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10
11 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

12
13 IN AND FOR THE COUNTY OF MARICOPA

14 DOUG KULPINS and KIM KULPINS,
15 husband and wife;

16 Plaintiffs,

17 v.

18 LYNNE S. WEAVER, as TRUSTEE of the
19 LYNNE S. WEAVER LIVING TRUST;
20 PRESERVE AT SHADOW MOUNTAIN
21 HOMEOWNER'S ASSOCIATION, an
22 Arizona not for profit corporation; JOHN
23 DOES I-X; WHITE CORPORATIONS I-X;
24 BLACK PARTNERSHIPS I-X; AND GRAY
25 LIMITED LIABILITY COMPANIES I-X,

26 Defendants.

No. CV2013-000599

PLAINTIFFS' FIRST
AMENDED COMPLAINT

(Breach of Contract, Nuisance,
Injunctive Relief, Breach of Duty,
Detrimental Reliance)

27 Plaintiffs are the record owners of Lot 47 located at 2602 East Spring Rd.

28 Phoenix, Arizona 85032 which is part of the Preserve at Shadow Mountain

Homeowner's Association. The Kulpins' home is bound by a set of deed restrictions

1 and the Preserve at Shadow Mountain Homeowner’s Association (“the Association”)
2 is governed by an Arizona not-for-profit corporation of the same name.
3

4 The Defendant is the record owner of Lot 48 located at 2610 East Spring Rd.
5 Phoenix, Arizona 85032 and is the neighboring home to the Kulpins. The Defendant
6 Homeowner has violated the Declaration of Covenants, Conditions and Restrictions
7 by allowing her trees to grow past the allowed and Association approved height. The
8 trees now are visible above the common wall between the properties and block the
9 Kulpins’ views. This is a direct violation of the contractual agreement.
10

11 Additionally, the Defendant Association has violated the CC&Rs and breached
12 its legal duty by rescinding a previous decision of the Board that the Kulpins relied up
13 on to their detriment.
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15
16 THE PARTIES, JURISDICTION AND VENUE
17

- 18 1. Plaintiffs, KIM AND DOUG KULPINS (“the Kulpins”) are the record
19 owners of Lot 47 at the Preserve at Shadow Mountain located at 2602 East
20 Spring Rd. Phoenix, Arizona 85032.
21
- 22 2. Plaintiffs are informed, believe and allege that at all relevant times, Defendant
23 LYNNE WEAVER (“Weaver”), was a resident of the State of Arizona.
24
- 25 3. The Plaintiffs allege that at all relevant times, Defendant Weaver, is and was
26 the record owner of Lot 48 located at 2610 East Spring Rd. Phoenix, Arizona
27 85032 located at the Preserve at Shadow Mountain.
28

1 4. Defendant, PRESERVE AT SHADOW MOUNTAIN HOMEOWNER'S
2 ASSOCIATION ("the Association") is an Arizona non-profit corporation
3 doing business in Maricopa County, Arizona.
4

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6 5. Defendants JOHN AND JANE DOES I-X, BLACK CORPORATIONS I-
7 X AND WHITE PARTNERSHIPS I-X are fictitious persons or entities
8 whose true names and identities are presently unknown to Plaintiffs but who,
9 upon information and belief, are liable to Plaintiffs along with the named
10 Defendant as stated above. Plaintiffs reserve the right to amend this
11 Complaint to show the true names and identities of these fictitious individuals
12 and persons as those true names and identities become known to Plaintiffs.

13 6. Lot 47 and Lot 48 share a common wall.
14

15 7. Both Lots and their respective owners, the Kulpins and Weaver, are bound by
16 the DECLARATION OF COVENANTS, CONDITIONS AND
17 RESTRICTIONS FOR THE PRESERVE AT SHADOW MOUNTAIN
18 (the "Declaration" or the "CC&Rs"), a copy of which is attached as Exhibit A
19 and incorporated by this reference.
20

21
22 8. The Association Preserve at Shadow Mountain is an Arizona not-for-profit
23 corporation, authorized by the Declaration and other governing documents to
24 enforce the restrictions and govern the relationship between the owners in the
25 Association.
26
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1 9. The Declaration was duly recorded on September 30, 1997, in the official
2 records of Maricopa County, Arizona at Record Number 1997-0685136.

3
4 10. The amount in controversy and the equitable claims in this Complaint are
5 within the jurisdiction of this Court.

6
7 11. All of the acts alleged in this Complaint occurred in Maricopa County,
8 Arizona. This court has jurisdiction over this matter.

9
10 12. Venue is proper before this court.

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12 GENERAL FACTUAL ALLEGATIONS

13
14 13. Both properties are subject to the Association's Declaration.

15
16 14. Morrison Group, Inc. is the managing company for The Preserve at Shadow
17 Mountain.

18
19 15. The Declaration provides as follows:

20 Article VIII, Section 2(d) Architectural Control

21 No Improvement which would be Visible from Adjacent Property shall
22 be constructed or installed on any Lot without the prior written approval of the
23 Design Review Committee... No building, fence, wall, landscaping, additional,
24 alteration, repair, change excavation, or other work which in any way alters the
25 exterior appearance, including but without limitation... any part of a Lot, or
any Improvements located thereon which are Visible from Adjacent Property...

26 ... any Improvement which is or would be Visible From Adjacent
27 Property shall submit to the Design Review Committee a written request for
28 approval specifying in detail the nature and extent of the addition, alteration,
repair, change excavation, or other work which the prospective or actual

1 Owner desires to perform. Any prospective or actual Owner requesting the
2 approval of the Design Review Committee shall also submit to the Design
3 Review Committee any additional information, plans, and specifications which
4 the Design Review Committee may request. The Design Review Committee
5 shall have the right to refuse to approve any plans or specifications which are
6 not suitable or desirable, in its opinion, for aesthetic or other reasons, and in so
7 passing upon such plans, specifications, and without any limitation of the
8 foregoing, it shall have the right to take into consideration the suitability of the
9 proposed building or other structure, and of the materials of which it is to be
10 built, the site upon which it is proposed to erect the same, the harmony thereof
11 with the surroundings and the effect of the building or other structure as
12 planned on the outlook from the adjacent or neighboring Property. Any
13 subsequent changes, deletions or additions to the plans and specifications
14 approved by the Design Review Committee must be approved in writing by
15 the Design Review Committee.

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Article XIII, Section 2(t)

Nuisances. No rubbish or debris of any kind shall be placed or permitted to accumulate upon or adjacent to any of the Property, and no odors shall be permitted to arise or emit therefrom, so as to render any Property or any portion thereof, or activity thereon, unsanitary, unsightly, offensive or detrimental to any other property in the vicinity thereof or to the occupants of such other property. No other nuisance shall be permitted to exist or operate upon any Lot so as to be offensive or detrimental to any other Property in the vicinity thereof or to its occupants.

Article I, Section 31 "Visible From Adjacent Property"

Shall mean, with respect to any given object, that such object is or would be visible to a natural person six feet tall, standing within 5' of common property line of such adjacent property at ground level.

Article IX, Section 2. Enforcement.

The Association or any Owner shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants and reservations now or hereafter imposed by the provisions of this Declaration and to recover its attorney's fees and costs incurred in connection with such proceeding if it prevails. Failure by the Association or by any Owner to enforce any covenant or restriction herein contained shall in no event be deemed a

1 waiver of the right to do so thereafter. Any violation of these restrictions shall
2 not affect the lien of any First Mortgage now of record, or which hereafter may
3 be placed of record, upon said Lots or any part thereof.

4
5 16. When Lot 48 was conveyed to Weaver, Weaver had actual and record notice
6 of, and agreed to be bound by, the restrictions contained in the Declaration
7 referenced herein.

8
9 17. In May 2009, Weaver initiated a conversation with Mrs. Kulpins over the
10 backyard fence regarding the Kulpins' view being obstructed by Defendant's
11 trees in her rear yard.

12
13 18. On October 8 2010, Mr. Kulpins invited Weaver over to the Kulpins' home to
14 see the obstructed view.

15
16 19. Mr. Kulpins asked if Weaver would consider trimming back the existing North
17 trees to be in line with the back of the Defendant's house.

18
19 20. Weaver had previously trimmed the trees in that manner as request by Mr.
20 Kulpins at that time.

21
22 21. On November 20, 2010, Weaver planted eight new trees in her backyard.

23
24 22. Weaver did not receive prior approval from the Association's Design Review
25 Committee to plan the new eight trees as required by the CC&Rs

26
27 23. The trees that Weaver planted were: two Sissoo trees, two Rio Verde Mesquite
28 trees, three Desert Willow trees, and one additional ficus tree.

1 24. On November 22, 2010, the Kulpins contacted Morrison Group, Inc. to advise
2 them of their conversations with Weaver and her actions regarding the planting
3 of the eight trees.
4

5 25. During the November 22, 2010, conversation the Kulpins inquired with the
6 managing agent at the Morrison Group about whether Weaver had submitted
7 for approval of the new trees from the Design Review Committee.
8

9 26. At that time, the Morrison Group confirmed that the Association had not
10 received a submittal from Weaver nor had the Association given Weaver any
11 approval to plant the new trees.
12

13 27. The Kulpins informed the Association's managing agent that the trees would
14 have a devastating effect on the Kulpins' view of the mountains and the
15 surrounding area from their backyard.
16

17 28. On December 2, 2010, Tim Nyland, the President of the Association, and Brad
18 Bossen, a member of the Design Review Committee came to the Kulpins' home
19 to view the Defendant's trees.
20

21 29. Both Mr. Nyland and Mr. Bossen agreed that the trees needed to be removed.
22

23 30. On December 5, 2010, the Kulpins were informed that the Design Review
24 Committee had decided that the Defendant's newly planted trees should be
25 removed.
26
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1 31. On December 6, 2010, the Mulcahy Law Firm, on behalf of the Association,
2 sent Weaver a letter informing the Weaver that she was in violation of the
3 Association's Declaration due to lack of approval to plant the trees.
4

5 32. On December 12, 2010, Weaver responded to the letter from the Mulcahy Law
6 Firm.
7

8 33. On December 16, 2010, the Mulcahy Law Firm sent another letter to the
9 Weaver.
10

11 34. On December 26, 2010, the Association sent Weaver a notice of violation
12 regarding her failure to receive approval for the newly installed trees.
13

14 35. On December 28, 2010, the Morrison Group sent a second notice of violation
15 to Weaver regarding the trees.
16

17 36. On January 14, 2011, the Defendant submitted her backyard landscaping plan
18 for approval from the Design Review Committee.
19

20 37. On January 24, 2011, Beth Mulcahy sent a letter to the Board of Directors for
21 the Preserve at Shadow Mountain giving her opinion to the Board about the
22 protection of views and view rights at the Association under Arizona law.
23

24 38. Her opinion further discussed potential liability of the Association in the
25 scenario with the Kulpins and Weaver.
26
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1 39. On January 28, 2011, the Association's managing agent advised the Kulpins
2 that Weaver's landscape plan was approved by the Design Review Committee.
3

4 40. After the January 2011 approval, the Association's Board of Directors was in
5 turmoil and the Board asked that the Kulpins not take any action or dispute the
6 Association's approval during Board elections.
7

8 41. After a new Board was seated, the Kulpins sent an e-mail to the Association to
9 formally request an appeal of the Committee's approval of the Defendant's
10 newly installed trees.
11

12 42. The Kulpins sent that email on April 1, 2012.
13

14 43. On April 11, 2011, the Kulpins filed a formal appeal with the Association.
15

16 44. On May 12, 2011, the Association's Design Review Committees amended its
17 original approval of the Weaver's landscaping plan.
18

19 45. The Association amended Weaver's original design approval to include a height
20 restriction on the newly planted trees, stating that the trees could not extend in
21 height above the shared wall between Lot 47 and Lot 48.
22

23 46. On February 21, 2012, the Defendant's trees became visible over the common
24 wall.
25

26 47. On March 6, 2012, the Kulpins sent a letter and photo exhibits to the
27 Association regarding the visibility of the Weaver's two Sissoo trees.
28

1 48. On June 6, 2012, the Kulpins' sent another letter and more photos to
2 Association informing the Association that the height of the trees is a direct
3 violation of the amended approval by the Preserve at Shadow Mountain
4 Design Review Committee dated May 12, 2011.
5

6
7 49. The next day, the Association sent a violation letter to Weaver regarding the
8 tree height.
9

10 50. On September 21, 2012, the undersigned sent Weaver a letter on behalf of the
11 Kulpins demanding compliance with the Declaration and with amended
12 approval by the Design Review Committee.
13

14 51. On September 25, 2012, the undersigned sent a letter on behalf of the Kulpins
15 to the Association regarding the Defendants' violation of the Declaration.
16

17 52. The Sissoo trees have now grown above the fence-line and in violation of the
18 Association's design review approval.
19

20 53. Almost one month later, Weaver responded to the demand letter stating that
21 the Kulpins were not legally entitled to any views.
22

23 54. The letter from Defendant completely ignored the language in the Declaration
24 and the Association's amended design review decision.
25
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1 55. Despite the clear restrictions in the CC&Rs and Rules, and despite notices of
2 their violations of the restrictions, Defendants continue to allow the clear and
3 damaging violation to the CC&Rs and Rules at the Association.
4

5 56. Enforcement of the restrictions described above is reasonable and necessary to
6 protect the interests of the Kulpins.
7

8 57. Defendants' continued refusal (and in some situations complete arrogance) to
9 comply with the CC&Rs and the governing documents is a continuing
10 violation, causing irreparable injury to the Kulpins.
11

12 58. The Kulpins have no adequate remedy at law for the violation of the governing
13 documents by the Defendant and as such, will continue to suffer irreparable
14 injury and damage by virtue of the continuing breach by the Defendant.
15

16 59. Because Defendants have failed and refused to abide by the Declaration and
17 other governing documents, it is likely that the Kulpins will be successful on
18 the merits of this matter and, therefore, a permanent injunction should be
19 issued.
20
21

22 60. The Kulpins have employed counsel to prosecute this matter. The Kulpins are
23 entitled to all of their legal fees and costs expended to enforce the restrictions
24 as set forth in the contractual CC&Rs at Article IX, Section 2, and pursuant to
25 Pinetop Lakes Ass'n v. Hatch, 659 P.2d 1341, 135 Ariz. 196, (Ariz.App. 1983).
26 The Kulpins' attorneys' fees are also recoverable pursuant to statute at ARS §
27
28

1 12-341.01. The Kulpins may advance further sums during the pendency of this
2 action for costs of this action and other expenses.
3

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6 COUNT I

7 (Breach of Contract of the Association's Declaration by Lynn Weaver)

8 61. Plaintiffs incorporate by this reference all previous allegations as though fully
9 set forth herein.
10

11 62. As detailed in the General Allegations above, the Association's Declaration
12 does not allow owners to install landscaping that is visible from an adjacent
13 property without approval from the Design Review Committee.
14

15 63. The Defendant planted trees that have grown to be so visible and now block
16 the views from the Kulpins' backyard.
17

18 64. The Defendant did apply to the Design Review Committee for approval after
19 planting the trees.
20

21 65. The Defendant received approval for the trees with a height restriction.
22

23 66. The height restriction stated that the Defendants' trees could not grow high
24 enough to be visible above the shared wall between Lot 47 and Lot 48.
25

26 67. Some of the Defendant's trees are now visible above the shared wall between
27 Lot 47 and Lot 48.
28

1 68. Due to the Defendant's violation of the Declaration and the amended approval
2 the Defendant is in breach of the contractual Declaration.
3

4 69. The continued refusal to trim or remove the trees is a violation of the
5 Declaration.
6

7 70. The Defendant has breached her contractual duties under the Declaration.
8

9 71. As a result of the Defendant's breach of contract, the Plaintiffs have been
10 damaged.
11

12 72. Plaintiffs' damages are compensatory, consequential, nominal, and punitive in
13 nature and of an amount to be determined at trial.
14

15 COUNT II

16 (Breach of Contract – Attorneys' Fees and Costs)

17 73. Plaintiffs hereby re-allege and incorporate each and every allegation set forth
18 above as though fully set forth herein.
19

20 74. Because of Defendants' failure and refusal to comply with the express terms of
21 the CC&R's and the Design Review Committee's decision, the Kulpins, in
22 addition to the actual and compensatory damage for the claims mentioned
23 above, have been additionally damaged in an amount equal to the attorneys'
24 fees and costs incurred in bringing this lawsuit on behalf of its remaining
25 members.
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1 75. Imposing the burden for the attorneys' fees and costs associated with
2 Defendants' failure and refusal to comply with the contractual CC&Rs on the
3 Kulpins is patently unfair.
4

5 COUNT 3
6 (Injunctive Relief)

7 76. Plaintiffs incorporate all previous paragraphs as if fully set forth herein.
8

9 77. Enforcement of the CC&Rs and the decisions of the Association is reasonable
10 and necessary to protect the interest of the homeowners of the Association, the
11 Plaintiffs and to preserve the CC&Rs in accordance with A.R.S. §§12-1801 et.
12 seq.
13

14 78. The Defendant's continued refusal to abide by the CC&Rs and the
15 Association's Design Review decision is a continuing violation, causing
16 irreparable injury to the Plaintiffs.
17

18 79. The Plaintiffs have no adequate remedy at law for the Defendant's violations as
19 detailed above with regard to the unapproved trees growing taller than allowed
20 by the CC&Rs and the Design Review Committee's amended approval.
21
22

23 80. As a result of these violations, the Plaintiffs have suffered and will continue to
24 suffer irreparable injury and damages.
25

26 81. Because the Defendant has failed and refused to abide by the express
27 provisions of the CC&Rs, it is likely that the Plaintiffs will be successful on the
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1 merits of this matter, and therefore, a preliminary and permanent injunction
2 should be entered.
3

4 COUNT 4

5 (Breach of Contract as to Defendant Association)

6 82. Plaintiff incorporates all previous paragraphs as if fully set forth herein.
7

8 83. The Association is governed by the CC&Rs of the Preserve of Shadow
9 Mountain Homeowners' Association.

10 84. The CC&Rs constitute a contract between the Association and homeowners,
11 such as the Kulpins.
12

13 85. The Association has a contractual duty to enforce the CC&Rs.
14

15 86. Upon information and belief, as of March 2013, there are new board members
16 on the Board of Preserve of Shadow Mountain.
17

18 87. Upon information and belief, the current Board of Directors has rescinded the
19 May 12, 2011, design review committee decision denying Ms. Weaver's request
20 to have trees above the shared wall.
21

22 88. By rescinding the May 12, 2011, decision the Association has breached the
23 contract.
24

25 89. As a result of the Defendant's breach, the Plaintiff has been damaged in an
26 amount to be proven at trial, including but not limited to attorneys' fees
27
28

1 incurred in the attempt to compel the Association to follow the proper
2 procedure set for in the CC&Rs.
3

4 90. Additionally, Plaintiffs relied on the Board's decision to not allow Ms. Weaver to have
5 trees above the adjoining wall when bringing this lawsuit.

6 91. Therefore, the Plaintiffs relied to their detriment on the Association's actions since the
7 Board has recently altered its decision on the Weaver's trees.
8

9 92. Plaintiffs are entitled to detrimental reliance damages.
10

11 COUNT 5
(Breach of Duty as to Defendant Association)

12 93. Plaintiff incorporates all previous paragraphs as if fully set forth herein.
13

14 94. The Association has a duty to act reasonably in the exercise of its discretionary
15 powers including rulemaking and enforcement.
16

17 95. The Association breached their duty to act reasonably in the exercise of its
18 discretionary powers when they rescinded the previous denial of Weaver's
19 trees.
20

21 WHEREFORE, Plaintiffs pray:

22 96. That a permanent injunction be issued ordering Defendant to comply with all
23 aspects of the CC&Rs governing Lot 48 by ordering the Weaver and any
24 future owners or occupants of Lot 48 that she must trim or remove any and all
25 of her trees and plantings so that they are not visible above the shared wall
26 between Lot 47 and Lot 48;
27
28

1 97. The Plaintiffs be awarded actual and compensatory damages in an amount to
2 be determined at trial;

3
4 98. That Plaintiffs be awarded punitive damages in an amount to be determined at
5 trial;

6
7 99. That Plaintiffs be awarded their attorneys' fees, expenses and costs; and

8
9 100. That Plaintiffs be granted such other and further relief as this Court
10 deems just.

11
12 RESPECTFULLY SUBMITTED this 25th day of March, 2013.

13
14 THE LAW OFFICES OF J. ROGER WOOD

15
16 By: /s/ James Roger Wood

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