

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

VILLAGE OF OAKCREEK
ASSOCIATION,

Plaintiff / Appellant,

vs.

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

Defendant / Appellee.

**Court of Appeals
Division One
1 CA-CV 22-0780**

**Yavapai County
Superior Court
Case No. V1300-CV2022-80081**

APPELLANT’S OPENING BRIEF

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	iii
INTRODUCTION	1
STATEMENT OF THE CASE AND STATEMENT OF THE FACTS.....	1
STATEMENT OF THE ISSUES.....	7
STANDARD OF REVIEW	9
ARGUMENT	10
I. THE DECLARATION IS A CONTRACT.....	10
II. THE 2016 RENTAL RESTRICTION IS VALID UNDER THE <i>DREAMLAND VILLA</i> AND <i>KALWAY</i> CASES, AND THE 2017 RE- RECORDING IS IRRELEVANT.....	10
III. THE ASSOCIATION’S COMPLAINT SHOULD HAVE SURVIVED A RULE 12(B)(6) MOTION.....	14
CONCLUSION	16
REQUEST FOR ATTORNEYS’ FEES AND COSTS	18
CERTIFICATE OF COMPLIANCE.....	19
CERTIFICATE OF SERVICE	20

TABLE OF CITATIONS

<u>CASES:</u>	<u>PAGE</u>
<i>Ariz. Biltmore Estates Ass’n v. Tezak</i> , 177 Ariz. 447, 868 P.2d 1030 (App. 1993) ...	10
<i>City of Phoenix v. Geyley</i> , 144 Ariz. 323, 697 P.2d 1073 (1985)	9
<i>City of Tucson v. Clear Channel Outdoor, Inc.</i> , 218 Ariz. 172 (App. 2008)	9
<i>Coleman v. City of Mesa</i> , 230 Ariz. 352, 284 P.3d 863 (2012)	9, 15
<i>Cullen v. Auto-Owners Ins. Co.</i> , 218 Ariz. 417 (2008)	15
<i>Dreamland Villa Community Club, Inc. v. Raimey</i> , 224 Ariz. 42, 226 P.3d 411 (App. 2010)	5, 8, 10, 11, 12
<i>Duffy v. Sunburst Farms E. Mut. Water & Agric. Co., Inc.</i> , 124 Ariz. 413, 604 P.2d 1124 (1979)	10
<i>Forest Guardians v. Wells</i> , 201 Ariz. 255, 34 P.3d 364 (2001)	9
<i>Heritage Heights Home Owners Ass’n v. Esser</i> , 115 Ariz. 330, 565 P.2d 207 (App. 1977)	14
<i>Johnson v. Pointe Cmty. Ass’n, Inc.</i> , 205 Ariz. 485 (App. 2003)	4
<i>Kalway v. Calabria Ranch HOA, LLC</i> , 2022 506 P.3d 18 (Ariz. 2022)	4, 5, 8, 11, 12, 13, 14, 16
<i>Murphey v. Gray</i> , 84 Ariz. 299, 327 P.2d 751 (1958)	14
<i>Murrell v. Taylor</i> , 1 CA-CV 20-0334, 2021 WL 982577 (App. Mar. 16, 2021)	15
<i>Newman v. Maricopa Cnty.</i> , 167 Ariz. 501 (App. 1991)	15
<i>Pinetop Lakes Ass’n v. Hatch</i> , 135 Ariz. 196, 659 P.2d 1341 (App. 1983)	14

TABLE OF CITATIONS
(continued)

<u>CASES:</u>	<u>PAGE</u>
<i>Rand v. Porsche Fin. Servs.</i>, 216 Ariz. 424 (App. 2007)	9
<i>Rowland v. Kellogg Brown & Root, Inc.</i>, 210 Ariz. 530, 115 P.3d 124 (App. 2005)	14
<i>State ex rel. Corbin v. Pickrell</i>, 667 P.2d 1304 (Ariz. 1983)	14
 <u>PROCEDURAL RULES:</u>	
Arizona Rule of Civil Appellate Procedure 21	16
Arizona Rule of Civil Procedure 12(b)(6)	1, 7, 9, 14, 15
 <u>STATUTES:</u>	
Arizona Revised Statute §12-341	18
Arizona Revised Statute §12-341.01	18

INTRODUCTION

Appellant Village of Oakcreek Association (hereinafter, the “Association”), by and through undersigned counsel, hereby submits its Opening Brief.

The Lower Court’s Decision should be reversed for many reasons. First, the court abused its discretion in granting Defendant-Appellee’s Motion to Dismiss when, taking the allegations in the Complaint as true as required under [Arizona Rules of Civil Procedure 12\(b\)\(6\)](#), it was evident that Defendant-Appellee acquired property within the Association two months *after* the 2016 Amendment at issue was recorded and in effect. Second, although the fact that Defendant-Appellee was already on record notice of the 2016 Amendment was established, the Lower Court continued deeper into an improper analysis that Defendant-Appellee was not bound by the 2016 Amendment in light of the fact that there was later a 2017 Re-Recorded Amendment. [Superior Court Index of Record “IR” IR # 25]. For the reasons that follow, the Association asserts that the Lower Court mistakenly decided that the 2017 Re-Recorded Amendment controlled, even though it did not change the language establishing a short term rental restriction provided in the 2016 Amendment.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

As set forth in the record in Appellant’s Complaint, Response to Motion to Dismiss, and Motion for Reconsideration, this case involves a dispute between a

homeowners association, Village of Oakcreek, and a property owner, Lance Bonham (“Bonham”).

The Association is a planned community in Yavapai County, Arizona, governed by the Master Declaration of Restrictive Covenants for all Property in the Village of Oakcreek Restated & Amended, recorded at Document Number 2014-0021505 on May 13, 2014, as amended (“the Declaration”). [IR # 1 at p. 2]. On January 23, 2017, Bonham became the record owner of the real property at 40 Rio Circle, Sedona, Arizona, 86351 (“the Property”), which is located within the Association and thus is subject to its Declaration. [IR # 1 at p. 2].

Bonham’s mother originally acquired title to the Property in 1989 and the Property was ultimately vested to Bonham by virtue of a Quit Claim Deed on January 23, 2017, by Bonham as the Trustee of his mother’s trust. [IR # 1 at p. 2]. Bonham does not live at the Property as his primary residence, instead, he leases the Property for terms of less than thirty days, and does so for monetary gain. [IR # 21 at p. 2].

On November 17, 2016, over two months before Bonham inherited the Property and became the record Owner, the Association recorded an Amendment that adds Section 4.23 to the Declaration. [IR # 1 at p. 3]. The Amendment, which passed by a 53% vote: 564 in favor out of 1067 votes, was recorded November 17, 2016 with the Yavapai County Recorder, at Document No. 2016-0058316 (“the 2016 Amendment”). [IR # 22 at p. 3].

The 2016 Amendment to Section 4.23 involves Leasing of Lots and Units; Restrictions and Limitations, and states, in part:

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

The Association then re-recorded the exact same minimum lease term language in a subsequent Amendment on May 3, 2017 (the “2017 Correction”). That 2017 Correction was recorded **for the sole purpose of correcting a clerical error** in the 2016 recorded Amendment by removing text that was mistakenly included in the original recording. [IR # 1 at p.3]

The 2017 correction stated, in part:

This instrument is being re-recorded for the sole purpose of correcting Section 2 of the Amendment to the Restated and Amended Master Declaration of Restrictive Covenants For All Property in The Village of Oakcreek previously recorded on November 17, 2016 as document number 2016-0058316, by **removing** the following provisions from the new Section 4.23 added to the Restated and Amended Master Declaration of Restrictive Covenants For All Property in The Village of Oakcreek by such Section 2, because a clerical error resulted in such recorded instrument including such removed sections which were not approved by the members of the Village of Oakcreek Association:

6. Tenant Registration Form.

...

7. Grandfather Provision.

...

Emphasis in original. The prohibition of rentals of less than 30 days has been in place since November 17, 2016. The 2017 Correction does not change the short term rental restriction in any way.

Between May 1, 2021 and February 28, 2022, Bonham rented his Property more than five times for a periods of less than thirty days, in violation of the 2016 Amendment. [IR # 21 at p.3]. Based on its obligation to enforce its governing documents, including the 2016 Amendment, the Association first attempted to enforce its Declaration short of litigation. “[An] association...must comply with the declaration’s requirements, and association members are entitled to judicial recourse to ensure such compliance.” [*Johnson v. Pointe Cmty. Ass’n, Inc.*](#), 205 Ariz. 485, ¶ 24 (App. 2003).

Despite the Association’s efforts, it could not gain compliance from Bonham, and the Association filed a lawsuit on April 5, 2022 to enforce its Declaration. On May 24, 2022, Bonham filed a Motion to Dismiss, alleging the Amendment is not valid because it did not get the requisite number of votes to pass, and also that it failed the [*Kalway v. Calabria Ranch HOA, LLC*](#), 2022 506 P.3d 18 (Ariz. 2022) sufficient notice test. [IR # 13].

On June 8, 2022, the Association responded to the Motion to Dismiss, explaining that at the time Bonham became record owner of the Property in 2017, the 2016 Amendment had already passed with proper approval of the Members obtaining

the requisite majority by a vote of 564 “for” and 452 “against” as required by Section 9.04 of the Declaration.¹ Bonham had record notice of the 2016 Amendment upon taking title the Property in 2017. [IR # 22 at p. 3].

Bonham improperly refers to the 2016 Amendment as “the 2017 Amendment” in both his Motion to Dismiss and his Reply. [IR # 22 and # 23]. In doing so, he misled the Superior Court to fit the facts of [Kalway](#) by labeling the Amendment with the incorrect year, making it appear that he acquired the Property *prior* to the Amendment’s recordation.

On September 8, 2022, without oral argument, the Superior Court granted Bonham’s Motion to Dismiss, ruling, in part, that he was not bound by the “2017” Amendment because he purchased the property after the recording of the “2017” Amendment. [IR # 25 at p. 2]. The Court declined to rule on the validity of the votes because it held that Bonham was not bound by the “2017” Amendment anyway since he did not have sufficient notice under [Dreamland Villa Community Club, Inc. v. Raimey](#), 224 Ariz. 42,226 P.3d 411 (App. 2010) and [Kalway](#), 252 Ariz. 532, 506 P .3d 18 (2022). [IR # 25 at p. 2].

¹ Section 9.04, Amendment of Master Declarations, provides: “These Master Declarations may be amended by a majority vote of the members of the Association voting at any meeting of the membership noticed pursuant to the By-Laws of the Association, provided the proposed amendment is included in the notice of the meeting.”

On September 21, 2022, the Association filed a Motion for Reconsideration. [IR # 26]. On September 30, 2022, the Superior Court denied the Motion before the deadline for Bonham to file a Response had even passed. [IR # 32]. After final judgment in favor of Bonham, along with an award of attorneys' fees and court costs, was filed by the Court on November 9, 2022, the Association filed its Notice of Appeal.

STATEMENT OF THE ISSUES

1. Did the Lower Court abuse its discretion in granting Bonham's Motion to Dismiss under [Arizona Rules of Civil Procedure 12\(b\)\(6\)](#) which require the court to take the allegations in the Association's Complaint, along with all reasonable inferences in the Association's favor, as true?
2. Did the Lower Court err in determining its rulings based on the language of the 2017 Amendment instead of reviewing the already existing language of the 2016 Amendment?
3. Did the Lower Court err in determining that the provision containing the restrictions on residential rentals is found, not in the 2016 Amendment, but in the amendment that was re-recorded on May 3, 2017?
4. Did the Lower Court err in determining that because Bonham did not purchase the property after the recording of the 2017 Amendment, that he would not be bound by the language in the 2016 Amendment, that was already recorded when the property was conveyed to him in 2017?
5. Did the Lower Court err in finding that Bonham did not purchase the property after the recording of the 2017 Amendment, despite the fact that he acquired the property after the recording of the 2016 Amendment which limited short term rentals?

6. Did the Lower Court err in determining that the Amendment is void because it was unforeseeable under the holding in [*Dreamland Villa Community Club, Inc. v. Raimey*](#), 224 Ariz. 42 (App. 2010)?
7. Did the Lower Court err in determining that the Amendment is void because it was unforeseeable under the holding in [*Kalway v. Calabria Ranch HOA, LLC*](#), 2022 506 P.3d 18 (Ariz. 2022)?
8. Did the Lower Court err in determining that the residential rental restriction is invalid as it relates to Bonham?

STANDARD OF REVIEW

1. This Court reviews the dismissal of a complaint under Rule [12\(b\)\(6\)](#) *de novo*. [Coleman v. City of Mesa](#), 230 Ariz. 352, 355, 284 P.3d 863, 866 (2012).
2. The Court reviews questions of law *de novo*. [Forest Guardians v. Wells](#), 201 Ariz. 255, at ¶ 9, 34 P.3d 364, 368 (2001).
3. This Court reviews the trial court's legal conclusions, such as the interpretation of a contract, *de novo*. [City of Tucson v. Clear Channel Outdoor, Inc.](#), 218 Ariz. 172, 182, ¶ 27 (App. 2008); [Rand v. Porsche Fin. Servs.](#), 216 Ariz. 424, 434, ¶ 37 (App. 2007).
4. This Court reviews an order denying relief under Rule 60, Ariz. R. Civ. P., for an abuse of discretion. [City of Phoenix v. Geyler](#), 144 Ariz. 323, 328, 697 P.2d 1073, 1078 (1985).

ARGUMENT

I. THE DECLARATION IS A CONTRACT

It is well settled law in Arizona that the Declaration constitutes a contract between the Association and Bonham, and gives rise to the respective parties' contractual duties. *See Ariz. Biltmore Estates Ass'n v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993); [*Duffy v. Sunburst Farms E. Mut. Water & Agric. Co., Inc.*](#), 124 Ariz. 413, 417, 604 P.2d 1124, 1128 (1979); *Divizio v. Kewin Enters., Inc.*, 136 Ariz. 476, 481, 666 P.2d 1085, 1090 (App. 1983).

II. THE 2016 RENTAL RESTRICTION IS VALID UNDER THE *DREAMLAND VILLA* AND *KALWAY* CASES, AND THE 2017 RE-RECORDING IS IRRELEVANT.

[*Dreamland Villa*](#) was a unique case in which the Court of Appeals fashioned a remedy to avoid the draconian result of forcing someone into an association against their will. The first sentence explains the Court's concern with "the validity of amendments to deed restrictions creating a homeowners' association and requiring homeowners within the community to pay assessments...." [*Dreamland Villa Cmty. Club v. Raimey*](#), 224 Ariz. 42, ¶ 1 (App. 2010). In that community, only minimal deed restrictions existed. *See id.* at ¶¶ 4, 30. There was no association, no common areas, and no dues. *See id.* at ¶¶ 6, 30. A majority of owners subject to the minimal deed restrictions tried to use the generic amendment provision to force all other owners into an association and pay dues to fund a recreational facility. *See id.* at ¶¶ 4-6.

The [*Dreamland*](#) Court noted that “[t]he question here is whether deed restrictions for a community without common areas, containing only restrictive covenants pertaining to each lot owner’s personal residence, can be amended by majority vote of lot owners to require membership in an association and the imposition of assessments.” *Id.* at ¶ 30. Not surprisingly, the Court found it unfair to force owners into an association and pay dues to fund recreational facilities they did not want. *Id.*

In [*Kalway*](#), the Court held that a homeowners association cannot place restrictions on a landowner’s use of their land if the declaration of the association *in effect at the time of purchase* did not provide “sufficient notice” to homeowners that such a restriction could occur. [*Kalway v. Calabria Ranch HOA, LLC*](#), 2022 506 P.3d 18 at ¶10, 23 (Ariz. 2022).

[*Kalway*](#) states:

The restriction itself does not have to necessarily give notice of the particular details of a future amendment; that would rarely happen. Instead, it must give notice that a restrictive or affirmative covenant exists and that the covenant can be amended to refine it, correct an error, fill in a gap, or change it in a particular way. *See Armstrong*, 633 S.E.2d at 87, 360 N.C. 547. But future amendments cannot be “entirely new and different in character,” untethered to an original covenant. *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill.App.3d 805, 77 Ill.Dec. 68, 459 N.E.2d 1164, 1167 (1984).

Id. 18, ¶17, 25.

In the present case, Bonham owns property that is part of the Association. [IR # 1 at p. 2]. It is undisputed that Bonham acquired title to the property in 2017 – *after* the 2016 Amendment had already been adopted. [IR # 21 at p. 2]. Thus, as discussed in more detail below, the 2016 Amendment passes the “Kalway sufficient notice test” because the amendment was in effect before the property was acquired. The 2017 Correction is irrelevant to this analysis. Therefore, the Lower Court erred when it ruled that that the Amendment is void due to it being “unforeseeable” under the holding in Kalway v. Calabria Ranch.

The facts in the Complaint, taken as true, establish that Bonham was on both actual and record notice of the 2016 Amendment at the time the property was transferred to him. [IR # 1 at p. 3]. Accordingly, the Lower Court abused its discretion when it ruled that the Kalway and Dreamland decisions have an impact on the dismissal of the Association’s claims.

Specifically, Bonham became record Owner of the Property on January 23, 2017. [IR # 1 at p. 2]. As such, he had full record notice of the 2016 Amendment adding Section 4.23. In his argument in the Lower Court, Bonham only referred to the Amendment as “the 2017 Amendment,” in reference to its date of re-recording. [See generally, IR # 13 and #23]. Notwithstanding the re-labeling attempt, the fact remains that Section 4.23 was recorded as part of the Amendment to the Declaration

on November 17, 2016, which predates Bonham becoming the record owner of the property. [IR # 1 at p. 3].

At this point, the analysis under *Kalway v. Calabria Ranch* should have concluded, because Bonham clearly had notice of the 2016 Amendment already in effect and recorded at the time he became record Owner of the Property. However, the Association in its original Complaint also established additional reasons why Bonham had sufficient notice of the Amendment. For example, Section 4.03 of the Association's original Declaration already prohibited business of any kind from being conducted from or located on properties subject to the Declaration. [IR # 1 at p. 3]. A short-term rental conducted for monetary gain is certainly a business, and such a business that is conducted from or located on, a property subject to the Declaration. Bonham could not argue that Section 4.23 was not foreseeable as arising out of Section 4.03. Renting or leasing property is a business, and that restriction was also already in effect before Bonham became record title owner of his Property. Therefore, the Amendment is not "entirely new or different in character" or untethered to the original Declaration, as *Kalway* describes. Thus, for multiple reasons, the Lower Court improperly found that the Amendment was inapplicable to Bonham under *Kalway*.

In summary, the Lower Court's ruling must be reversed because Bonham took the Property subject to the 2016 Amendment that was *already in place* prior to him acquiring title to the property. The fact that the 2016 Amendment was already in effect

puts an end to any other analysis required under the [Kalway](#) ruling. Pursuant to Arizona law, the purchaser of real property who has notice of restrictive covenants and “who accepts a deed referring to those restrictions is deemed to assent to be contractually bound by the restrictions as if he had individually executed an instrument containing them.” [Pinetop Lakes Ass'n v. Hatch](#), 135 Ariz. 196, 198, 659 P.2d 1341, 1343 (App. 1983) *citing* [Murphey v. Gray](#), 84 Ariz. 299, 327 P.2d 751 (1958); *citing* [Heritage Heights Home Owners Ass'n v. Esser](#) 115 Ariz. 330, 565 P.2d 207 (App. 1977). [Kalway](#) reinforces this standard when it considers the restrictions in effect at the time of purchase.

III. THE ASSOCIATION’S COMPLAINT SHOULD HAVE SURVIVED A RULE 12(B)(6) MOTION.

Pursuant to [Arizona Rule of Civil Procedure 12\(b\)\(6\)](#), the allegations in the Association’s Complaint must be taken as true, and all reasonable inferences from those allegations must be drawn in the Association’s favor in evaluating the Motion. “Dismissal for failure to state a claim is appropriate only if as a matter of law ... plaintiffs would not be entitled to relief under any interpretation of the facts susceptible to proof. [Rowland v. Kellogg Brown & Root, Inc.](#), 210 Ariz. 530, 534, ¶ 15, 115 P.3d 124, 128 (App. 2005); [State ex rel. Corbin v. Pickrell](#), 667 P.2d 1304, 1309 (Ariz. 1983).

When evaluating a [Rule 12\(b\)\(6\)](#) motion to dismiss, “courts look only to the pleading itself and consider the well-pled factual allegations contained therein.” [Cullen v. Auto-Owners Ins. Co.](#), 218 Ariz. 417, 419, ¶ 7 (2008). “In determining if a complaint states a claim on which relief can be granted, courts must assume the truth of all well-pleaded factual allegations and indulge all reasonable inferences from those facts.” [Murrell v. Taylor](#), 1 CA-CV 20-0334, 2021 WL 982577, at *3 (App. Mar. 16, 2021) (quoting [Coleman v. City of Mesa](#), 230 Ariz. 352, 356, ¶ 9 (2012)). A “defect in the pleading, however, is not sufficient to support a motion to dismiss.” [Pickrell](#), 667 P.2d at 1309. “The motion should be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” [Newman v. Maricopa Cnty.](#), 167 Ariz. 501, 503 (App. 1991).

As discussed above, the governing set of facts in this case are solely the allegations in the Complaint, along with all reasonable inferences that may be drawn in the Association’s favor. Taking such allegations as true, the Complaint was more than sufficient to state claims against Bonham in order to survive a [Rule 12\(b\)\(6\)](#) motion to dismiss, and the Lower Court abused its discretion in granting Bonham’s Motion to Dismiss when the Complaint clearly established that Bonham acquired the property *after* the 2016 Amendment restricting short term rentals was recorded, thereby putting him on notice of such a restriction.

CONCLUSION


Owners in a planned community have collective rights. That is the essence of living in a planned community. The owners in this Association have a collective expectation the Declaration can be amended. The owners have a right to rely upon the amendment provision in the Declaration. These provisions serve a valuable purpose because they allow the Association to adapt to changing circumstances.

The Association complied with the provisions of the Declaration when it passed and recorded the 2016 Amendment restricting short term rentals. The Planned Community Act also authorizes amendments that do so. Further, the 2016 Amendment passes the “[*Kalway*](#) sufficient notice test” because the amendment was already in effect at the time Bonham acquired title to the Property. Any additional analysis under [*Kalway v. Calabria Ranch*](#) to determine the validity of such an amendment is moot.

For the foregoing reasons, the Association respectfully requests that the Court reverse the Superior Court’s decision on the matters addressed herein.

RESPECTFULLY SUBMITTED this 6th day of March, 2023.

CARPENTER, HAZLEWOOD, DELGADO & BOLEN, LLP

By: 

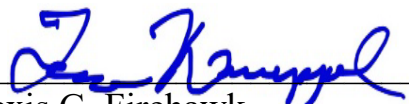
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REQUEST FOR ATTORNEYS' FEES AND COSTS

Additionally, the Association hereby gives notice that it intends to claim attorneys' fees and costs pursuant to [Arizona Rule of Civil Appellate Procedure 21\(a\)](#), ARS [12-341](#) and [12-341.01](#) and Declaration section 5.13.

RESPECTFULLY SUBMITTED this 6th day of March, 2023.

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CERTIFICATE OF COMPLIANCE

This Certificate of compliance concerns a brief, and is submitted under Rule 14(a)(5) of Civil Appellate Procedure. The undersigned certifies that **APPELLANT’S OPENING BRIEF** to which this Certificate is attached uses proportionally spaced type of 14 points or more, is double-spaced using a roman font (Times New Roman), and contains 3317 words, which does not exceed the word limit that is set by Rule 14.

DATED this 6th day of March, 2023.

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CERTIFICATE OF SERVICE

Pursuant to Ariz. R. Civ. App. P. 4, the undersigned certifies that **APPELLANT'S OPENING BRIEF** was filed and served as follows:

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