ARIZONA COURT OF APPEALS
DIVISION ONE

GORDON GROSS and LILIANA GROSS, husband and wife; *et al*., Plaintiffs/Appellees/Cross-Appellants, v. THE SHORES AT RAINBOW LAKE COMMUNITY ASSOCIATION, an Arizona nonprofit corporation, Defendant/Appellant/Cross-Appellee.	Case No.: 1 CA-CV-23-0394 Navajo County Superior Court Case No.: S0900CV202200042

REPLY BRIEF ON CROSS APPEAL

DYER BREGMAN FERRIS WONG & CARTER, PLLC
3003 North Central Avenue, Suite 2600
Phoenix, Arizona 85012
Rick K. Carter #012660
rkcarter@dbfwclegal.com
Matthew A. Klopp #023313
mklopp@dbfwclegal.com
Stockton D. Banfield #027789
sdb@dbfwclegal.com
Joseph R. Rainey #037536
jrrainey@dbfwclegal.com

Attorneys for Appellees/Cross-Appellants

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I. INTRODUCTION

[¶1] As it did throughout the proceedings in the trial court, the Association has presented a flurry of straw men, mischaracterized (if not outright misstated) Homeowners' positions, argued for a misapplication of controlling precedent, and taken positions that are clearly contrary to Arizona law. The Association goes so far as to take the Homeowners to task for utilizing the very same phrases[1] employed by the Arizona Supreme Court in espousing the standards for review of amendments to deed restrictions in the controlling precedent. Unfortunately, this Court sits not to determine which party's persiflage was most amusing[2] or even to monitor how many times key phrases or concepts are utilized in briefing. Rather, as the Court need not be reminded, it sits to review the findings of the lower courts and apply Arizona law in ensuring that the correct, logical, and just disposition is reached. While the Association's Answering Brief is replete with statements that would be interesting and persuasive if true, the reality is that the Association has misrepresented the Homeowner's various positions, fabricated contradictions through these misrepresentations, and, rather fundamentally, misapplies and

[1] Far from conclusory descriptions, phrases and terms such as "general amendment power" and "foreseeable" are used by the courts in the controlling authorities. *See Kalway, supra* and *Dreamland, supra*.

[2] Undersigned respectfully and humbly submits that neither side is likely to find a second career in comedy writing.

misunderstands Arizona law.

[¶2] When it comes to amending deed restrictions, Arizona law is clear:

> an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations. … [because] we do not enforce unknown terms which are beyond the range of reasonable expectation.

Kalway v. Calabria Ranch HOA, LLC, 252 Ariz. 532, 538, ¶14, 506 P.3d 18, 24 (2022) (citations omitted). In other words, procedural compliance with a community's governing documents and Planned Communities Act, while necessary, is not the only factor in determining whether an amendment is enforceable under Arizona law from a substantive perspective. Even if the Planned Communities Act is complied with, an amendment must still be within the reasonable expectations of those who will be bound by it. In other words, it must be *foreseeable*. As discussed in the Homeowners' prior briefing, the applicable standards are little more than the application of contractual maxims to the particular contracts at issue – deed restrictions that are recorded and agreed upon, not through negotiation, but by the simple act of purchase. It is for that reason that reasonable expectations and foreseeability are important. Without those limited protections, people have no protection against the changing opinions of the majority with respect to what is often the largest purchase of their lives.

[¶3] The subsection (B) of the Amendment[3] fails under *Kalway* for two reasons: (1) the occupancy restriction was entirely new and untethered to any prior restriction; and (2) changing the definition of "Single Family" solely for purposes of Section 2.30 could not be foreseen as that definition never existed in Section 2.30 and would not apply to any other portion of the deed restrictions (thus creating two different meanings for "Single Family" within the same document where only one meaning existed before). Put simply, the original Declaration did not dictate to *whom* an owner could lease their property and included nothing to put an owner on notice that the Declaration could later be amended to include a restriction upon whom could be a lessee. The trial court's ruling as to subsection (B) of the Amendment should therefore be reversed.

[¶4] With respect to the Homeowners' requested fee award, Arizona law is similarly clear: the prevailing party may be awarded its attorneys' fees in a quiet title action and, here, the Homeowners were the prevailing party. The Homeowners' argument that they should be awarded fees is precisely the argument and position that was intended. Here, the factors to be considered and weighed by the Court clearly favor an award of the Homeowners attorneys' fees, rendering the

[3] The temporal restriction in subsection (A) similarly fails but is beyond the scope of this Reply Brief on Cross-Appeal.

trial court's denial of fees an abuse of discretion.[4] If fees are not awarded here, where the Association acted in contravention of clear Arizona law, there is both a chilling effect on future Davids and an emboldening of future Goliaths. Discretion should be exercised to accomplish justice, which was denied by the trial court in denying Homeowners' request for fees in light of applicable Arizona law. For these reasons and those below, this Court should reverse the trial court's denial of attorneys' fees and costs.

[¶5] The Association's sharp, flailing rhetoric does not, nor can it, overcome clear Arizona law. The redefinition of "Single Family" is impermissible under *Dreamland* and *Kalway* and the Homeowners should have been awarded their attorneys fees incurred in addressing the Association's encumbrance of their property. Therefore, the Homeowners respectfully request that the Court reverse the trail court's rulings with respect to the foregoing issues.

II. LEGAL ARGUMENT

A. Interpretation of *this* contract is not dictated by the interpretation of *different* contracts in *Las Sendas* and *Nicdon*.

[¶6] As the Court need not be reminded, deed restrictions are contracts that should be construed to give effect to the intent of the parties. *Powell v. Washburn*,

[4] A trial court's discretion is abused when its ruling is clearly against the logic of the circumstances, *Jezewak v. Jezewak*, 3 S.W.3d 860, 865 (Mo. App. 1999), or where the trial court's action is "clearly untenable, legally incorrect, or amount to a denial of justice." *State v. Chapple*, 135 Ariz. 281, 297, n. 18, 660 P.2d 1208, 1224 (1983).

211 Ariz. 553, 556, ¶9, 125 P.3d 373, 376 (2006) (*citing Arizona Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993). Because Arizona courts construe deed restrictions according to the intent of the parties, courts only give effect to general amendment provisions insofar as the amendment at issue was within the expectations of the parties. *Kalway*, 252 Ariz. at 538, ¶14, 506 P.3d at 24 (citations omitted); *see also Dreamland Villa Community Club, Inc. v. Raimey*, 224 Ariz. 42, 51, ¶38, 226 P.3d 411, 420 (App. 2010). Thus, the relevant inquiry for this Court is whether the 2021 Amendment was foreseeable in light of the parties' intent, as evidenced by the language of the 2001 Declaration being amended.

[¶7] The fact that this Court may have reached different results in *Nicdon* (which pre-dates *Kalway*) and *Las Sendas* is irrelevant. Those cases involved different deed restrictions and different amendments. To conclude that subsection (A) or (B) of the Amendment are enforceable because of what was foreseeable with respect to an entirely different contract makes little sense unless the underlying deed restrictions and amendments are identical. They are not, and the analysis must center upon the language at issue here.

B. Section 2.30(B) is invalid under *Kalway*.

[¶8] While the Association goes to great lengths to avoid discussing *Kalway* and attacks Homeowners' use of the language employed by the Supreme Court, the

fact remains: the controlling guidance on the issues presented in this dispute comes from *Kalway*, which affirmed this Court's reasoning in *Dreamland*; these cases stand for the proposition that enforceability of an amendment depends upon the language of the amendment itself and the underlying restriction it seeks to amend.

[¶9] Thus, the only relevant inquiry is whether the 2001 Declaration gave notice that the deed restrictions contained therein could be amended in the way that was attempted by the 2021 Amendment. Whether an amendment to community documents was upheld in a different community, with different documents, and a different community history is irrelevant to the Court's inquiry here. Rather, the Court need only to apply the facts of this case, utilizing *this* community's documents and history, to determine whether the redefinition of "Single Family,", only for *one provision* of the Declaration, was foreseeable under *Kalway* and *Dreamland*. Clearly, the answer is no.

1. Section 2.30(B) restricts whom may occupy property as a lessee where no such restriction existed before.

[¶10] The Association argues that "Whether a Single Family is using the property or occupying the residence on the property is a distinction without a difference under the 2001 Covenants." This absurd position is the result of cherry-picking inapplicable portions of the 2001 Declaration in an attempt to, once again, mislead this Court. The Association cites Sections 1.13 and 1.19 of the 2001 Declaration in support of its position that use and occupancy restrictions "are the

same." As the Court can certainly appreciate, it would make little sense for the drafters of the 2001 Declaration to include *both* words in the same sentence if they were intended to convey the same meaning (and principles of contractual interpretation require dictate that language should not be construed to be duplicative as it would render the words superfluous). Furthermore, "use" and "occupancy" are distinct legal concepts, conveying different meanings and resulting in different consequences. Presumably, the drafters of the 2001 Declaration understood "use" and "occupancy" to be different concepts. In fact, the Association itself demonstrates that these are two distinct concepts in the fact that it has attempted to restrict occupancy but not use. Setting aside the Association's peculiar argument concerning the foregoing concept, a reading of the entirety of the provisions cited by the Association, as well as the 2001 Declaration as a whole, clearly demonstrates that the Declaration drafters never intended for use and occupancy to be the same concept and that the redefinition of Section 2.30 to include an occupancy restriction was clearly unforeseeable under *Kalway*.

[¶11] As with the temporal restriction, which never existed in the 2001 Declaration, the 2001 Declaration did not contain any restrictions or impositions with respect to *who* property owners could lease their homes. To impose a new restriction that limits who can occupy under a lease is an entirely new restriction, completely untethered to the 2001 Declaration.

[¶12] Moreover, the Association amended the definition of "Single Family" for only *one provision* in the Declaration because subsection (B) expressly states that it is modifying the definition only for purposes of Section 2.30. This "narrow amendment" was necessary because application of the new definition to the rest of the provisions within the 2001 Declaration would make little sense because "Single Family" was previously only used as an adjective to modify the type of *use* that was permitted rather than as a noun phrase to dictate the only permitted *occupant*. While the grammatical distinction is perhaps subtle, it explains why the Association limits the application of this new definition of "Single Family" to only subsection (B). Because doing otherwise is so unforeseeable as to upset the entirety of the 2001 Declaration and its other uses of "Single Family."

[¶13] The inapplicability of this new and narrowly applicable provision illustrates the reality: this is an entirely new restriction, wholly untethered to the original restrictions contained in the 2001 Declaration. There were no restrictions on occupancy that would have put the Homeowners on notice that the Association could redefine "Single Family," with respect to *leasing only*, as a means to impose a previously non-existent occupancy restriction. This is precisely the kind of amendment the Supreme Court held to be invalid in *Kalway*:

> an HOA cannot create new affirmative obligations where the original declaration did not provide notice to the homeowners that they might be subject to such obligations. … [because] we do not enforce unknown terms which are beyond the range of

reasonable expectation.

Kalway, 252 Ariz. at 538, ¶14, 506 P.3d at 24 (citations omitted).

[¶14] Furthermore, Section 1.13, cited by the Association, is not even applicable to the Homeowners because none of them own Cluster Residential Units. The requirements and restrictions imposed by the 2001 Declaration on such properties clearly is irrelevant to whether or not the Homeowners had notice that "Single Family" could be redefined *only for purposes of leasing* under Section 2.30.

[¶15] Section 1.19 defines what a "Detached Residential Unit" is. It is a building situated upon a Lot intended for independent ownership for *use and occupancy* as a residence by a single family. While, as the Association notes, this definition includes both "occupancy" and "use" by a single family, it is silent on leasing and lessees. Section 2.30, as amended by the 2021 Amendment, redefines "Single Family" *specifically* and *exclusively* with respect to leasing and lessees. In other words, there is no tether between Section 1.19's "occupancy as a residence by a Single Family" with respect to Detached Residential Units and the 2021 Amendment's imposition of a new occupancy restriction through the redefinition of "Single Family" *only* with respect to leases and lessees. In the Association's view of the world, lessees are a lesser class and to be treated differently than owners when it comes to how they choose to formulate their familial relationships

and structure.

[¶16] It is absurd to argue that the simple inclusion of the word "occupancy" in the same sentence as "Single Family," in a provision that had *nothing* to do with leasing and lessees, could constitute a sufficient tether between the 2021 Amendment, which imposed an occupancy restriction through redefining the term "Single Family," *only* for the purposes of leasing and with respect to lessees, under *Kalway*. Yet, that is exactly what the Association does in arguing both that the 2001 Declaration gave notice that an occupancy restriction, with respect to leasing, could later be enacted and that the 2021 Amendment was a "narrow amendment" to the Declaration because of that notice.

[¶17] With respect to the Association's citations to the holdings of this Court in both *Las Sendas* and *Nicdon*, and as noted above, it is imperative to note that each and every case contesting the validity of an amendment to community documents will necessarily hinge on the specific language, circumstances, and other facts present in each respective dispute, because these disputes are, essentially, contract disputes in which the court must figure out what, exactly, was intended, operative, and, ultimately, permissible. Here, the outcomes in *Las Sendas* and *Nicdon*, while perhaps interesting to the people within those communities, are ultimately irrelevant here other than they happen to cite the correct standards under *Dreamland* and *Kalway*. To the extent the Association attempts to argue that,

because an amendment was upheld in *Las Sendas* or *Nicdon*, the 2021 Amendment should be upheld, the Court should reject such rationale and, rather, should apply governing Arizona law to the facts of *this case*.

[¶18] Arizona law is clear on this issue: amendments cannot be entirely new and different in character, untethered to the original covenant. *Kalway*, 252 Ariz. at 539, ¶17, 506 P.3d at 25. Imposing an occupancy restriction through redefining the term "Single Family," with respect only to leasing and lessees, where the 2021 Declaration never discussed occupancy restrictions in connection with leasing, is clearly an amendment that is entirely new and different in character, wholly untethered to the 2021 Declaration. Therefore, it is invalid under *Kalway* and this Court must reverse the trial court's ruling as to subsection (B) of the 2021 Amendment.

C. <u>The denial of attorneys' fees amounts to a denial of justice and an abuse of discretion that must be overturned on appeal</u>.

[¶19] As discussed in the Opening Brief on Cross-Appeal, the Homeowners were the prevailing party under the standard articulated in *Cook v. Grebe*, where this Court held that, for purposes of determining fees, the prevailing party in a contested quiet title action is the party that quieted title. As discussed in that same prior briefing, where cases involve multiple parties, issues, and claims, the analysis centers upon which party has achieved the primary objective. Here, it is clear who has prevailed: the Homeowners quieted title by successfully removing the primary

objective of this dispute, namely, the short-term rental restriction. A simple review of the Complaint, the summary judgment briefing below, and the briefing on appeal demonstrate that, while there is some dispute as to other provisions of the Amendment, the primary purpose of this litigation is to remove the temporal leasing restriction.

[¶20] This Court went on to note in *Cook* that, despite Mr. Cook prevailing on a greater number of claims than Ms. Grebe, she was the prevailing party because of the legislature's choice in words in A.R.S. § 12-1103(B):

> Cook argues that the superior court erred in finding Grebe was the prevailing party because, when considering the totality of the litigation, he prevailed on a greater number of claims than she did. He contends the litigation was, at best, a draw. But Cook's position fails to acknowledge the legislature's word choices in describing the circumstances in which a party may recover attorneys' fees in litigation involving quiet title disputes. See A.R.S. § 12-1103(B) (explaining the prerequisites for recovery of attorneys' fees in an "action to quiet title to real property") (emphasis added).
>
> Therefore, under § 12-1103(B), the determination of who is the prevailing party for purposes of awarding attorneys' fees turns on whether a party successfully quieted title, regardless of whether claims that do not involve quieting title are included in the same lawsuit. See McCleary v. Tripodi, 243 Ariz. 197, 202, ¶ 26, 403 P.3d 1191, 1196–97 (App. 2017) (explaining that "[a] party successfully quieting title may recover attorney fees if" he or she complies with the requirements of A.R.S. § 12-1103(B)).

Cook at ¶¶7-8. Thus, the Association is simply wrong to the extent it is arguing that the number of provisions invalidated versus the number validated controls or

that the Homeowners' decision to voluntarily dismiss their claims for monetary damages given their victory on the temporal restriction defeats their claim for fees.[5] Determination of the prevailing party in this case hinged upon who quieted title as to the primary objective (i.e., the temporal lease restriction). The only interest claimed by the Association were the restrictions contained in the 2021 Amendment and the primary objective and cloud to title of that Amendment, the short-term rental restriction, was removed through the successful efforts of Homeowners in this litigation. This was not a case of "mixed results" as the Association asserts; it was a total and complete success on the primary objective of the litigation by the Homeowners.[6] Clearly, the Homeowners were the prevailing party and the trial court abused its discretion by misapplying the *Associated Indemnity* factors, rendering its ruling against the logic of the circumstances and denying the Homeowners justice.

[¶21] The Homeowners directly addressed the "totality of the litigation" standard discussed by the Association. This standard clearly weighs in favor of

[5] If anything, the Homeowners should be lauded for voluntarily dismissing claims for money damages that, while valid, would have further burdened the trial court and parties in a relatively unexciting second act to the main event – the invalidation of the temporal leasing restriction.

[6] Indeed, as the Court may have recognized and as noted below, Homeowners did not intend to cross-appeal in this case because, despite believing the trial court to have erred with respect to the "Single Family" amendment discussed above, they had achieved their primary objective by invalidating the temporal restriction.

awarding fees to the Homeowners because: (1) they achieved their primary purpose in the litigation by removing the short-term rental ban; (2) the Homeowners gave the Association multiple opportunities to withdraw the 2021 Amendment without resorting to litigation, in compliance with A.R.S. § 12-1103; and (3) the Homeowners obtained a stipulation from the Association to not enforce the Amendment pending the outcome of this litigation, which effectively mooted virtually all of Homeowners' money damages.

[¶22] While the Association claims that the Homeowners' voluntary dismissal of their money damage claims under Count 2 of the Complaint weigh *against* Homeowners with respect to a fee award, this makes little sense. Rather, the voluntary dismissal truly evidences just how overwhelming the Homeowners' victory in this matter was; they voluntarily dismissed their other claims because they achieved what they set out to do and to avoid incurring further fees and burdening the court after their primary objective had been achieved. Further to the contrary of the Association's assertions in its Answering Brief, the only reason Homeowners are cross-appealing now is simply because they were already forced to be here by the HOA due to its appeal. Hardly the evidence that the Association wishes it was.

[¶23] Furthermore, the well-established *Associated Indemnity* factors weigh in favor of awarding the Homeowners their attorneys fees, and the trial court's

failure to recognize that amounts to an abuse of discretion because it is against logic and a denial of justice:

- ***The merits.*** The Association's defense, which was primarily directed at the inapplicability of *Kalway* in a Planned Communities Act community, was contrary to the clear language of the Arizona Supreme Court. The issues and standards controlling this dispute have been settled law in Arizona since 2010. *Kalway* simply affirmed the law set forth in *Dreamland*. Moreover, *Kalway* made clear that amendments must comply with both the Planned Communities Act **and** the common law foreseeability analysis. Frankly, the Association's persistence in this regard arguably crosses over the Rule 11 and A.R.S. § 12-349 lines of good faith.
- ***Whether litigation could have easily been avoided or settled.*** The Homeowners tried to come to a reasonable compromise with the Association well before any lawsuit was filed, including through their quiet title demand. All of the Homeowners' efforts were rebuffed by the Association. In fact, A.R.S. § 12-1103(B), by requiring the provision of a quiet title demand, recognizes that the entire purpose of the demand requirement is to demonstrate that litigation could have been avoided.
- ***Hardships.*** An assessment of fees against the Association would not cause extreme hardship; the Association is authorized to issue assessments to

property owners within the community it governs and, therefore, it could easily and quickly raise the necessary funds in the event of a fee award. Conversely, a denial of fees would certainly cause Homeowners tremendous hardship.

- ***Whether the successful party prevailed on all aspects.*** While the Association argues that the Homeowners did not prevail with respect to all of the relief sought, this is simply not the case. The primary objective of this dispute was to remove the short-term rental restriction imposed by the 2021 Amendment and the Homeowners successfully removed that restriction, thereby quieting title. With respect to the money damages claims, as noted above, those were voluntarily dismissed by the Homeowners as a result of the damages associated therewith being largely mooted by the Association agreeing not to enforce the 2021 Amendment during the litigation. This was very clearly the result of Homeowners' efforts through the seeking of an injunction against the Association and the Association's relenting to the relief sought thereby.
- ***Novelty.*** Clearly, the issues in this matter are not novel. Whether or not unforeseeable modifications to a community declaration are enforceable was addressed by this Court in *Dreamland* over 13 years ago. The 2022 Supreme Court decision in *Kalway*, as noted by the court in its opinion, affirmed the

reasoning and law set forth in *Dreamland*. It did not create new law. There were no novel issues presented in this case.

- ***Public policy considerations.*** Perhaps most importantly for public policy reasons, failure to award the Homeowners their fees may very well discourage other property owners with tenable claims from enforcing their property rights. As the Court can appreciate, policy for fees in connection with property disputes is, and should be, different from fees over disputes arising from the sale of widgets. Property rights are a fundamental aspect of our shared history and our society. When another party acts to remove one of a property owner's sticks, the owner should not be discouraged from enforcing its rights and reclaiming that stick. A failure to award Homeowners their fees does exactly that.

[¶24] While the Association is correct that this Court should not disturb an award, or denial of an award, of attorneys' fees absent an abuse of discretion, the Association is incorrect that no such abuse occurred here. For the reasons set forth above, it is clearly error, under Arizona law, to fail to award Homeowners their attorneys fees. The various factors and considerations require that some amount of fees be awarded to the Homeowners for justice to be achieved, and the trial court's failure to award fees is manifestly against the logic of the circumstances and amounts to a denial of justice to Homeowners.

[¶25] If anything, denying fees to the Homeowners sends a message to the Association (and other homeowners associations) that courts will allow the well-funded majority to overstep the rights of the minority and put the minority to the task of expending resources to re-secure their rights, without facing any financial consequences. Denying fees to the Homeowners will only encourage more overreaching by the Association and others like it.

D. <u>Purported abandonment of alternative theories</u>.

[¶26] As it is prone to do, the Association fails to accurately describe and cite the Homeowners' positions. The Association's misrepresentation is so contrary to the Homeowners' Opening Brief that one must wonder whether it Hanlon's Razor happening in real time. The Association claims that Homeowners, in footnotes 7 and 8 of their Answering Brief, requested that the Court reverse the trial court's order dismissing all other claims with prejudice. *See* Association Answering Brief at p.34. Of course, this does not comport with reality. Footnotes 7 and 8 are descriptive, noting the factual and procedural history of the dispute. This context is obvious when reading the footnotes in conjunction with the body text associated therewith.

[¶27] This is not the only delusion on display by the Association. At p.35 of its Answering Brief, the Association claims that it was "Plaintiff's [Homeowners] rush to obtain a judgment that resulted in this Court of Appeals dismissing the first

appeal as premature." Not only is this untrue, but it is the Association that prematurely filed its Notice of Appeal. It was the Association that filed a Motion for New Trial on December 20, 2022, only to follow up that Motion nine days later with a Notice of Appeal *while the HOA's Motion for New Trial was still pending*. This was, of course, all briefed in this Court when the Association requested that this Court dismiss its Appeal, which it did in its April 5, 2023 Order.

[¶28] At no point did the Homeowners abandon any other theories that would invalidate all or a portion of the 2021 Amendment. Rather, the trial court did not reach those alternative theories of invalidity. If, for some reason, this Court concludes that the trial court erred in its ruling as to the purely legal arguments against the 2021 Amendment based upon principles of contractual construction, the Homeowners have not abandoned, nor should be precluded from, pursuing its other arguments to invalidate the 2021 Amendment due to the irregularities in the vote and other issues alleged but never reached. However, as set forth below and on appeal/cross-appeal, there is simply no need to further burden the parties or the judicial resources of Navajo County (or the State of Arizona at large) given what is required by a proper application of *Kalway*.

V. CONCLUSION

[¶29] For the reasons stated, the Homeowners respectfully request that this Court: (a) reverse the trial court's denial of attorneys' fees and costs; (b) direct the

trial court to rule upon the Homeowners' request for fees below; (c) reverse its findings as to subsection (B) of the Amendment; and (d) direct the trial court to redline the Amendment as follows:

> (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~~.

Additionally, the Homeowners respectfully request an award of attorneys' fees and costs incurred on appeal pursuant to the Declaration and A.R.S. §§ 12-341, -341.01 subject to their compliance with *ARCAP* Rule 21.

RESPECTFULLY SUBMITTED this 21st day of December, 2023.

By: /s/ Joseph R. Rainey
Rick K. Carter
Matthew A. Klopp
Stockton D. Banfield
Joseph R. Rainey
Attorneys for Appellees/Cross-Appellants