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10 **IN THE SUPERIOR COURT OF ARIZONA**  
11 **COUNTY OF YAVAPAI**

12 **JOHN B. CUNDIFF** and **BARBARA C. )**  
13 **CUNDIFF**, husband and wife; **ELIZABETH )**  
14 **NASH**, a married woman dealing with her )  
15 separate property; **KENNETH PAGE** and )  
16 **KATHRYN PAGE**, as Trustee of the Kenneth )  
17 Page and Catherine Page Trust, )  
18 Plaintiffs, )  
19 vs. )  
20 **DONALD COX** and **CATHERINE COX**, )  
21 husband and wife, )  
22 Defendants. )

23 \_\_\_\_\_ )  
24 **JAMES L. VARILEK**, Trustee, James L. )  
25 Varilek Revocable Trust Dated November 16, )  
26 1994, )

Plaintiff,

vs.

27 **ROBERT D. VERES**, an unmarried man, )  
28 Defendant. )

Case No. P1300CV20030399 ✓

and

Case No. P1300CV20090822

**CONSOLIDATED  
REPLY IN SUPPORT OF  
VARILEK'S  
REQUEST FOR JUDICIAL  
RE-ASSIGNMENT**

(Oral Argument Requested)

29 James L. Varilek, trustee of the James L. Varilek Revocable Trust, plaintiff in *Varilek v.*  
30 *Veres*, Yavapai County Cause No. P1300CV20090822, now consolidated with the instant action upon

1 motion by counsel for Robert Veres and by order of Division 4, hereby submits this reply in support  
2 of a request that this Court re-assign the case based upon Varilek's previous request under Rule 42(f)  
3 when his action was assigned to this Court. This reply is a consolidated response to the objections  
4 filed by counsel for Cundiff, Cox, and Veres, as each raises essentially the same argument.

5 This reply is supported by the following memorandum of points and authorities, together with  
6 the pleadings in the *Varilek v. Veres* action.

7 RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of May, 2011.

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14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15  
16 **I. STATEMENT OF CASE**

17 It is critical to an appropriate analysis of Varilek's request that it be viewed in its proper  
18 procedural context. Varilek has brought suit against Veres as a separate action for a separate violation  
19 of the recorded covenants and restrictions of Coyote Springs. Unlike the recorded covenants at issue  
20 in the *Cundiff v. Cox* litigation, Varilek's suit is premised on Veres' undeniable violation of the  
21 minimum lot-size restriction set forth in the recorded covenants. Varilek's action was initially  
22 assigned to this Court, and Varilek timely exercised his preemptory right to reassignment. The case  
23 was thus reassigned to Division IV (now Judge Jones).

24 Veres' counsel who had at one time had represented Cox, raised the affirmative defense of  
25 abandonment of the recorded covenants, and sought consolidation of Varilek's action with the Cox  
26 litigation. Varilek was not voluntarily joined to the Cox litigation by simple fact of his ownership of

1 land in the sub-division. To the contrary, Varilek's separate action premised on a separate complaint  
2 was involuntarily consolidated with the Cox litigation.

3 Counsel for Cox, Cundiff and Veres (herein collectively referred to as "Objectors") attempt  
4 to mischaracterize the request in two ways. First, Objectors erroneously take the implicit position that  
5 Varilek voluntarily joined the litigation by requesting alignment with Cundiff in the case (done simply  
6 to ensure that there was no confusion as to Varilek's position in rejecting the claim that the restrictive  
7 covenants have been abandoned). However, this confuses Varilek's request for reassignment based  
8 on his previous exercise of a peremptory challenge in litigation he initiated against Veres, with  
9 Varilek being brought into the action simply by virtue of his land ownership (for which he requested  
10 alignment with Plaintiff Cundiff).

11 From this latter confusion, Objectors take the position that this issue may be analyzed under  
12 Rule 42(f)'s rubric of "a side" having previously noticed a judge merely based upon Varilek's  
13 alignment with a party that had previously exercised a peremptory challenge to the same judge. Yet  
14 that alignment was in Varilek's individual capacity as a landowner to whom the Court demanded  
15 joinder. The objections raised are erroneous and shift the focus from the issue of whether a trial judge  
16 that has been peremptorily noticed in a separate action has jurisdiction over the case by virtue of  
17 subsequent consolidation.

18 **II. VARILEK'S EXERCISE UNDER RULE 42(f) and THE SUBSEQUENT TRANSFER**  
19 **OF THE CASE PRECLUDES THIS COURT FROM NOW HEARING THE MATTER**

20 Upon timely noticing this Court from hearing his cause pursuant to Rule 42(f), Varilek's case  
21 was re-assigned. The protested consolidation of his action with the Cox case does not operate to  
22 vitiate that earlier peremptory challenge. This is the juncture where Objectors confuse the issue.  
23 Varilek's alignment in this case with Plaintiffs because of his joinder in the action as a landowner,  
24 has no bearing on Varilek's prior exercise of a peremptory challenge in his separate litigation against  
25 Veres. To argue, as Objectors do, that Varilek's alignment with a side constitutes a waiver applies  
26 only to an analysis of Varilek's joinder in the case as an individual landowner. The same cannot

1 apply to Varilek's involuntary joinder in the case because of his litigation against Veres. Varilek has  
2 a separate cause of action as against Veres which was subsequently consolidated with the Cox  
3 litigation and for which his request for reassignment is premised. His prior timely exercise of his right  
4 to notice this Court from hearing the action precludes this Court from hearing his action *regardless*  
5 of its involuntary consolidation with the Cox litigation. This is not a situation of Varilek seeking  
6 reassignment on the basis of his joinder in the litigation by virtue of his land ownership in the subject  
7 subdivision, and (by necessity) becoming aligned with a "side" that previously exercised its  
8 peremptory challenge rights. In that situation, the party has no separate cause of action as evidenced  
9 by initiation of a separate lawsuit, based upon differing facts. Varilek initiated litigation against  
10 Veres – his complaint stands separate and apart from Cundiff's complaint. But for Veres demanding  
11 consolidation these cases would remain in different judicial divisions. To allow for Objectors'  
12 argument is to order that Varilek be deprived of his peremptory challenge right.

13         The distinctness of each action as a separate litigation, *even if* they share similar facts, has led  
14 the California Court of Appeals to hold that a litigant whose case is consolidated with another does  
15 not lose his right to peremptorily challenge the judge to whom the assignment is made. *Nissan Motor*  
16 *Corporation in USA v. Superior Court*, 6 Cal.App.4th 150, 7 Cal.Rptr.2d 801 (1992), involved three  
17 separate litigations by plaintiffs asserting sudden unexplained acceleration in their Nissan 300ZX  
18 cars. Nissan did not exercise its peremptory challenge in any of the cases, and after each case had  
19 been litigated and discovery was well underway or accomplished, two of the three were consolidated.  
20 Nissan then, in the two cases that were consolidated with the third, exercised its peremptory  
21 challenge, even though it had no objection to the court hearing the one case to which it had initially  
22 been assigned. The trial judge rejected Nissan's peremptory challenges, and an interlocutory appeal  
23 ensued. The California Court of Appeals overruled. "Assigning the same judge to hear a series of  
24 complex actions, such as these where there exists subject matter overlap, may promote judicial  
25 efficiency. However, judicial efficiency is not to be fostered at the expense of a litigant's rights [to  
26 a peremptory challenge under the statute]." *Id.*, 6 Cal.App.4th at 155, 7 Cal.Rptr.2d at 803, quoting

1 *City of Hanford v. Superior Court*, 208 Cal.App.3d 580, 593, 256 Cal.Rptr. 274 (1989) (other  
2 internal citations omitted).

3 The consolidation of Varilek's cause with the Cox litigation, done over the strenuous objection  
4 of Varilek for this very reason, was simply a matter of judicial preference and economy. Yet, as  
5 pointed out by the California appellate court, such matters of expediency cannot override a litigant's  
6 peremptory challenge right. The issue is not whether Varilek is aligned with a side that previously  
7 utilized its peremptory challenge. The facts do not support such an analysis. Rather, the issue is  
8 whether Varilek having properly and timely exercised his right by peremptory challenge of this Court  
9 to have another judge hear his action, this Court honoring that request, now be required to have his  
10 action heard by the very judge who agreed to its re-assignment. The fact that this is a newly  
11 configured case because Varilek has a separate cause of action undermines Objectors' arguments that  
12 Varilek has waived his right to have the matter heard by this Court because of his alignment with  
13 Plaintiffs in Cox case. Varilek cannot waive that which this Court has already recognized he has  
14 properly and timely exercised. As a result, Varilek cannot be forced to have his cause heard by a Court  
15 for which he has previously sought re-assignment. This very argument between Varilek and  
16 Objectors only places Varilek in the position for which the rule was sought to ameliorate: an  
17 "imbroglio which might result in everlasting bitterness on the part of the judge and the lawyer."  
18 *Anonymous v. Superior Court In and For Pima County*, 14 Ariz.App. 502, 504, 484 P.2d 655  
19 (1971).

### 20 III. CONCLUSION

21 Having properly and timely filed his peremptory challenge under Rule 42(f) when his case  
22 was initially assigned to this Court, this Court cannot simply ignore its previous ruling to have the  
23 case reassigned simply because Veres demanded consolidation for its convenience in pursuing its  
24 affirmative defense. There is no valid legal premise that permits this Court to overrule its previous  
25 order on Varilek's notice under Rule 42(f)(1). Equally absent from Objectors' argument is any legal  
26 rationale that this case being consolidated for Veres' convenience should result in prejudice to

1 Varilek's rights such that he must have his action heard by a Court for which he had sought  
2 peremptory challenge. The obvious negative repercussions to Varilek in having to argue this issue  
3 – which Objectors are undoubtedly aware and have promoted by virtue of their responses – operates  
4 to completely undermine the rationale for the rule.

5 Therefore, upon this basis, this Court having previously ordered that Varilek's action be  
6 reassigned, Varilek requests that this Court reassign his cause in keeping with its previous order.

7 DATED this 3<sup>rd</sup> day of May, 2011.

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16 Original of the foregoing  
17 filed with the Clerk of the Superior  
18 Court this 3<sup>rd</sup> day of May, 2011

19 and a copy hand-delivered this same date to:

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22 Prescott, Arizona 86301

23 Honorable Kenton Jones Div. 4  
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26 and copies mailed this same date to:

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Dated October 5, 2010

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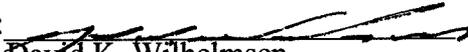
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