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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

VILLAGE OF OAKCREEK
ASSOCIATION,

Plaintiff,

vs.

LANCE E. BONHAM; JOHN DOES
I-V, inclusive; JANE DOES I-V,
inclusive; BLACK CORPORATIONS
I-V, inclusive; WHITE
PARTNERSHIPS I-V, inclusive;
Unknown Heirs and Devises of each
of the above-names Defendants, if
deceased,

Defendants.

Case No.: V1300-CV2022-80081

**DEFENDANT LANCE BONHAM'S
MOTION TO DISMISS**

AND

**MOTION TO VACATE ORDER TO
SHOW CAUSE HEARING**

(Expedited Ruling Requested)

Defendant Lance E. Bonham ("Bonham" or "Defendant"), by and through undersigned counsel, hereby moves to dismiss Plaintiff Village of Oakcreek Association's ("Association" or "Plaintiff") Complaint. Defendant further requests that the Order to Show Cause Hearing set for Tuesday, June 7, 2022 at 9:00 a.m. be vacated.

The Association's Complaint seeks to enforce the May 3, 2017 Amendment to the Declaration ("2017 Amendment") which attempts to impose an extremely oppressive

1 thirty (30) day “rental” restriction. The 2017 Amendment is invalid for multiple reasons.

2 First, on March 22, 2022, the Arizona Supreme Court issued the Kalway v.
3 Calabria Ranch HOA, LLC opinion. 252 Ariz. 532, 506 P.3d 18, (2022). In rendering its
4 opinion, the court stated, “Construing such provisions narrowly, as with any restrictive
5 covenant on real property, we hold that a general-amendment-power provision may be
6 used only to amend those provisions for which the HOA’s original declaration has
7 provided significant notice.” Id. at 22. The court went on to strike amendments that: 1)
8 limited an owners’ ability to convey or subdivide their lots; 2) restricted the size and
9 number of buildings permitted on each lot; and 3) reduced the maximum number of
10 livestock permitted on each lot. Kalway does not allow amendments which are “entirely
11 new and different in character untethered to an original covenant.” Id. at 25. Instead, “The
12 original Declaration must give sufficient notice of the possibility of a future amendment.”
13 Id. Here, the Association’s Original Declaration¹ allowed rentals and provided no notice
14 to Bonham or other homeowners that the right to rent their property could be revoked by
15 their neighbors.

16 Second, the Declaration requires that an amendment be adopted by the vote of the
17 majority of the membership. The 2017 Amendment was adopted by 24% of the
18 membership and is not a valid amendment.

19 Based on the facts as pled by the Association and the basic recorded documents,
20 including the various amendments to the Declaration, there is no set of circumstances in
21 which the Association’s 2017 Amendment is legal. Accordingly, the 2017 Amendment is
22 illegal, the Association cannot enforce it, the Association’s Complaint should be
23 dismissed, and the Order to Show Cause hearing currently scheduled for June 7, 2022 at
24 9:00 am should be vacated. Defendant should be allowed to apply for his attorney’s fees
25 and costs pursuant to the Declaration and A.R.S. §§12-341 and 12-341.01.

26
27 ¹ The Original Declaration references the first recorded Declaration of the Village of
28 Oakcreek which was recorded in 1981.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 **I. BACKGROUND**

4 **A. Defendant Owns a Property in the Village of Oakcreek Association.**

5 The Village of Oakcreek Association is a master Association with 19
6 separate satellite associations, which includes 2,340 Units in total. (See Declaration,
7 Attached to Plaintiff's Complaint at Exhibit B; See Association's Website).

8 Bonham owns Lot 75 ("Subject Property") in the satellite association known as
9 Cathedral View. Bonham's mother, Bette Simmons, purchased the Subject Property in
10 1989. (See Deed, Attached as Exhibit 1). In 2003, the Subject Property was transferred
11 into Ms. Simmon's Trust with Mr. Bonham named as a trust beneficiary. (See Deed,
12 Attached as Exhibit 2). Bonham took sole title to the Subject Property as an individual in
13 2017 by Quit Claim Deed where he, as the sole Trustee of the Bette Simons Living Trust,
14 deeded the Subject Property to himself as an individual. (See Quit Claim Deed, Plaintiff's
15 Complaint, Exhibit A). Bonham or his mother, through a trust or otherwise, have owned
16 the Subject Property since 1989. Bonham has been the holder of equitable title since
17 2003.

18 **B. The Declaration does not Place a Restriction on Rentals.**

19 The Master Declaration of Restrictive Covenants for all Property in the
20 Village of Oakcreek was originally recorded in 1981. (See "Original Declaration,"
21 Attached as Exhibit 3). The Original Declaration does not restrict rentals. (See Original
22 Declaration, Attached as Exhibit 3). The Original Declaration does contain use
23 restrictions (See Original Declaration at Section 4, *General Land Use Regulations*,
24 Attached as Exhibit 3). The *General Land Use Regulations* section regulates such things
25 as commercial use, animals, drilling, laundry areas, and the like. However, a section
26 similar to the newly adopted Section 4.23, *Leasing of Lots and Units; Restriction and*
27 *Limitations* of the 2017 Amendment did not exist. Over the years, the Association
28 amended the Original Declaration, ultimately resulting in a 2014 version which,

1 according to the Association’s Complaint, is the pertinent Document (“2014
2 Amendment”). The 2014 Amendment contains the same *General Land Use Regulations*
3 but also does **not** contain use restriction related to rentals nor does it contemplate that the
4 Association has the power to take away the ability to rent. For all practical purposes, the
5 Original Declaration and the 2014 Declaration are the same. However, the Original
6 Declaration is the genesis of the Association and ultimately the document in which all
7 amendments and revisions must emanate. Since neither the Original Declaration, nor the
8 2014 Amendment for that matter, restricted rentals in any regard, the Association had to
9 create an entirely new section of the Declaration purporting to oppressively restrict
10 rentals. In 2017, the Association recorded the amendment at issue which includes
11 Section 4.23, *Leasing of Lots and Units; Restrictions and Limitations* (See 2017
12 Amendment, Attached as Exhibit C to Association’s Complaint).

13
14 **C. The Association Relied on the Original Declaration’s General-
Amendment Provision to Amend the Declaration.**

15 This litigation concerns the validity of the 2017 Amendment.
16 (Association’s Complaint, Exhibit C). The Association adopted the new restriction
17 prohibiting rentals for less than thirty (30) days pursuant to the general-amendment
18 provision contained in the Declaration. The 2017 Amendment states,

19
20 Whereas, pursuant to Section 9.04 of the Third Restated Master
21 Declaration, the Third Restated Master Declaration may be amended by a
22 majority vote of the members of the Association voting at any meeting of
23 the membership noticed and held pursuant to the By-laws of the
24 Association.

25 There are no other provisions in any of the Association’s documents that allow the
26 Association to effectuate such a major use restriction and the Association relies solely on
27 Section 9.04, or the general amendment provision of the Original Declaration.

28 ///

///

1 **D. The 2017 Amendment Adds New Restrictions.**

2 The 2017 Amendment adds a restriction not contemplated by the Original
3 Declaration. Section 4.23(1) of the 2017 Amendment states,

4
5 “Lease” defined. As used herein, the term “Lease” is defined to include all
6 agreements, contracts, grants, memorandums, conveyances, lets,
7 assignments, or rents that give a non-Owner of a Lot or Unit access to or
8 right to use a Lot or a Unit. A Lease may exist whether it is in writing, or
9 not, and regardless of the amount or nature of consideration exchanged to
10 enjoy the benefit of a Lease. The Board’s determination of what constitutes
11 a Lease and what constitutes the leasing or subleasing of a Lot or a Unit
12 shall be conclusive and binding on the Owner of the Lot or Unit.

13 Section 4.23(2) of the 2017 Amendment then states,

14 Minimum Lease Term. No owners shall lease a Lot or a Unit for a Lease
15 term of less than thirty (30) days.

16 The 2017 Amendment has additional sections related to tenant registration forms,
17 leasing rules, fine schedules, and the like.

18 Without any notice in the Original Declaration that a fraction of the membership
19 can revoke property rights, the Association, through the 2017 Amendment, has dictated
20 that not only can you not lease your property in the typical sense, but you are prohibited
21 from allowing anyone to “access or utilize your property... regardless of the amount or
22 nature of the consideration.”

23 Again, there is no mention of a rental restriction in the Original Declaration and
24 nothing in the Original Declaration besides a general-amendment provision. According
25 to Kalway, a general amendment provision is insufficient to impose such a substantial
26 amendment restricting property rights.

27 **II. LEGAL ARGUMENT**

28 Pursuant to Rule 12(b)(6), Defendant is entitled to a dismissal of the Complaint

1 because under any interpretation of the facts, Plaintiff cannot maintain any cause of
2 action.

3
4 **A. Rule 12(b)(6) Standard**

5 Motions to dismiss for failure to state a claim should be granted if, as a
6 matter of law, plaintiffs would not be entitled to relief under any interpretation of the facts
7 susceptible of proof. Matter of ABB Trust v. Bates, 251 Ariz. 313, 491 P.3d 1120, (App.
8 Div. 1 2021). When adjudicating a motion to dismiss for failure to state a claim, courts
9 draw from relevant exhibits to the complaint and the public records relied upon by the
10 parties. Mesnard v. Campagnolo, in and for County of Maricopa, 251 Ariz. 244, 489 P.3d
11 1189, (2021).

12 **B. Contract Interpretation**

13 The Declaration is a contract between the individual lot owners as a whole
14 and the Association. Wilson v. Playa de Serrano, 211 Ariz. 511, 513 (App. 2005). The
15 interpretation of the Declaration is an issue of law. Id. “Because covenants originate in
16 contract, the primary purpose of a court when interpreting a covenant is to give effect to
17 the original intent of the parties with *any doubts to be resolved against the validity of the*
18 *restriction.*” Kalway at 24. (emphasis added). Thus, the Court must look to the Original
19 Declaration and the intent of the restriction in 1981.

20 Nothing contained in the Original Declaration, or the 2017 Amendment, suggests
21 the intent of the documents was to limit short-term rentals, limit the ability to allow any
22 guest to utilize your property “regardless of the amount or nature of the consideration,” or
23 restrict your property with respect to rentals in any regard. To the contrary, the Original
24 Declaration allows guests and tenants. The Original Declaration at Section 2 (viii) defines
25 guest to include tenants, lessees, invitees, and licensees. The Original Declaration at
26 Section 4.02, *Residential Use*, allows an Owner, his family, and guests to utilize the
27 property for unrestricted residential purposes. Further, Section 4.18 of the Original
28 Declaration grants guests (which includes tenants) revokable licenses for the use of the

1 common areas.² The Declaration is devoid of any restriction on rentals and, in fact,
2 contemplates rentals.

3 **C. The Rental Amendment is Contrary to the Well-Established Law in**
4 **Arizona.**

5 The Arizona Supreme Court recently espoused a “sufficient notice test”
6 declaring that only reasonable amendments can be effectuated if the homeowner was on
7 sufficient notice of the possibility of a future amendment. Specifically, the court stated,

8 The original declaration must give sufficient notice of the possibility of a
9 future amendment; that is, amendments must be reasonable and foreseeable.
10 *See Dreamland*, 224 Ariz. at 51 ¶38; *see also Shamrock v. Wagon Wheel*
11 *Park Homeowners Ass’n*, 206 Ariz. 42, 45-46 p14 (App. 2003); *Wilson v.*
12 *Playa de Serrano*, 211 Ariz. 511, 513 p7 (App. 2005).

13 Kalway at 23-24.

14 “[A]n HOA cannot create new affirmative obligations where the original
15 declaration did not provide notice to homeowners that they might be subject to such
16 obligations.” Id. “Instead, it must give notice that a restriction or affirmative covenant
17 exists and that the covenant can be amended to refine it, correct an error, fill in a gap or
18 change it in a particular way. *See Armstrong*, 633 S.E.2d at 87. But future amendments
19 cannot be ‘entirely new and different in character,’ untethered to an original covenant.”
20 *Lakeland Prop Owners Ass’n v. Larson*, 459 N.E.2d 1164, 1167 (Ill. App. Ct. 1984).” Id.

21 The amendment in Kalway was passed pursuant to a general amendment provision
22 which stated,

23 This Declaration may be amended at any time by an instrument executed
24 and acknowledged by the Majority Vote of the Owners which shall not be
25 effective until the recording of such instrument.

26 (Kalway, 506 P.3d at 25.)

27 The general amendment provision in Kalway was insufficient to put the homeowners on

28 ² Section 2(viii), Section 4.2, and Section 4.18 of the Original Declaration are unchanged

1 notice of an amendment that: 1) limited their ability to convey or subdivide their lots; 2)
2 restricted the size and number of buildings permitted on each lot; and 3) reduced the
3 maximum number of livestock on each lot.

4 Here, the general amendment provision is similar and states,

5 These Master Declarations may be amended by a majority vote of the
6 members of the Association voting at any meeting of the membership
7 noticed pursuant to the By-laws of the Association, provided the proposed
8 amendment is included in the notice of the meeting.

9 (Original Declaration, Section 9.04, Exhibit 3).

10 This is a broad grant of authority and is not “sufficient notice.” “[E]ven a broad grant of
11 authority to amend an original declaration is insufficient to allow a majority of property
12 owners to adopt and enforce restriction on the minority without notice.” Kalway, 506
13 P.3d at 22. The 2017 Amendment is entirely untethered to any previous restriction in the
14 Original Declaration, failed to give sufficient notice to the homeowners, and is invalid.
15 “In special types of contracts, we do not enforce “unknown terms which are beyond the
16 range of reasonable expectations.” Darner Motor Sales, Inc. v. Universal Underwriters
17 Ins., 140 Ariz. 383, 391 (1984)(quoting Restatement (Second) of Contracts s211 cmt. F
18 (Am. L. Inst. 1981)). “CC&Rs are such contracts.” Kalway, 506 P.3d at 24.

19 Bonham and all members of the Association were without sufficient notice of a
20 potential restriction imposed by a minority of the Association that would eviscerate a
21 property right related to their ability to rent.

22 The current law in Arizona is consistent with the Restatement. Amendments to
23 deed restrictions that are “substantial and unforeseeable” must be made with the approval
24 of all the members in a deed restricted community such as the Association. *See*
25 Restatement (Third) of Property; Servitudes s6.10(3)(a)(200) (“[U]nanimous approval is
26 required.... to prohibit or materially restrict the use or occupancy of, or behavior within,
27 individually owned lots or units....”). The Association certainly does not have unanimous
28 consent to restrict property rights and, as illustrated below, less than 25% of the members
in the 2014 Amendment.

1 supported such an absurd amendment. The 2017 Amendment is contrary to the well-
2 established law and is illegal.

3 **D. The Amendment was not Passed by a Majority of the Homeowners as**
4 **Required by the Declaration.**

5 An amendment to the Declaration requires the majority vote of the homeowners in
6 the Association. (See Section 9.04 of the Original Declaration, Exhibit 3; See also Section
7 9.04 of the 2014 Amendment, Plaintiff's Exhibit B). The 2017 Amendment was not
8 passed by a majority vote of the homeowners and is thus invalid. There are 2,340 lots in
9 the Association. (See Association Website, Attached as Exhibit 4). The Association
10 claims it received 1,067 total votes with 564 voting in favor of the 2017 Amendment and
11 452 voting against the 2017 Amendment. (See Letter from Association's Counsel,
12 Attached as Exhibit 5). Thus, a rental restriction was imposed upon the entire community
13 with only 24% of the members in favor of such an amendment.³

14 Section 9.04, *Amendment of Master Declaration*, states,

15 These Master Declarations may be amended by a majority vote of the
16 members of the Association voting at any meeting of the membership
17 noticed pursuant to the By-laws of the Association, provided the proposed
18 amendment is included in the notice of the meeting.

19 The Association's interpretation of this provision is that an amendment can be effectuated
20 by the majority vote of a quorum of the membership voting at any meeting of the
21 membership. Pursuant to the most recent Bylaws, a quorum is 20% of the membership.
22 Thus, according to the Association, 235 (or the majority of a 20% quorum) can impose an
23 amendment restricting a fundamental property right on all members of the Association.
24 Allowing ten percent (10%) of the community to impose an overwhelming restriction on
25 the membership is not what was intended in the Original Declaration. The Association's

25 ³ The lots within the Association, as well as the tally of the vote, were obtained from
26 Association records and are provided for demonstrative purposes only. The fact that the
27 2017 Amendment was not passed by a majority of the members is illustrated in the
28 amendment itself (Plaintiff's Complaint, Exhibit C) which states only that it was passed
by a majority of those voting. Thus, the reference to specific voting numbers and
percentages is unnecessary for the Court to conclude there was not the required majority
approval.

1 position is contrary to the express terms of the Original Declaration which requires a
2 “majority vote of the members” and it is also contrary to equity and principles of fairness.

3 **E. The Prior County Ordinance is Irrelevant.**

4 Plaintiff cannot argue that the 2017 Amendment is justified as a result of
5 the 2016 enactment of A.R.S. §11-269.17. State legislation now mandates that “A county
6 may not prohibit vacation rentals or short-term rentals” and that “A city or town may not
7 prohibit vacation rentals or short-term rentals.” A.R.S. §§11-269.17 and 9-500.39. In
8 adopting such statutes, the legislature has emphasized the importance of tourism in
9 Arizona and the ability to rent property on a short-term basis. The legislature has
10 determined that requiring compliance with Declarations, local laws, and adopting
11 reasonable rules is the appropriate manner to regulate rental activity. *See* A.R.S. §33-
12 1806.01. The legislature certainly did not intend to prohibit short-term rentals only to
13 have Associations, or in this case a minority of owners, supplant the legislation with
14 illegal amendments to the Declaration. The Association’s analysis related to the reason
15 for the alleged amendment is irrelevant and should not be considered by this Court.

16 **III. CONCLUSION.**

17 For the foregoing reasons, the Court should dismiss the Association’s Complaint,
18 vacate the Order to Show Cause hearing currently scheduled for June 7, 2022 at 9:00 am,
19 and allow Bonham to apply for his attorney’s fees and costs.

20 **RESPECTFULLY SUBMITTED** this 24th day of May, 2022.

21
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23
24 /s/ Mark J. Bainbridge

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1 Efiled this 24th day of May, 2022, with:
2 Clerk of the Court
3 Yavapai County Superior Court
4 <http://www.azturbocourt.gov>

5 COPY of the foregoing emailed and e-served
6 this 24th day of May, 2022, to:

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