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14 *Attorneys for Plaintiffs*

15 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

16 **IN AND FOR THE COUNTY OF NAVAJO**

17 GORDON GROSS and LILIANA
18 GROSS, husband and wife; 854 PINE
19 CREEK, LLC, an Arizona limited liability
20 company; BALD EAGLE RETREAT,
21 LLC, an Arizona limited liability company;
22 1501 RAINBOW VIEW, LLC, an Arizona
23 limited liability company; LAKESIDE
24 FAMILY INVESTMENTS, LLC, an
25 Arizona limited liability company,
26 STEVEN A. KERNAGIS AND SANDRA
27 K. KERNAGIS, trustees of THE STEVEN
28 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,

Plaintiffs,

v.

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

Defendant.

No. S0900CV202200042

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

(Assigned to the Hon. Michala M.
Ruechel)

Pursuant to Rule 58(a)(2)(B)(i), Plaintiffs submit their Reply to Defendant's
Objection to the proposed Amended Final Judgment lodged by Plaintiffs. Although the

1 Court of Appeals has not yet returned the case to this Court,¹ Plaintiffs are proceeding in
2 anticipation that the Court of Appeals will do so on or before the argument set for May 17,
3 2023 and that the final instructions to this Court will be consistent with the Order entered
4 by the Court of Appeals on April 5, 2023.

5 **A. Plaintiffs’ form of Amended Final Judgment address all claims.**

6 The Court of Appeals concluded that the existing Final Judgment was insufficient
7 because it did not adjudicate all causes of action, namely, Count II (breach of the covenant
8 of good faith and fair dealing). The form of Amended Final Judgment lodged by Plaintiffs
9 makes clear that Count II is dismissed. Count I (quiet title) is clearly adjudicated to finality.
10 This is all that the Court of Appeals requires.

11 Defendant argues that any judgment must adjudicate the allegations in Paragraphs
12 74 and 75 of the First Amended Complaint. This is not what is required. Rather, as noted
13 above, the Court of Appeals indicated that all causes of action must be adjudicated in the
14 judgment. This is what Plaintiffs’ form of Amended Final Judgment does. Resolution of
15 the allegations raised by Defendant would require fact-finding that has not occurred and
16 that is not necessary to resolve Count I (quiet title).

17 **B. Plaintiffs’ form of Amended Final Judgment complies with blue-penciling.**

18 Plaintiffs’ form of Amended Final Judgment notes that the entirety of subsection
19 (A) of the subject restrictive covenant has been stricken in its entirety. It further notes that
20 _____

21 ¹ During the recent Status Conference, Plaintiffs noted for the Court that no Mandate had
22 yet issued and, therefore, this Court should not act in a manner that would disrupt the Final
23 Judgment as currently entered. Defendant noted that no Mandate issues when an appeal is
24 dismissed for lack of jurisdiction. While Defendant is correct that no Mandate is issued,
25 the Court can take judicial notice of the appellate procedure that results in the issuance of
26 a Letter from the Clerk of the Court of Appeals, which encloses a certified copy of the
27 Court’s appellate decision/order/disposition. While not titled “Mandate,” this Letter serves
28 the same functional and procedural purpose. As can be gleaned by the Court of Appeals
docket, such Letter is typically issued to the Superior Court approximately 45 days after
the appellate decision/order/disposition, which is likely in recognition of the parties’ right
to petition for further appellate review by the Supreme Court. While no party has sought
further review here, that does not change the Court of Appeals’ process.

1 the remaining subsections are unaffected. The record is clear how the Court has blue-
 2 penciled the restrictive covenant – it has stricken the entirety of subsection (A) and left the
 3 rest unaffected.

4 To the extent that Defendant wants the Court to attach a photocopy of the restrictive
 5 covenant with a line drawn through subsection (A), Plaintiffs would have no objection even
 6 if it is unnecessary. The overall purpose of the recording system is to give notice that is
 7 clear. Plaintiffs assert that is accomplished by their form of Amended Final Judgment, but
 8 if it is clearer to put that in picture form, Plaintiffs are willing to do whatever makes it
 9 easiest for Defendant to comply with the law and not enforce unenforceable restrictions.

10 **C. Any form of Amended Final Judgment must relate back to the original**
 11 **recording.**

12 As discussed in Plaintiffs’ Objection to Defendant’s form of final judgment, the
 13 Court of Appeals has already made it clear that deed restrictions must apply uniformly to
 14 avoid inconsistency that would upset the order of the subdivision at issue:

15 The lot of one homeowner cannot be considered separate and apart
 16 from its relation to all lots within a subdivision. *See Camelback Del*
 17 *Este Homeowners Ass’n v. Warner*, 156 Ariz. 21, 27, 749 P.2d 930,
 18 936 (App. 1987) (concluding that "unless otherwise provided for in
 19 the restrictions themselves, any amendment to restrictive covenants
 20 must apply to every lot"); *La Esperanza Townhome Ass’n, Inc. v. Title*
 21 *Sec. Agency of Ariz.*, 142 Ariz. 235, 239, 689 P.2d 178, 182 (App.
 22 1984) (finding that "restrictions and conditions can only be changed
 23 uniformly"); *Riley v. Boyle*, 6 Ariz. App. 523, 526, 434 P.2d 525, 528
 24 (1967) (**allowing a majority of homeowners to impose restrictions**
 25 **on some, but not all lots, "could easily result in a patchwork quilt**
 26 **of different restrictions . . . and completely upset the orderly plan**
 27 **of the subdivision"). Therefore, to ensure uniformity in the**
 28 **application of deed restrictions, *Raimey’s* holding necessarily**
applies to all homeowners within the Six Sections.

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

26 For all the reasons already found by this Court, subsection (A) of the subject
 27 restrictive covenant is unenforceable as to Plaintiffs. It was *never* enforceable as to
 28 Plaintiffs for all the reasons already found. Because this particular contract, the subject

1 restrictive covenant, runs with the land, these findings must be recorded and run with
2 Plaintiffs' land in perpetuity. Therefore, the Court's ruling on the unenforceability of
3 subsection (A), as it pertains to Plaintiffs and their lots, must relate back to the original
4 recording. By virtue of the fact that reciprocal covenants must apply to everyone or no one,
5 as discussed in the authority above, that must relate back as to the entire community
6 regardless of whether someone purchased a lot after the recording on March 3, 2021. If the
7 Court proceeds consistent with Defendant's Objection, the result will be a patchwork quilt
8 of different restrictions.

9 DATED this 10th day of May, 2023.

10 DYER BREGMAN FERRIS WONG &
11 CARTER, PLLC.

12 By /s/ Matthew A. Klopp

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20 COPIES emailed and mailed
21 this 10th day of May, 2023 to:

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