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7 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF YAVAPAI**

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

15 Plaintiffs,)

16 v.)

17 DONALD COX and CATHERINE COX,)
18 husband and wife,)

19 Defendants.)

CASE NO. CV 2003-0399

DIVISION 1

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE TO MOTION
FOR LIFT OF STAY OF PROCEEDINGS
AND REQUEST FOR ORDER RE:
JOINDER**

(Oral Argument Requested)

(Assigned to the Hon. David L. Mackey)

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21 Defendants Donald and Catherine Cox, by and through undersigned counsel, hereby files this
22 Reply to Plaintiffs' Response to the Motion for Lift of Stay of Proceedings and Request for Order re:
23 Joinder and object to the Plaintiffs' requests therein. This Reply is supported by the accompanying
24 Memorandum of Points and Authorities and the record on file, which shall be incorporated by
25 reference.
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MEMORANDUM OF POINTS AND AUTHORITIES

1 This Court should see the Response for what it is – namely another in a long line of delays
2 in this case. Plaintiffs' Response is not merely a request for a delay but also a request to amend their
3 Complaint. In their Response, in addition to asking for more time to join in this action all Coyote
4 Springs Ranch subdivision property owners subject to the June 13, 1974, Declaration of Restrictions
5 ("Absent Owners"), they request leave to amend their Complaint to assert another declaratory
6 judgment claim. However, Plaintiffs failed to comply with Rule 15(a), Ariz. R. Civ. P., which
7 requires that in any request for leave to amend a pleading, the moving party must "attach a copy of the
8 proposed amended pleading as an exhibit to the motion, which shall indicate in what respect it differs
9 from the pleading that it amends, by bracketing or striking through the text to be deleted and
10 underlining the text to be added." See Rule 15(a)(1), Ariz. R. Civ. P. Without having the benefit of
11 the proposed amendment, we have no way of knowing the claims Plaintiffs intend to present or the
12 relief they intend to request. If do in fact they formally file a Motion to Amend and provide a draft
13 of the proposed amendment that complies with Rule 15(a)(1), Ariz. R. Civ. P., we will be left with
14 even more delays, delays Plaintiffs specifically request and delays to which Defendants object.
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18 Pursuant to the August 22, 2008, ruling of this Court, Plaintiffs were provided 90 days within
19 which to "take substantial steps to join" the Absent owners. See August 22, 2008, Ruling. Rather
20 than complying with that Order, Plaintiffs wasted nearly eight months of Defendants' and this Court's
21 time engaged in filing frivolous appeals that were summarily denied. Now, they seek leave of Court
22 for more delays. It is high time Plaintiffs were required to comply with the Court's August 22, 2008,
23 and previous Orders that the Absent Owners be joined.
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1 With respect to Plaintiffs' contention that they may seek leave of Court to have this matter
2 considered as a class action, we have the following comments. Class actions are governed by Rule
3 23, Ariz. R. Civ. P. Whether a lawsuit should be allowed to proceed as class action is left to trial
4 court's discretion, and appellate courts do not interfere in absence of abuse. See Carpinteiro v. Tucson
5 School Dist. No. 1 of Pima County, 18 Ariz.App. 283, 501 P.2d 459. (Ct.App. 1972). Furthermore,
6 "[i]f the plaintiff seeks to bring a class action, he bears the burden of showing that his case is
7 appropriate for class action certification." Markiewicz v. Salt River Valley Water Users' Ass'n, 118
8 Ariz. 329, 341 (App.1978). In this regard, "[t]he United States Supreme Court has recognized that
9 a class should be certified only 'if the trial court is satisfied, after a rigorous analysis, that the
10 prerequisites of Rule 23(a) have been satisfied.' To undertake that rigorous analysis, the Court must
11 evaluate the evidence proffered by Plaintiff against the elements of the Plaintiff's claims and the
12 Plaintiff's burden of proof." Markiewicz quoting Gen. Tel. Co. Of S.W. v. Falcon, 457 U.S. 147, 161
13 (1982).

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16 Pursuant to Rule 23(a), Ariz. R. Civ. P., a member of a class may only bring an action if "(1)
17 the class is so numerous that joinder of all members is impracticable, (2) there are questions of law
18 or fact common to the class, (3) the claims or defenses of the representative parties are typical of the
19 claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the
20 interests of the class." These have been commonly referred to, respectively, as the "numerosity,
21 commonality, adequacy of representation, and appropriateness of a class action" requirements. See
22 e.g., Cruz v. Unilock Chicago, 383 Ill.App.3d 752, 892 N.E.2d 78 (Ill.Ct.App. 2008) (involving
23 Illinois class brought pursuant to Rule 23, Ill. R. Civ. P., which mirrors Rule 23, Ariz. R. Civ. P.).
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1 Class actions tend to be long, arduous cases. In fact, simply certifying a case as a class action
2 alone takes an abundance of time as the Court must, as stated in Falcon, engage in a rigorous analysis
3 of the Plaintiff's evidence to support certification. As this Court will recall, during the March 10,
4 2008, hearing on the issue of joinder, Plaintiffs addressed the issue of bringing the matter as a class
5 action. See March 10, 2008, Nature of Proceedings. In response, the Court advised that "if the matter
6 is to be brought as a class action matter, it needs to be in accordance with the Rules of Civil
7 Procedure." Id. at 2. However, to date, Plaintiffs have done nothing to have this matter proceed as
8 a class action. If Plaintiffs had wished for this matter to proceed as a class action, they should have
9 undertaken that effort, in accord with Rule 23, Ariz. R. Civ. P., long ago. However, they did not.
10 Rather, Plaintiffs have filed nothing with the Court to reflect that they have done anything towards
11 compliance with Rule 23, Ariz. R. Civ. P., to secure class action certification. To the contrary, it
12 appears that Plaintiffs intend for the Court to undertake, *sua sponte*, Plaintiffs' burden in establishing
13 that class action certification is appropriate in a case Plaintiffs have aggressively litigated for nearly
14 six years. They also ask, and apparently expect, the Court to undertake the effort to "realign [the
15 joined Absent Owners] consistent with the interests of those currently before the Court," which really
16 will not be necessary as the Absent Owners' Answers to the lawsuit will define their legal positions.

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19 On August 22, 2008, because Plaintiffs had failed to comply with prior orders to join the
20 Absent Owners, the Court determined that this case should be dismissed. In this regard, the Court
21 stated:
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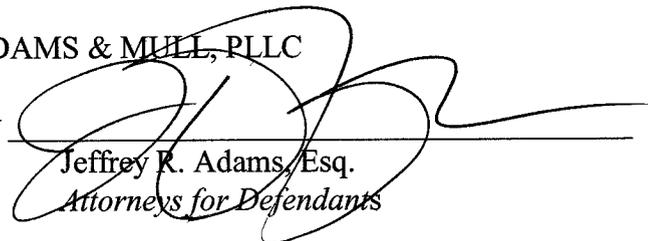
23 The Court finds based upon the factors set forth above that "in equity
24 and good conscience the action ... should be dismissed" since all
25 property owners subject to the Declaration of [Restrictions] sic are
26 necessary and indispensable parties. ***The Plaintiffs have delayed this
matter long enough.***

1 See August 22, 2008, Ruling (emphasis added). However, the Court gave Plaintiffs “one more chance
2 to comply with the Court’s orders for joinder.” Id. In response to being given that one last chance,
3 Plaintiffs engaged in an aggressive and unproductive appellate practice that, at the end of the day,
4 wasted a significant amount of time, and more importantly, unnecessarily wasted thousands of dollars
5 of Defendants’ finances. It is clear that Plaintiffs will continue to fight the Order of this Court to
6 timely join the Absent Owners and will continue to engage in delays to that end. Such conduct should
7 not be tolerated. To avoid further delays, Plaintiffs should be compelled to timely join the Absent
8 Owners. Accordingly, we ask that the Court reject Plaintiffs’ proposal and order that Plaintiffs comply
9 with the Court’s August 22, 2008, Order to join the Absent Owners by completing joinder within 55
10 days of the Arizona Supreme Court’s denial of Plaintiffs’ Petitions for Review on March 17, 2009
11 and, if they do not, this matter should be dismissed. Fifty-five days from March 17, 2009, and the 35
12 days between the Court’s August 22, 2008, Order regarding joinder and 35 days prior to Plaintiffs’
13 filing of their first Petition for Special Action is plenty of time for Plaintiffs to complete joinder. In
14 fact, from Defendants’ perspective, it is overly generous given the year and eight months that has gone
15 by since the Court’s August 23, 2007, Minute Entry during which Plaintiffs fought in opposition to
16 this Court’s decisions on joinder all the way to the State Supreme Court – and summarily lost.
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19 DATED this 17 day of April, 2009.

20 ADAMS & MULL, PLLC

21 By


22 Jeffrey R. Adams, Esq.
23 Attorneys for Defendants

24 A copy of the foregoing was
25 hand-delivered this 17 day of
26 April, 2009 to:

27 The Honorable David L. Mackey
Yavapai County Superior Court
Division 1
Yavapai County Courthouse
Prescott, Arizona

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