judgment” Plaintiffs requested the Court
8 sign was not a judgment because it did not adjudicate all claims. The current form is a step
9 closer, but still not there. Although this form of judgment states Count II is to be dismissed
10 (which is better than Plaintiffs’ prior form of judgment), there is nothing in the form of judgment
11 describing the claims that were included within Count I, such as the claim that:

- 12 (1) “the amendment is invalid and unenforceable due to the conduct, described
13 above, that was undertaken by the master HOA in seeking to adopt the
14 amendment,” and
15 (2) “the amendment is invalid and unenforceable because it was passed without
16 compliance with the procedures required under the master declaration and
17 Arizona law.”

18 *See* paragraphs 74 and 75 of July 15, 2022 First Amended Complaint.

19 The above-listed issues were not considered in the cross motions for partial summary
20 judgment and were not adjudicated in the Court’s September 14, 2022 Order. These claims are
21 alleged in Count I and would not be included in a dismissal of Count II. There is also nothing
22 found in the current form of judgment that specifies what happened to Plaintiffs’ request for
23 injunction.

24 Unless a judgment is entered that dismisses these claims and all other claims not
25 specifically mentioned in the Court’s September 14, 2022 Order on the cross-motions for partial
26 summary judgment, Plaintiffs will simply repeat the same problem they caused with the prior
form of judgment they asked the Court to sign.

1 In the form of judgment lodged by Rainbow Lake last October and in April, there is an
2 express adjudication of all other claims – by dismissal with prejudice. Absent this determination
3 of all remaining claims, Plaintiffs will be repeating the same mistake they made the last time.

4 **B. Must Follow Arizona Supreme Court Holdings.**

5 Rainbow Lake objects to Plaintiffs’ failure to comply with the Arizona Supreme Court’s
6 dictate that the Court employ the blue pencil rule. *Kalway v. Calabria Ranch Hoa, Ltd. Liab.*
7 *Co.*, 252 Ariz. 532, 537 (2022) (“if an amendment is invalid, we ‘blue pencil’ the amended
8 CC&Rs, striking severable provisions.”); *see also* *Valley Med. Specialists v. Farber*, 194 Ariz.
9 363, 372 (1999) (“Arizona courts will ‘blue pencil’ restrictive covenants, eliminating
10 grammatically severable, unreasonable provisions.”). Applying the blue pencil rule required by
11 the Arizona Supreme Court’s holdings would also satisfy Plaintiffs’ express written agreement
12 found in the Severability clause which mandates the same result.¹

13 **C. Retroactive Clause is Contrary to the Law.**

14 The form of judgment offered by Plaintiffs also includes, for the first time, a retroactive
15 application clause by which Plaintiffs ask the Court to determine the judgment relates back to
16 March 3, 2021 (the date the 2021 Amendment was recorded). What Plaintiffs are attempting to
17 do, without briefing or argument, is to avoid the holding of *Kalway*, which states: “The notice
18 requirement relies on a homeowner’s reasonable expectations based on the declaration in effect
19 at the time of purchase – in this case, the original declaration.” *Id.* 252 Ariz. at 538, ¶ 15.

20 In this matter, the declaration that is in place currently, which includes the 2021
21 Amendment, would be the “declaration in effect at the time of purchase” for anyone purchasing
22 property or obtaining title after the March 3, 2021 recording date for the 2021 Amendment.
23 Those who have purchased or will purchase a home after the 2021 Amendment was recorded
24 cannot claim that their “reasonable expectations” at the time of their purchase were based on

25 ¹ **“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 anything other than the recorded 2021 Amendment. They would therefore be bound by the
2 Covenants as amended by the 2021 Amendment. Kalway.

3 Again, the Court is better served to comply with the Arizona Supreme Court's decision
4 in Kalway rather than, as Plaintiffs request, ignore the Court's holding.

5 For the reasons stated above, Rainbow Lake objects to the form of judgment lodged by
6 Plaintiffs and respectfully requests the Court not follow Plaintiffs down the same path Plaintiffs
7 took the parties on the prior occasion, only to have the Court of Appeals tell Plaintiffs that no
8 judgment has been entered.

9 DATED this 4th day of May, 2023.

10 JENNINGS HAUG KELEHER MCLEOD LLP

11
12 /s/ James L. Csontos
13 James L. Csontos
14 *Attorneys for Defendant*

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16 ELECTRONICALLY FILED
17 this 4th day of May, 2023,

18 AND A COPY e-mailed to:

19 Stockton D. Banfield
20 Rick K. Carter
21 Matthew A. Klopp
22 DYER BREGMAN FERRIS
23 WONG & CARTER PLLC
24 3003 N. Central Avenue, Suite 2600
25 Phoenix, AZ 85012
26 sdb@dbfwclegal.com
rkcarter@dbfwclegal.com
mklopp@dbfwclegal.com
Attorneys for Plaintiffs

/s/ Sylvia Aguayo

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