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6 **IN THE SUPERIOR COURT OF ARIZONA**  
7 **COUNTY OF YAVAPAI**

8 JOHN B. CUNDIFF and BARBARA C. )  
CUNDIFF, husband and wife; BECKY NASH, a )  
9 married woman dealing with her separate )  
property; KENNETH PAGE and KATHRYN )  
10 PAGE, as Trustee of the Kenneth Page and )  
Catherine Page Trust, )

11 Plaintiffs, )

12 vs. )

13 DONALD COX and CATHERINE COX, )  
14 husband and wife, )

15 Defendants. )

No. CV 2003-0399

Division 1

**PLAINTIFFS' REPLY TO  
DEFENDANTS' RESPONSE TO  
PLAINTIFFS' PLAN FOR  
JOINDER OF PROPERTY  
OWNERS SUBJECT TO  
RESTRICTIVE COVENANTS**

17 Plaintiffs (hereinafter collectively referred to in the singular as "Cundiff"), by and through  
18 undersigned counsel, in accordance with this Court's minute entry, dated June 4, 2008, hereby submit  
19 their reply to Defendants Cox's (hereinafter collectively referred to as "Cox") objection to the plan  
20 for joinder submitted by Plaintiffs pursuant to this Court's minute entry dated March 10, 2008.  
21 Cundiff further responds to Cox's motion to strike Cundiff's proposed plan for joinder.

22 This reply is supported by the following memorandum of points and authorities, together with  
23 the memorandum decision from the Court of Appeals, and the pleadings on file in this case pertaining  
24 to, in relevant part, the issue of joinder of all non-party property owners based upon Cox's allegation  
25 that these individuals must be joined in order for this Court to enter an order on their affirmative  
26 defense.

1 RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of June, 2008.

2 FAVOUR MOORE & WILHELMSSEN, P.A.

3  
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10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. RESPONSE TO COX'S MOTION TO STRIKE**

12 Cox's own response fails to support their argument that Cundiff's proposed plan of joinder  
13 must be stricken as "non-responsive." While not setting forth a cogent basis for striking Cundiff's  
14 proposed joinder plan as provided in Rule 12(f), Ariz.R.Civ.Proc., in order to avoid any further delay  
15 and increased cost to litigation as a result of Cox's latest maneuver, Cundiff will summarily address  
16 Cox's misplaced argument on the issue. Simply stated, Cox's take exception with Cundiff's  
17 arguments to this Court on the issue of whether the additional property owners are "indispensable"  
18 parties who must be joined, and if not, mandate dismissal of the action.

19 However, Cox's admit in their motion to strike that this Court has only "ostensibly  
20 determin[ed]" that the non-party property owners must be joined or the case dismissed. *See, Motion*  
21 *to Strike, p.3 at line 10.* Obviously, even Cox's own counsel (albeit strenuously arguing to the  
22 contrary) recognizes that this Court has not yet definitively ruled on whether the additional property  
23 owners are indeed indispensable parties. This Court has never entered any order that provides factual  
24 findings that the non-party property owners are indispensable such that their joinder must be had or  
25 the case is dismissed. That the Court may have used the language that "Plaintiffs shall join all  
26 landowners" in a prior minute entry cannot be logically extrapolated to mean that the Court has held  
that these individuals are indispensable to the Court's adjudication of the case. The Court's request

1 for a plan for joinder simply, and rationally, was a request for those threshold facts that are necessary  
2 for the Court's determination of non-party indispensability under Rule 19. There is nothing in the  
3 record that provides that this Court has entered an order that the action must be dismissed absent  
4 joinder of all non-party subdivision property owners. That Cox cannot reference such an order  
5 demonstrates the inherent fallacy on which Cox have premised their artificially contrived motion to  
6 strike.

7 The Court's reference that "Plaintiffs shall join all landowners" was merely a decision on  
8 which party beared the burden of joinder. It cannot feasibly be read as a decision on the  
9 indispensability of the non-party landowners, as Cox adamantly contend. This Court, well versed in  
10 Rule 19, would clearly have issued a determination as to indispensability under the tests set forth in  
11 Rule 19(b). The absence of a such a decision, particularly in light of the Court's duty to make  
12 appropriate assessments "in equity and good conscience," militate against Cox's argument that this  
13 Court's cursory "Plaintiffs shall join all landowners" is not this Court's conclusive determination as  
14 to indispensability of those non-party property owners.

15 Cox additionally argues that Cundiff's plan for joinder must be stricken on the grounds that  
16 Cundiff failed to provide a list of all property owners. Cundiff's list of property owners provided to  
17 the Court was obtained from Yavapai County records. If a property owner was not listed, as Cox  
18 argues, then the remedy is hardly striking Cundiff's plan as it was based on a good faith effort to  
19 obtain the names of all property owners as provided by public record.

20 Finally, Cox takes exception with virtually every other aspect of Cundiff's proposed plan,  
21 demanding on that basis that Cundiff's plan be stricken. Cox's argument is not well taken, particularly  
22 since no basis in Rule 12(f) exists to support Cox's contention that a proposed plan for joinder must  
23 be stricken when it does not meet their, Cox's, subjective interpretation of what this Court may or may  
24 not have required to be discussed in the plan for joinder. Cox's arguments in support of their motion  
25 to strike reveals an unfortunate but predictable simplistic and antagonistic position that does little to  
26 promote this Court's ultimate determination of the issues under Rule 19.

1                   **II. REPLY TO COX'S RESPONSE TO CUNDIFF'S ARGUMENT**  
2                   **CONCERNING THE NON-INDISPENSABILITY OF THE NON-PARTY**  
3                   **PROPERTY OWNERS TO THIS ACTION**

4           Cox next chastises Cundiff's legal analysis as to the non-indispensability of other sub-division  
5 landowners to this action. While Cox correctly posits the general rules from other jurisdictions a court  
6 applies to determine the indispensability of a party, Cox fails to provide any meaningful deliberation  
7 of the issue that would assist this Court. In part, Cox's contentions rest on a lack of understanding  
8 concerning the imperative distinction under Rule 19 between a party being subject to conflicting  
9 obligations as opposed to conflicting adjudications. Federal case law interpreting the federal  
10 counterpart of Rule 19, presented to this Court in Cundiff's proposed plan for joinder, sets forth a  
11 more sophisticated analysis of the issue that demonstrates Cox's mere recitation of general rules does  
12 not afford this Court with appropriate assistance to enable it to render a meaningful decision on the  
13 outstanding issue of indispensability.

14           As a threshold matter, no property owner would be prejudiced if that landowner were not made  
15 a party to this case. Each property owner has a right, under the restrictive covenants, to bring an action  
16 in the event of an infringement of the recorded covenants by another property owner. Since only those  
17 that are parties to the litigation would be bound by the Court's or jury's ruling, to insist upon their  
18 joinder under the pretext that *their rights* would be affected by this judgment is a red herring. To the  
19 contrary, joinder would constitute an unnecessary hardship on each of those landowners (much less  
20 the Court's resources), as each would then be compelled to bring any action they may have against  
21 another landowner, or risk loss of the right. As a result, joinder would only lead to inequity in forcing  
22 non-party landowners to be haled into court to defend or prosecute rights at a time of Cox's choosing,  
23 not theirs.

24           Thus, the only party that Cox seek to protect through joinder is themselves. With respect to  
25 Cox's oft-repeated complaint that absent joinder of all property owners, they are at risk of multiple  
26 inconsistent judgments, the astute analysis of this argument from the federal court merits repetition:

1 It should be noted that Rule 19 protects only against inconsistent obligations, not  
2 inconsistent adjudications. *See RPR & Assoc. v O'Brien/Atkins Assoc., P A*, 921  
3 *F.Supp. 1457, 1464 (M.D.N.C. 1995)*. The Third Circuit agrees **that Rule 19 is not**  
4 **triggered merely by inconsistent adjudications.** *See Field v. Volkswagenwerk AG.*  
5 *626 F.2d 293, 301-02 (3d Cir. 1980)*. (*The mere risk that a defendant who has*  
6 *successfully defended against a party may be found liable to another plaintiff in a*  
7 *subsequent action does not necessitate joinder of all of the parties in one action.*)  
8 *Saudi Basic Industries Corp. v. Exxonmobil Corp., 194 F.Supp.2d 378, 397 (D.N.J. 2002)* (*emphasis*  
9 *added*). In other words, Cox's argument that all property owners must be joined is thinly veiled  
10 subterfuge aimed at coercing the dismissal of this case by rendering it cost-prohibitive to Cundiff and  
11 inordinately taxing to the Court's scarce judicial resources.

12 **III. CONCLUSION**

13 This Court has not ruled on the indispensability of all other landowners subject to the  
14 restrictive covenants at issue in this case. Cox's argument to the contrary, on the basis of this Court's  
15 prior decision that Plaintiffs were to bear the burden of joinder is to ignore the plain reading of Rule  
16 19(b), Ariz.R.Civ.Proc. Furthermore, Cox's argument as to the merits of this Court finding all other  
17 property owners in the subdivision are "indispensable" is the product of a fundamentally flawed  
18 analysis of the topic. These individual property owners are not prejudiced nor affected by this Court's  
19 determination of Cox's affirmative defense. This Court is quite capable of rendering a decision on  
20 the merits as between the parties presently before it, without prejudicing the rights of other non-parties  
21 to the action. Again, the only interests that Cox seek to protect are their own, and those were  
22 adequately protected by Cox during the approximate two year period that they litigated the action  
23 without the "benefit" of having all other subdivision property owners joined.

24 Therefore, Cundiff respectfully requests that this Court deny Cox's motion to strike Cundiff's  
25 proposed plan for joinder, and further respectfully request that this Court enter its order setting forth  
26

1 its determination under Rule 19(b) whether all other non-party landowners must be joined in order for  
2 this action to proceed.

3 DATED this 25<sup>th</sup> day of June, 2008.

4 FAVOUR MOORE & WILHELMSSEN, P.A.

5  
6 By   
7 David K. Wilhelmsen  
8 Marguerite Kirk  
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10 Prescott, Arizona 86302-1391  
11 Attorneys for Plaintiffs

9 Original of the foregoing filed  
10 this 25<sup>th</sup> of June, 2008, with:

11 Clerk, Superior Court of Arizona  
12 Yavapai County  
13 120 S. Cortez Street  
14 Prescott, Arizona 86302

14 A copy of the foregoing  
15 hand-delivered this 25<sup>th</sup> day  
16 of June, 2008, to:

16 Honorable David L. Mackey  
17 Division One  
18 Superior Court of Arizona  
19 Yavapai County  
20 120 S. Cortez Street  
21 Prescott, Arizona 86302

19 A copy of the foregoing  
20 mailed this 25<sup>th</sup> day of June, 2008, to:

21 Jeffrey Adams  
22 Adams & Mull  
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24 Prescott, Arizona 86302  
25 Attorneys for Defendants Cox

24 By:   
25 David K. Wilhelmsen  
26 Marguerite Kirk