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SANDRA K MARKHAM, CLERK  
BY:                     K. Sechez                    

1 FAVOUR MOORE & WILHELMSSEN, P.A.  
2 Post Office Box 1391  
3 Prescott, AZ 86302  
4 928-445-2444 – Telephone  
5 928-771-0450 – Facsimile  
6 David K. Wilhelmsen 007112  
7 Lance B. Payette 007556

8 Attorneys for Property Owner James Varilek

9 **SUPERIOR COURT OF ARIZONA**  
10 **YAVAPAI COUNTY**

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

Case No. CV 2003-0399  
Division 1  
(Assigned to Hon. David L. Mackey)  
**JAMES VARILEK’S RESPONSE  
TO MOTION FOR NEW TRIAL  
RE: GRANT OF PLAINTIFFS’  
MOTION FOR SUMMARY  
JUDGMENT**

22 Aligned Plaintiff property owner James Varilek (“Varilek”) files this response to  
23 the *Motion for New Trial* (“MNT”) filed by Defendants (“the Coxes”).

24 **Introduction**

25 This case, concerning one parcel of land in Coyote Springs Ranch (“CSR”), is now  
26 *ten years* old. The Coxes *lost* on the central issue in the case – *i.e.*, their violation of  
27 paragraph 2 of the Declaration of Restrictions of CSR (“the Declaration”) – in the Court of  
28 Appeals almost *seven years* ago. For the past seven years, the parties have been litigating  
the Coxes’ affirmative defense that the Declaration had been *abandoned* before the  
original complaint was filed in 2004 and that paragraph 2 (together with the rest of the  
Declaration) is unenforceable on that basis. After careful consideration of the record and

1 the well-established Arizona case law, Judge Jones recognized the fundamental flaw in the  
2 Coxes' abandonment defense and granted Plaintiffs' *Motion for Summary Judgment* (in  
3 which Varilek had joined) on June 14, 2013.

4 The Coxes did not move for reconsideration of Judge Jones' ruling. Now, *seven*  
5 *months later* (and some *four months* after Judge Jones was appointed to the Court of  
6 Appeals), they purport to move for a new trial on Judge Jones' ruling. Their *MNT* is  
7 procedurally defective and is nothing more than a 25-page regurgitation of their  
8 unsuccessful response to the *Motion for Summary Judgment*. Varilek sees absolutely  
9 nothing of substance that is new.

10 Faced with finally having to relocate their business after ten years, the Coxes are  
11 understandably desperate and hoping a new judge will be more receptive to the same  
12 arguments that Judge Jones rejected. What they are trying to do should be obvious and  
13 offensive to the Court. Because the *MNT* is simply a regurgitation of the Coxes' previous  
14 filings, Varilek will not try the Court's patience by regurgitating his own previous filings  
15 and will keep this response as short and to the point as possible.

16 **The *MNT* is procedurally defective**

17 The *MNT* is either extremely late or considerably premature. ARCP 59(c) provides  
18 that a motion for new trial shall be filed "not later than 15 days after entry of the  
19 judgment." Here, no judgment has been entered. A form of judgment was lodged months  
20 ago, but the Coxes objected to it and it has been pending ever since. The *MNT* purports to  
21 be based on Judge Jones' ruling of June 14, 2013, which was obviously not a final  
22 judgment and was, moreover, seven full months ago. The Arizona case law indicates that  
23 a motion for new trial may be filed prematurely – *see, e.g., Farmers Ins. Co. of Ariz. v.*  
24 *Vagnozzi*, 132 Ariz. 219, 644 P.2d 1305 (1982) – but the weird procedural posture of the  
25 *MNT* should be a clue to the Court as to how much thought and care went into it.

26 Of greater significance, the *MNT* does not set forth the grounds on which it is based,  
27 as is required by ARCP 59(c)(1). ARCP 59(a) lists the eight grounds on which a motion  
28 for new trial may be based, while ARCP 59(c)(1) requires the ground(s) to be set forth in

1 the motion. None of the permissible grounds is set forth in the *MNT*. In *Vagnozzi*, our  
2 Supreme Court stated concerning a motion for new trial that it is “essential that such a  
3 motion satisfy two requirements: it must refer to rule 59 as authority for the motion, *and it*  
4 *must describe grounds set forth under that rule.*” 132 Ariz. at 221, 644 P.2d at 1307  
5 (emphasis added). The *MNT* thus is defective and should be denied.

6 Alternatively, the *MNT* should be treated as what it really is: a long-after-the-fact  
7 motion for reconsideration. This is apparent from the fact that the Coxes have simply  
8 regurgitated their response to the *Motion for Summary Judgment*. ARCP 7.1(e) does not  
9 specify a time within which a motion for reconsideration must be filed, but Varilek  
10 respectfully urges that a motion for reconsideration filed *seven months* after the ruling on  
11 the motion is untimely and should be denied on the basis of laches.

### 12 **What Judge Jones actually decided**

13 A file that is ten years’ thick may seem at first blush to be an unlikely candidate for  
14 summary judgment, but Judge Jones recognized that the Coxes’ abandonment defense is  
15 less complicated than it first might appear and is easily disposed of when the correct  
16 analytical approach is adopted. First, Judge Jones noted that the Court of Appeals had  
17 recognized in 2007 that the overarching purpose of the Declaration is to ensure that CSR  
18 remains a *rural, residential environment*. (*Ruling of 6-14-13* at 3.) He then noted that the  
19 reported Arizona decisions make clear that an abandonment of a subdivision declaration  
20 can be found only if violations of the restrictions are so pervasive and of such magnitude  
21 that they have *changed the fundamental character* of the development. (*Id.*) The question  
22 then became the straightforward one as to whether there was a genuine issue of material  
23 fact as to whether CSR remains a rural, residential subdivision. (The answer “*Yes, it*  
24 *does*” was so obvious even in 2013, let alone in 2004, that Plaintiffs and Varilek had  
25 confidently encouraged Judge Jones to undertake a view of the subdivision.) As Judge  
26 Jones recognized, there could be 1,000 trivial violations encompassing every parcel in  
27 CSR without altering its fundamental character as a rural, residential subdivision.  
28

1 Far from turning a blind or skeptical eye toward the Coxes' evidence, as the Coxes  
2 suggest in the *MNT* he did, Judge Jones actually *carefully reviewed* the Coxes' evidence  
3 (as Plaintiffs and Varilek had urged him to do) and found it insufficient to create a genuine  
4 issue of material fact as to whether CSR remains a rural, residential subdivision. (*See*  
5 *Ruling of 6-14-13* at 4-8.). His well-reasoned analysis bears repeating:

6 But even more fundamentally, the issue before the Court  
7 is whether this matter should proceed to trial based solely upon  
8 defenses of waiver and/or abandonment of the CC&Rs as a  
9 result of the restrictions imposed upon the use of the properties  
10 having been so thoroughly disregarded as to result in such a  
11 change in the area as to destroy the effectiveness of the  
12 restrictions and defeat the purposes for which they were  
13 imposed. *The issue is whether the property remains rural and*  
14 *whether the property remains residential, or whether the*  
15 *property is no longer rural or no longer residential.*

16 As addressed above, the Court finds no real debate that  
17 the property remains rural. Further, an assessment of whether  
18 the CC&Rs might have been violated as a result of commercial  
19 businesses being run from residential properties, something  
20 clearly in violation of the CC&Rs, does not obviate the fact  
21 that the properties, themselves, remain residential. To the  
22 Court's understanding, the only portion Coyote' Springs that  
23 has been utterly given over to a non-residential use is that of  
24 Defendants Cox; that being their use of their 19 acres for  
25 purely commercial purposes.

26 Those items addressed by [the Coxes' investigator  
27 Sheila] Cahill and upon which Defendants rely, while  
28 reflecting violations of the CC&Rs to some degree; even  
possibly to a large degree, *do not illustrate, in any fashion, a*  
*complete abandonment and thorough disregard of the intention*  
*of the Declarants that the property remain rural and*  
*residential.* Admittedly, there is probably no denying that  
Coyote Springs is a rural, residential environment where a  
number of property owners both reside and operate businesses  
out of their homes as [original CSR developer, the late Robert]  
Conlin indicated was appropriate. Admittedly, there may be  
circumstances where contractors are using the property where  
they live to stack materials and that may well be a violation of  
the CC&Rs. *However, nothing presented to the Court supports*

1                    *a finding that Coyote Springs has become anything other than,*  
2                    *a rural, residential subdivision.*

3                    (*Ruling of 6-14-13 at 8, emphasis added.*)

4                    Far from being a careless piece of work, as the Coxes' suggest it is, Judge Jones'  
5                    ruling is a veritable *model* of the way an abandonment defense should be analyzed.  
6                    Notwithstanding an abundance of Arizona case law, the Coxes persist in their refusal to  
7                    acknowledge that this is the correct analytical approach.

8                    Varilek will now very briefly address the key arguments in the *MNT*, citing the  
9                    Court to the relevant pages of his previous filings rather than regurgitating them here.

10                    **Judge Jones did not improperly focus on paragraph 2 of the**  
11                    **Declaration or the Conlin affidavit**

12                    The “initial matter” raised by the Coxes' at page 2 of the *MNT* is that Judge Jones  
13                    supposedly “improperly tethered the dispute surrounding enforceability/abandonment of  
14                    the subject Declaration entirely to Paragraph 2 and to the undated Affidavit of [original  
15                    CSR developer, the late] Robert Conlin, which focuses on Paragraph 2 only.” The Coxes  
16                    state that the record “is replete with evidence of hundreds of violations of Paragraphs 3, 5,  
17                    7, 8, 9, 11, 12 and 16, as well as Paragraph 2, of the CC&Rs.”

18                    It is obvious on the face of Judge Jones' ruling that the Coxes' statements are not  
19                    true. Paragraph 2 of the Declaration, prohibiting commercial uses of the parcels in CSR, is  
20                    the one the Court of Appeals determined in 2007 the Coxes had violated. It is also the one  
21                    for which pervasive violations would be most likely to lead to a finding of abandonment –  
22                    *i.e.*, if CSR now looked like it should be renamed Prescott Valley Industrial Park, one  
23                    might be hard-pressed to argue that it remains a rural, residential subdivision. Judge Jones  
24                    thus understandably focused on the other commercial uses alleged by the Coxes and found  
25                    the evidence either incompetent or insufficient to create a genuine issue of material fact.

26                    However, Judge Jones also took due notice of the Coxes' evidence of other  
27                    violations such as “bottled gas tanks not below ground and trash receptacles visible; in one  
28                    instance a couch sitting outside, and in another some amount of construction materials  
                     located on properties where construction company owners reside. There are apparently

1 boarded up properties and what appear to be dilapidated and/or trashed mobiles and  
2 properties.” (*Ruling of 6-14-13 at 6-7.*) These trivialities are typical of the “hundreds of  
3 violations” on which the Coxes rely; what Judge Jones recognized, in addition to finding  
4 much of the Coxes’ evidence speculative or otherwise incompetent, is that above-ground  
5 propane tanks, old couches, trashed mobile homes and similar trivialities are virtually  
6 irrelevant to whether CSR remains a rural, residential subdivision. Indeed, it might be said  
7 that most of them are *typical* of a rural, residential subdivision.

8         *The fundamental error that the Coxes have made, and continue to make in the MNT,*  
9 *is their failure (or stubborn refusal) to acknowledge that an abandonment of the*  
10 *Declaration cannot be proved simply by counting violations without regard to the nature or*  
11 *triviality of the violations. An abandonment is proved by showing that the violations have*  
12 *altered the fundamental character of the development as a rural, residential subdivision.*  
13 *The Arizona case law is absolutely clear about this. See pages 6-8 of James Varilek’s*  
14 *Consolidated Reply to the Responses to Plaintiffs’ Motion for Summary Judgment filed by*  
15 *Defendants Cox and Veres (“Varilek’s Reply”).*

16         When the Coxes’ state at page 2 of the *MNT* that the video of CSR filed with  
17 Plaintiff John Cundiff’s affidavit “fails to fully and accurately depict myriad CC&R  
18 violations,” they miss the point. What the video *does* fully and accurately depict is that  
19 CSR is still a rural, residential subdivision. When the Coxes similarly state at page 15 of  
20 the *MNT* that “Cundiff’s Affidavit stating that ‘The three (3) DVD’s attached to this  
21 affidavit accurately depict the appearance of CSR’ is no different that [*sic*] taking a picture  
22 of the Courthouse from Whiskey Row and stating that it accurately ‘depicts’ the  
23 Courthouse,” the answer is that such a photo *would* accurately depict the Courthouse if  
24 what one were trying to prove was simply that the Courthouse had not been transformed  
25 into a Walmart.

26         In a similar vein, the Coxes complain at pages 9 and 10 of the *MNT* that “our  
27 appellate court held that the Conlin Affidavit merely affirms that the Declaration ensures  
28 both a rural and a residential environment” and that Judge Jones’ “should not have adopted  
Plaintiffs’ narrow premise that Coyote Springs was limited to rural and residential property

1 and nothing more.” Judge Jones did *not* adopt “Plaintiffs’ narrow premise.” Long before  
2 Plaintiffs had filed their *Motion for Summary Judgment*, the *Court of Appeals* had  
3 emphasized that both parties had relied on Conlin’s affidavit in which he had stated, “The  
4 recorded covenants and restrictions were intended to ensure that the Coyote Springs Ranch  
5 subdivision would be a residential community. The nine-acre lots were intended to ensure  
6 that the residential community would retain a rural setting.” *Mem. Op.* at 11. The *Court of*  
7 *Appeals* had further stated: “As confirmed in Conlin’s affidavit, *the Declaration ensures*  
8 *not only a rural setting, but a rural, residential environment.*” *Id.* at 12 (emphasis added).

9 What the Coxes describe as “Plaintiffs’ narrow premise” was, in fact, the law of the  
10 case as decided by the Court of Appeals several years before Judge Jones decided the  
11 *Motion for Summary Judgment*. What the Coxes state that the Court of Appeals “merely  
12 affirmed” – *i.e.*, that the purpose of the Declaration is to preserve CSR as a rural,  
13 residential subdivision – is, as Judge Jones recognized, actually the knife in the heart of the  
14 Coxes’ abandonment defense.

15 Just when one might have thought the Coxes’ reasoning could not drift any further  
16 into the ozone, they embark on an convoluted analysis of paragraph 2 of the Declaration  
17 and weirdly announce at page 20 of the *MNT* that “Plaintiffs did not take any action at the  
18 appellate court level to challenge the foregoing ruling from Division One. Rather, they let  
19 it stand and therefore have waived any argument that Division One’s interpretation of  
20 Paragraph 2 is not the law of the case. Because the Conlin Affidavit contradicts the plain  
21 and unambiguous language of the Declaration of Restrictions, the Declaration must be read  
22 and applied according to its express terms.” Varilek has difficulty even following what the  
23 Coxes are talking about. To state the obvious, Plaintiffs and Varilek *love* the Court of  
24 Appeals’ interpretation of paragraph 2; it is why Plaintiffs *prevailed* in the Court of  
25 Appeals! They *embrace* it as the law of the case. Moreover, developer Conlin’s affidavit  
26 does not *contradict* the Declaration in regard to its purpose to preserve the rural, residential  
27 character of CSR; rather, as the Court of Appeals expressly stated, Conlin’s affidavit  
28 *confirms* that this is the purpose of the Declaration. Preserving the rural, residential  
character of CSR is the purpose of the Declaration *as a whole*, which is the proper focus of

1 a claim of abandonment – and which is why, as Judge Jones recognized, that in order to  
2 avoid summary judgment the Coxes had to make some showing, not merely that the  
3 Declaration had been violated 50 or 500 times, but that CSR had lost its character as a  
4 rural, residential subdivision. This they failed to do.

5 **The Coxes continue to be confused about the fundamental difference**  
6 **between waiver and abandonment**

7 One reason the Coxes persist with their violation-counting approach, when the real  
8 question is whether the violations have caused CSR to lose its character as a rural,  
9 residential subdivision, is that they are confused about the difference between *waiver* and  
10 *abandonment*. A particular restriction is waived when it has been violated *so many times*  
11 that it would be unfair to enforce it now. When a declaration contains a non-waiver  
12 provision, as the Declaration of CSR does, a waiver defense is precluded and the  
13 restriction will be enforced, regardless of how many prior violations have been allowed,  
14 unless a complete abandonment of the declaration can be proved. For an abandonment, the  
15 focus is on the declaration as a whole and whether pervasive violations have transformed  
16 the development into something other than it was intended to be. The distinction is  
17 discussed at length at pages 6-8 of *Varilek's Reply*.

18 The Coxes' confusion is apparent on pages 16 and 17 of the *MNT*, where they  
19 purport to find a "frequency of violation test" in *Burke v. Voicestream Wireless Corp. II*,  
20 207 Ariz. 393, 87 P.3d 81 (App. 2004), and *College Book Centers, Inc., v. Carefree*  
21 *Foothills Homeowners' Ass.n.*, 225 Ariz. 533, 241 P.3d 897 (App. 2010), two decisions on  
22 which Varilek himself relied. *College Book Centers* does indeed have a section of the  
23 opinion entitled "Frequency of Violations," but in the context of *waiver*; concerning  
24 abandonment, the court stated that the appellant "does not argue that the CC&Rs in  
25 Carefree Foothills have been disregarded so thoroughly as to constitute complete  
26 abandonment." 225 Ariz. at 539, 241 P.3d at 903. *College Book Centers* thus was not an  
27 *abandonment case* at all, although the court did accurately describe the standard for  
28 abandonment as set forth in *Burke* and the other Arizona decisions cited by Varilek (and  
this portion of the opinion is quoted in Judge Jones' ruling).

1            *Burke* likewise was solely a *waiver* case. The court stated that a non-waiver  
2 provision in a declaration would be unenforceable only if an *abandonment* had occurred.  
3 The court clearly *distinguished* between waiver and abandonment, as the Coxes fail to do,  
4 and concluded, “No evidence was presented, however, that Desert Estates is no longer a  
5 ‘choice residential district.’ The violations of section 4 described by Voicestream and  
6 SWC have not *destroyed the fundamental character of the neighborhood.*” 207 Ariz. at  
7 399, 87 P.3d at 87 (emphasis added).

8            The only new citation in this portion of the *MTN* is one from what the Coxes  
9 describe on page 17 as “our sister jurisdiction” of Texas. What our beloved sister thinks  
10 scarcely matters when Arizona has a body of case law as fully developed as that  
11 concerning waiver and abandonment, but in any event *New Jerusalem Baptist Church, Inc.*  
12 *v. City of Houston*, 598 S.W.2d 666 (Tex. App.1980), is yet another waiver case that  
13 concerned the enforceability of one particular restriction. Although the court loosely used  
14 the term “abandoned” a couple of places in the opinion, the nature of the case is clear from  
15 this passage: “In order to establish the affirmative defense of waiver in a deed restriction  
16 case, the non-conforming user must prove that the violations then existing are so great as  
17 to lead the mind of the ‘average man’ to reasonably conclude that the restriction in  
18 question has been abandoned and its enforcement waived.” 598 S.W.2d at 669.

19            There is *no question* what proving an abandonment requires in Arizona. There is *no*  
20 *question* that Judge Jones had the proper focus and analytical approach. There is *no*  
21 *question* that the Coxes are either hopelessly confused or attempting to mislead the Court.

### 22            **Judge Jones’ ruling was not premature**

23            At page 3 of the *MNT*, the Coxes assert that Judge Jones’ ruling “was premature as  
24 there has been no ruling on Defendants’ April 25, 2103, Motion to Dismiss, which is  
25 premised upon Rule 19. Stated another way, once the Court [of Appeals] ordered on  
26 remand the joinder of all of the Coyote Springs property owners not already named in the  
27 litigation as indispensable parties, the Court was affirmatively obligated to ensure that  
28 joinder was completed prior to rendering dispositive summary rulings.” (Actually, the

1 Court of Appeals directed the Court to determine whether the indispensable parties were  
2 also necessary, but technicalities such as this seemingly do not concern the Coxes.) This  
3 argument is further developed at pages 21-25 of the *MNT*.

4 The fact that the Coxes' persist with this vacuous argument shows they are merely  
5 regurgitating their unsuccessful response to the *Motion for Summary Judgment*. As the  
6 Court of Appeals recognized, the joinder of all other property owners in CSR was  
7 necessitated *solely* by the Coxes' abandonment defense. If the defense had been  
8 *successful*, it would have had subdivision-wide ramifications because an abandonment  
9 would, by definition, render the Declaration entirely unenforceable. Before the *Motion for*  
10 *Summary Judgment* was granted, Varilek himself had raised concerns as to whether the  
11 past efforts at joinder had comported with due process. But Varilek pointed out that the  
12 awarding of summary judgment *in favor of Plaintiffs* and *against the Coxes* on the issue of  
13 abandonment would render any concerns about joinder *moot* because such a decision  
14 would have no subdivision-wide ramifications. This issue is discussed at length at pages  
15 2-4 of *James Varilek's Motion to Require Defendants Cox to Serve the Indispensable*  
16 *Parties with Documents Comporting with Due Process*.

17 **The 2005 denial of Plaintiffs' prior motion for summary judgment**  
18 **did not become the "law of the case"**

19 Once again the Coxes regurgitate a vacuous argument from their unsuccessful  
20 response to the *Motion for Summary Judgment*. At page 4 of the *MNT*, they state that  
21 Judge Mackey's April 4, 2005 ruling in which he denied Plaintiffs' prior motion for  
22 summary judgment on the issue of abandonment became the "law of the case" and  
23 precluded Judge Jones from awarding summary judgment more than *eight years later*. The  
24 ruling in 2005 decided nothing; Judge Mackey simply found the existence of a genuine  
25 issue of material fact at that time. The Coxes *completely* misunderstand the law of the case  
26 doctrine, and Varilek *thoroughly* demolished their argument by citation to ample authority  
27 directly on point, including a number of Arizona decisions. See pages 1-4 of *Varilek's*  
28 *Reply*.

1 The only new thing in this portion of the *MNT* is a citation to dicta in *Mozes v.*  
2 *Daru*, 4 Ariz. App. 385, 420 P. 2d 957 ( 1966), where the court condemned what it called  
3 “horizontal appeals,” or “the practice of bringing the same motion before different superior  
4 court judges in the hope of finding one who will rule in one's favor.” (The *Mozes* court  
5 decided it was *not* dealing with a horizontal appeal.) Varilek might suggest that this is  
6 *precisely* what the Coxes are doing with their motion for reconsideration in the guise of a  
7 motion for new trial, but in any event the *Mozes* dicta has never been applied in a reported  
8 Arizona decision involving a second motion for summary judgment and has scarcely been  
9 applied at all. See, e.g., *Shade v. United States Fid. & Guar. Co.*, 166 Ariz. 206, 210, 801  
10 P.2d 441, 445 (App. 1990) (noting that the *Mozes* court itself had stated “that there is no  
11 iron-clad rule that absolutely precludes renewal of a prior motion or making a subsequent  
12 motion for the same relief, and that no purpose would be served by forcing a case to trial  
13 once it clearly appears that summary judgment should be granted”); *Powell-Cerkoney v.*  
14 *TCR-Montana Ranch Joint Venture II*, 176 Ariz. 275, 278-279, 860 P.2d 1328, 1331-1332  
15 (App. 1993) (discussing both the law of the case doctrine and the horizontal appeals  
16 doctrine and noting that the latter doctrine is a harsh one and that “courts must not afford  
17 this procedural doctrine undue emphasis”).

18 The Coxes’ reliance on the *Mozes* dicta in the face of Varilek’s previous citation of  
19 a wealth of authority directly on point serves only to underscore their desperation. Judge  
20 Mackey’s 2005 ruling was not a substantive one, was made without the benefit of the  
21 Court of Appeals’ interpretation of the Declaration and its overarching purpose to preserve  
22 the rural, residential character of CSR, and was made several years before the decision  
23 cited in Judge Jones’ ruling (*College Book Centers, Inc., v. Carefree Foothills*  
24 *Homeowners’ Ass’n.*, 225 Ariz. 533, 241 P.3d 897 (App. 2010)) had come down.

25 **“Clear and convincing” is the standard for proving an**  
26 **abandonment of subdivision restrictions**

27 At page 19 of the *MNT*, the Coxes assert that “contrary to Plaintiff's [*sic*] Varilek's  
28 assertion, the standard for proving an affirmative defense of abandonment is not ‘clear and

1 convincing.’ The *Condos* opinion [*Condos v. Home Development Co.*, 77 Ariz. 129, 267  
2 P.2d 1069 (1954)] does not announce such a standard.”

3 Varilek did not cite *Condos* as supporting the clear and convincing standard for the  
4 simple reason that the opinion does not address the evidentiary standard *at all*, but  
5 technicalities such as this seemingly do not concern the Coxes. Varilek *did*, however, cite  
6 a wealth of authority, ranging from *American Jurisprudence* to decisions from Arizona and  
7 other jurisdictions. See *James Varilek’s Joinder in Plaintiffs’ Motion for Summary*  
8 *Judgment* at 3. As quick examples, the Utah Supreme Court stated in *Swenson v.*  
9 *Erickson*, 998 P.2d 807, 812 (Utah 2000), that an abandonment of restrictions must be  
10 established by clear and convincing evidence; the Nevada Supreme Court stated in  
11 *Tompkins v. Buttrum Const. Co. of Nevada*, 659 P.2d 865, 867 (Nev. 1983), that an  
12 abandonment of restrictions must be established by clear and unequivocal evidence of acts  
13 of a decisive nature; and the Maryland Court of Appeals likewise stated in *Lindner v.*  
14 *Woytowitz*, 378 A.2d 212, 216 (Md. App. 1977), that an abandonment of restrictions must  
15 be established by evidence clear and unequivocal of acts of a decisive nature.

16 What do the Coxes offer the Court in regard to the applicable evidentiary standard?  
17 They offer two Arizona *insurance* decisions involving *policy defenses*. In *Am. Pepper*  
18 *Supply Co. v. Federal Insurance Co.*, 208 Ariz. 307, 93 P.3d 507 (2004), concerning an  
19 insurer’s policy defense of concealment or misrepresentation, the court undertook an  
20 extensive analysis of the different approaches to *insurance contracts* and concluded on the  
21 basis of a host of insurance considerations that the appropriate standard was a  
22 preponderance of the evidence. *Godwin v. Farmers Ins. Co. of Am.*, 129 Ariz. 416, 631  
23 P.2d 571 (App. 1981), is to similar effect concerning an insurer’s policy defense of arson.

24 Neither *American Pepper* nor *Godwin* has been cited outside of the insurance  
25 context, and Varilek has no idea why the Coxes believe these decisions should be  
26 persuasive here. Again the Coxes demonstrate their desperation. Nothing in Judge Jones’  
27 ruling suggests he evaluated the Coxes’ evidence in light of the clear and convincing  
28 standard, but certainly this standard is the general rule across the United States and finds  
support in Arizona decisions such as *Webber v. Smith*, 129 Ariz. 495, 632 P.2d 998 (App.

1 1981) (abandonment or rescission of written contract must be proved by clear and  
2 convincing evidence), and *Velasco v. Mallory*, 5 Ariz. App. 406, 412, 427 P.2d 540, 546  
3 (1967) (party asserting abandonment or forfeiture of mining claim has burden to prove  
4 abandonment or forfeiture by clear and convincing evidence).

5 **The MTN should be denied**

6 The Coxes have managed to keep this case alive for ten years, during which time  
7 they have continued to operate the nursery business that the Court of Appeals decided in  
8 2007 was a violation of paragraph 2 of the Declaration. They would like to keep it alive  
9 another ten years. They are so desperate that they cling by their fingernails to an  
10 abandonment defense that a half-hour drive through CSR would reveal to be completely  
11 bogus. If it would serve their purposes, they would drag every other property owner in  
12 CSR (and there are *hundreds* of them) into this one-parcel controversy. Their *MTN* is  
13 nothing but a rambling and at times incoherent regurgitation of vacuous arguments that  
14 Judge Jones recognized for what they are. It is little more than the legal version of kicking  
15 and screaming.

16 Varilek urges the Court to carefully review Plaintiffs' *Motion for Summary*  
17 *Judgment*, *James Varilek's Joinder in Plaintiffs' Motion for Summary Judgment*, *James*  
18 *Varilek's Consolidated Reply to the Responses to Plaintiffs' Motion for Summary*  
19 *Judgment filed by Defendants Cox and Veres*, and Judge Jones' well-reasoned ruling of  
20 June 14, 2013 and to contrast those documents with the Coxes' *MTN* and other filings.  
21 There is *no* reason to disturb Judge Jones' ruling and *no* reason to grant the Coxes' *MTN*.  
22 Varilek thus respectfully urges the Court to deny the *MTN* for all the reasons set forth  
23 herein.

24 RESPECTFULLY SUBMITTED January 14, 2014.

25 FAVOUR MOORE & WILHELMSSEN, P.A.

26  
27 By:



David K. Wilhelmsen

Lance B. Payette

Attorneys for Property Owner James Varilek

1 Original of the foregoing  
2 filed on January 14, 2014  
3 with:

4 Clerk of the Court  
5 Yavapai County Superior Court  
6 120 S. Cortez Street  
7 Prescott, AZ 86303

8 Copy of the foregoing  
9 hand-delivered on January  
10 14, 2014 to:

11 Honorable David L. Mackey  
12 Yavapai County Superior Court  
13 120 S. Cortez Street  
14 Prescott, AZ 86303

15 Copy of the foregoing  
16 mailed on January 14,  
17 2014 to:

18 Jeff Adams  
19 THE ADAMS LAW FIRM PLLC  
20 125 Grove Avenue  
21 P.O. Box 2522  
22 Prescott, AZ 86302  
23 Attorney for the following named  
24 Defendants:

25 Donald & Catherine Cox;  
26 Leon H. & Noreen N. Vaughn;  
27 Martha Lillian Caudill;  
28 Sandra Godinez;  
Curtis Kincheloe;  
John L. & Gena D. Hatfield, Trustees of  
the Brit-Char Trust UDT 7-10-07;  
Cindi E. Lebash;  
Roberta L. Baldwin;  
James H. & Doris L. Strom;  
Joy D. Basset;  
James B. & Lorraine Darrin, Trustees of  
the Darrin Family Trust UDT 12-14-98;  
Tracy L. Greenlee;  
Franklin B. & Laura L. Lamberson;  
Rhonda L. Folsom;  
Daniel & Louella Bauman;  
Theresa E. Massardi;  
James & Shirley Stephenson;  
West R. & Catherine S. Rivers;  
Lawrence K. & Heide J. McCarthy,  
Trustees of the McCarthy Living Trust  
UDC 5-20-81;  
Edward C. & Christine Woodworth;

1 Donald J. & Charlotte F. Klein, Trustees  
of the Klein Family Trust;  
2 Jeff & Mychel Westra;  
Christine L. Bowra;  
3 Charles R. Coakley, Trustee of the  
Charles Coakley Trust UTD 6-10-91;  
4 Else Clark, Trustee of the 2005 Else  
Clark Revocable Trust UTD 10-27-05;  
5 Wendy L. Changose;  
Kari L. Dennis;  
6 John P. & Karen R. Hough;  
James Barstad;  
7 Michael J. & Diane Glennon;  
Michael D. White;  
8 Steve M. & Deborah D. Wilson;  
Ottis R. & Delores F. Clark;  
9 Mark S. & Soma D. Williams, Trustees  
of the Mark & Soma Williams Trust  
10 UTD 10-10-07;  
Geoffrey M. McNabb & Kristen D.  
11 McNabb;  
Grant L. & Pamela L. Griffiths;  
12 Charles A. & Sherry S. Marx;  
Kenneth R. & Elizabeth A. Yarbrough;  
13 Gary Wanzek; and  
14 Vincent J. & Dorothy M. Wanzek

15 J. Jeffrey Coughlin, PLLC  
1570 Plaza West Drive  
16 Prescott, AZ 86303  
Attorney for Plaintiffs

17 Mark W. Drutz  
18 Sharon Sargent-Flack  
MUSGROVE DRUTZ & KACK, P.C.  
19 1135 W. Iron Springs Road  
P.O. Box 2720  
20 Prescott, AZ 86302  
Attorneys for Defendant Veres

21 Hans Clugston  
22 HANS CLUGSTON, PLLC  
1042 Willow Creek Road  
23 Suite A101-PMB 502  
Prescott, AZ 86301  
24 Attorney for Defendants  
Northern Arizona Fiduciaries, Inc.

25 Robert E. Schmitt  
26 MURPHY, SCHMITT,  
HATHAWAY & WILSON  
27 117 East Gurley St.  
Prescott, AZ 86301  
28 Attorney for Robert H. Taylor &  
Terri A. Thomson-Taylor

1  
2  
3  
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5  
6  
7  
8  
9  
10  
11  
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14  
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22  
23  
24  
25  
26  
27  
28

Noel J. Hebets  
NOEL J. HEBETS, PLC  
2515 N. 48<sup>th</sup> St., #3  
Phoenix, AZ 85008  
Attorney for Defendant  
William M. Grace

William Fred and Theresa Hyder  
11411 E. Sweetwater Ave.  
Scottsdale, AZ 85259

Joyce Hattab Trust  
3449 Lorilou Ln. #D  
Las Vegas, NV 89121

Leon H. and Noreen Vaughan  
9235 N. Coyote Springs Rd.  
Prescott Valley, AZ 86315

Gordon and Becki Nash  
7901 N. Coyote Springs Rd.  
Prescott Valley, AZ 86315

Jimmy and Nancy Hoffman  
P.O. Box 639  
Dewey, AZ 86327

Rodney and Victoria Page  
8920 E. Smittys Pl.  
Prescott Valley, AZ 86314

Deborah Ann and Richard A Davis  
P.O. Box 4388  
Prescott, AZ 86302

Bruce K and Teri A. Morgan  
8520 E Lonesome Valley Road  
Prescott Valley, AZ 86315

Deborah Ann Curtis  
6070 Little Papoose Dr.  
Prescott Valley AZ 86314

Jeffrey and Renita Donaldson  
2175 N. Concord Dr. #A  
Dewey, AZ 86327

Corea Family Trust  
Nicholas and Patricia Corea  
4 Denia  
Laguna Niguel, CA 92677

1 Charles and Kelly Markley  
8999 E. Pronghorn Ln.  
2 Prescott Valley, AZ 86315

3 Thomas and Nancy Tierney  
7711 W. Michigan Ave.  
4 Glendale, AZ 85308

5 Jerry L. Emerson  
P.O. Box 27254  
6 Prescott Valley, AZ 86312

7 Mary Ferra  
4930 Antelope Dr.  
8 Prescott, AZ 86301

9 Kirk and Joy Smith  
8650 E. Marrow Rd.  
10 Prescott Valley, AZ 86315

11 Jeffrey A. and Kimberly A. Sharp  
8320 E. Plum Creek Way  
12 Prescott valley, AZ 86315

13 Logan and Theresa Franks  
8233 W. Country Gables Dr.  
14 Peoria, AZ 85381

15 Humberto and Ana Pimentel  
8419 E. Tracy Drive  
16 Prescott Valley, AZ 86314

17 Jeffrey Carlson  
1451 W. Irving Park Rd. #317  
18 Itasca, IL 60143

19 Richard and Jessica Compsom  
8805 E. Marrow Drive  
20 Prescott Valley, AZ 86315

21 Stanley and Sharon Gonzales  
8820 E. Slash Arrow Drive  
22 Prescott Valley, AZ 86315

23 Bernard and Mary Milligan  
29835 N. 56th Street  
24 Cave Creek, AZ 85331

25 Autery Family Trust  
8175 N. Coyote Springs Road  
26 Prescott Valley, AZ 86315

27

28

- 1 Patrick and Vickie DiNieri  
35807 N. 3rd Street  
2 Phoenix, AZ 85086
- 3 George L. Gillan and Yuan-Ling Hong  
8625 Mountain View Rd.  
4 Prescott Valley, AZ 86315
- 5 Jacob McAllister  
8620 Slash Arrow Dr.  
6 Prescott Valley, AZ 86315
- 7 Jack and Delores Richardson  
505 Oppenheimer Drive #412  
8 Los Alamos, NM 87544
- 9 Paul J. and Mary E. Temple  
535 Metropolitan Avenue  
10 Brooklyn, NY 11211
- 11 David Ungerer  
13229 W. Doty Ave #4A  
12 Hawthorne, CA 90250
- 13 Peter J. Trevillian  
8600 Turtle Rock Rd.  
14 Prescott Valley, AZ 86315
- 15 John and Deirdre Feldhaus  
3331 E. Sundance Cir.  
16 Prescott, AZ 86303
- 17 Bonnie Rosson  
8950 E. Plum Creek Way  
18 Prescott Valley, AZ 86315
- 19 Marty and Sharon Mason  
8945 E. Spurr Ln.  
20 Prescott Valley, AZ 86315
- 21 Evelyn M. Sadler Trust  
10575 N. Coyote Springs Road  
22 Prescott Valley, AZ 86315
- 23 Ronald and Kellene Litchfield  
8415 E. Marrow Road  
24 Prescott Valley, AZ 86315
- 25 Stanley D. Hall and Anne Womack-Hall  
8450 Morning Star Ranch Road  
26 Prescott Valley, AZ 86315
- 27
- 28

1 Wayne L. and Bonnie L. Battram  
8400 E. Morning Star Ranch Rd  
2 Prescott Valley, AZ 86315

3 Watkins Family Trust  
7455 Coyote Springs Road  
4 Prescott Valley, AZ 86315

5 Loren James and Tracy Lee Peterson  
P.O. Box 25977  
6 Prescott Valley, AZ 86315

7 Gunther Family Living Trust  
Richard H. and Lois M. Gunther  
8 1035 Scott Dr. #256  
9 Prescott, AZ 86301

10 James and Vicki Biscay  
7090 N. Coyote Springs Rd.  
11 Prescott Valley, AZ 86315

12 Central Baptist Church of Prescott  
3298 N. Glassford Hill Rd. #104  
13 Prescott Valley, AZ 86314

14 Robert Mancini  
7425 N. Gueneviers Pl.  
15 Prescott Valley, AZ 86315

16 Robert Laquerre  
Laquerre Family Living Trust  
17 8594 E. Kelly Rd.  
18 Prescott Valley, AZ 86314

19 Daniel L. and Charlotte E. Sanders  
P.O. Box 2542  
20 Prescott, AZ 86302

21 Margaret Sue Pennington  
Pennington MS Living Trust  
22 5655 N. Camino Del Conde  
Tucson, AZ 85718

23 Michael A. Kelley Family Trust  
P.O. Box 26232  
24 Prescott Valley, AZ 86312

25 Kenneth Paloutzian  
8200 Long Mesa Drive  
26 Prescott Valley, AZ 86315

27

28

1 Faith Inc.  
7225 N.Coyote Springs Rd.  
2 Prescott Valley, AZ 86315

3 John D. and Sheila K. Fox  
1520 Scenic Loop  
4 Fairbanks, AK 99701

5 Rosario Carrillo  
8989 N. Coyote Springs Rd.  
6 Prescott Valley AZ 86315

7 Jose and Rosario Carrillo  
8989 N. Coyote Springs Rd.  
8 Prescott Valley AZ 86314

9 Michael and Judy Strong  
10 4415 N. 9th Avenue  
Phoenix, AZ 85013

11 Cong Van Tong and Phi Thi Nguyen  
8775 N. Coyote Springs Rd.  
12 Prescott Valley AZ 86315

13 Nadia Y. Clark  
14 8595 E. Turtle Rock Rd #1116  
Prescott Valley, AZ 86315

15 James Wilson Holmes  
16 8615 Windmill Acres Rd.  
Prescott Valley, AZ 86314

17 Thomas P. and Kimberly L. Marty  
18 8610 E. Marrow Rd.  
Prescott Valley, AZ 86315

19 Donald S. Benker and D. Lynn Wheeler-Benker  
20 8700 E. Marrow Rd.  
Prescott Valley, AZ 86315

21 Amanda G. Deane  
22 8250 E. Spurr Ln.  
Prescott Valley, AZ 86315

23 Jennifer Silva and Carl and Jeanette Samuelson  
24 8490 E. Spurr Ln.  
Prescott Valley, AZ 86315

25 Neil B. Vince  
26 8450 E. Spurr Ln.  
Prescott Valley, AZ 86315

27 Gary W. and Dianna R. Cordes  
28 8370 E. Spurr Ln.  
Prescott Valley, AZ 86315

1 Terry L. and Grace M. Jones  
10492 E. Old Black Canyon Hwy.  
2 Dewey, AZ 86327

3 Kevin Eden  
8275 E. Turtle Rock Rd.  
4 Prescott Valley, AZ 86315

5 Guaranty Mortgage Trust, L.L.C.  
15240 N. 44th Pl.  
6 Phoenix, AZ 85032

7 Dana E. and Sherrilyn G. Tapp  
8595 E. Easy St.  
8 Prescott Valley, AZ 86315

9 Craig C. and Bronte J. Casperson  
10 8301 E. Spouse Dr.  
Prescott Valley, AZ 86314

11 Anthony and Angela Lawrence  
12 8575 E. Far Away Pl.  
Prescott Valley, AZ 86315

13 Richard A. and Patricia A. Pinney  
14 43945 W. Kramer Ln.  
Maricopa, AZ 85238

15 Leonara Cardella and Santo Fricano  
16 12404 N. 33rd St.  
Phoenix, AZ 85032

17 Daniel and Christine Turner  
18 8959 E. Lonesome Valley Rd.  
19 Prescott Valley, AZ 86315

20 Larry Michael and Debra Ann Kirby  
Kirby Family Trust  
21 8801 Lonesome Valley Rd.  
Prescott Valley, AZ 86315

22 Christopher Lefebvre  
23 8250 E. Sparrow Hawk Rd.  
Prescott Valley, AZ 86314

24 Karen L. Thompson  
25 8100 E. Sparrow Hawk Rd.  
Prescott Valley, AZ 86315

26 Weldon Family Trust  
27 P.O. Box 9208  
Rancho Santa Fe, CA 92067

28

1 Sergio Martinez and Susana Navarro  
10150 N. Lawrence Ln.  
2 Prescott Valley, AZ 86315

3 Bernard D. and Diana M. Anderson  
7601 N. Gueneviers Pl.  
4 Prescott Valley, AZ 86315

5 William J. Lumme  
7570 N. Coyote Springs Rd.  
6 Prescott Valley, AZ 86315

7 Santo and Rosa Fricano  
5902 W. Cortez  
8 Glendale, Arizona 85304

9 William E. Brumbill Trust  
8910 Morrow Drive  
10 Prescott Valley, Arizona 86314

11 Kevin Paul Sasse  
9125 E. Dog Ranch Rd.  
12 Prescott Valley, AZ 86315

13 Jesus O. and Rosa M. Manjarrez  
105 Paseo Sarta #C  
14 Green Valley, AZ 85614

15 Rackley Family Living Trust  
8565 Dog Ranch Road  
16 Prescott Valley, AZ 86315

17 Jayme Salazar  
11826 Coyote Springs Road  
18 Prescott Valley, AZ 86315

19 Anglin Living Trust  
11950 Coyote Springs Road  
20 Prescott Valley, AZ 86314

21 Renee Meeks  
8975 N. Lawrence Lane  
22 Prescott Valley, Arizona 86315

23 Ken and Fay Lawrence  
P.O. Box 25905  
24 Prescott Valley, Arizona 86312

25 Kenneth and Lois Fay Lawrence Trust  
P.O. Box 25905  
26 Prescott Valley Arizona 86312

27  
28

1 Anthony and Patricia Sinclair  
P.O. Box 25457  
2 Prescott Valley, AZ 86312

3 Gary L. and Suzanne J. Spurr  
8240 E. Spurr Ln.  
4 Prescott Valley, AZ 86314

5 Joshua F. and Anita D. Ollinger  
Ollinger Family Revocable Trust  
6 14202 N. 68th Pl.  
7 Scottsdale, AZ 85254

8 Lisa Soronow  
Ginomai Living 2004 Trust  
9 3530 Wilshire Blvd. #1600  
Los Angeles, CA 90010

10 Fritz and Janet Doerstling Revocable Trust  
11 8610 Mountain View Rd.  
Prescott Valley, AZ 86314

12 Ernest and Judy Rojas  
13 Rojas Family Living Trust  
8310 N. Coyote Springs Rd.  
14 Prescott Valley, Arizona 86315

15 Anthony B. Lee  
8496 Coyote Springs Rd.  
16 Prescott Valley, AZ 86315

17 Thomas K. and Gwendolyn D. Anderson  
8922 E. Windmill Acres  
18 Prescott Valley, AZ 86315

19 Nguyen Nghia Huu and Le Dung Ngoc  
20 3616 W. Country Gables Dr.  
Phoenix, AZ 85023

21 Donald G. and Deborah T. Southworth  
7595 Coyote Springs Rd.  
22 Prescott Valley, AZ 86314

23 Janis Revocable Trust  
24 7685 N. Coyote Springs Rd.  
Prescott Valley, AZ 86315

25 Christiene R. Andrews  
26 16355 Orchard Bend Rd.  
Poway, CA 92064

27  
28

1 Valentino and Hildegard Muraca  
Muraca Trust  
2 10895 E. Manzenita Trl.  
Dewey, AZ 86327  
3  
4 Dorothy T. Baker Revocable Trust  
190 Wildwood Dr.  
5 Prescott, AZ 86301  
6 Francis M. Moyer  
6 Meadow Green Ct.  
7 Johnson City, TN 37601  
8 James W. and Corrine A. Stueve  
Stueve Living Trust  
9 10025 N. Coyote Springs Rd.  
Prescott Valley, AZ 86315  
10 Thanh Huu and Dung L. Nguyen  
11 Nguyen Family Trust  
12601 N. 29th Ave.  
12 Phoenix, AZ 85029  
13 William and Joanne Friend  
Friend Family Trust  
14 17661 Mariposa  
Yorba Linda, CA 92886  
15 Art and Debra G. Gustafson  
16 9975 N. Coyote Springs Rd.  
Prescott Valley, AZ 86315  
17 James R. and Barbara L. Bowman  
18 P.O. Box 2959  
Okeechobee, FL 34973  
19 Hendrickson 2002 Family Trust  
20 P.O. Box 13069  
Prescott, AZ 86304  
21 Howard P. Roberts  
22 9936 Coyote Springs Rd.  
Prescott, AZ 86315  
23 Mainland Water Investments, L.L.C.  
24 P.O. Box 2945  
Prescott, AZ 86302  
25 Paul and Amella Stegall  
26 8275 E. Spurr Lane  
27 Prescott Valley, AZ 86315  
28

1 Robert and Starr Ladehoff  
7805 E. Pharlap Ln.  
2 Prescott Valley, AZ 86315

3 Opal L. Belland  
Opal L. Belland Trust  
4 10936 Caloden St.  
5 Oakland, CA 94605

6 Kennard L. Easter  
10350 N. Lawrence Ln.  
7 Prescott Valley, AZ 86315

8 Jerry and Leann Carver Family Trust  
8940 E. Spurr Ln.  
9 Prescott Valley, AZ 86315

10 Justin Gardner and Kathy Welsh  
10791 N. Coyote Springs Rd.  
11 Prescott Valley, AZ 86315

12 Terri A. Carver  
P.O. Box 3499  
13 Los Altos, CA 94024

14 Richard and Regina Recano  
14090 E. Camino Pl.  
15 Fontana, CA 92337

16 Robert Lee and Patti Ann Stack  
Robert Lee and Patti Ann Stack Trust  
17 10375 Lawrence Ln.  
18 Prescott Valley, AZ 86315

19 Kathy A. Ware and Patricia Pursell  
Ware Family Living Trust  
20 1525 S. Verde Dr.  
Cottonwood, AZ 86326

21 Todd A. Swaim  
8500 E. Turtle Rock Rd.  
22 Prescott Valley, AZ 86315

23 Richard and Darlene Mauler  
9655 N. Coyote Springs Road  
24 Prescott Valley, AZ 86315

25 Jane L. Hesse  
4729 N. Sauter Dr.  
26 Prescott Valley, AZ 86314

27 Terry Lee Pettigrew  
6721 W. Villa St. #12  
28 Phoenix, AZ 85043

1 Nancy A. Painter Family Trust  
Nancy A. Painter  
2 1022 N. Cloud Cliff Pass  
Prescott Valley, AZ 86314  
3

4 James D. Borel MD LTD Restated PRFT Plan  
P.O. Box 9870  
5 Phoenix, AZ 85068

6 Masumi Gavinski  
P.O. Box 27377  
7 Prescott Valley, AZ 86314

8 Jesus and Inez Valdez  
Valdez Trust  
9 2410 E. Whitton  
Phoenix, AZ 85016

10 Wiley and Kathleen Williams  
11 9575 E. Turtle Rock  
Prescott Valley, AZ 86315

12 Glenn and Gina Higa  
13 9350 E. Mountain View Rd.  
Prescott Valley, AZ 86315

14 Gilstrap Family Trust  
15 Ladonna J. Leppert  
6361 Mann Ave.  
16 Mira Loma, CA 91752

17 Richard and Beverly Strissel  
9350 E. Slash Arrow Dr.  
18 Prescott Valley, AZ 86314

19 Michael and Julie Davis  
9147 E. Morning Star Ranch Road  
20 Prescott Valley, AZ 86315

21 Edward R. and Anna E. Fleetwood Family Trust  
4838 E. Calle Redonda  
22 Phoenix, AZ 85018

23 John and Paula Warren  
9180 E. Pronghorn Lane  
24 Prescott Valley, AZ 86315

25 1999 Winter Family Trust  
26 10830 E. Oak Creek Trail  
Cornville, AZ 86325

27 Steven and Becky Ducharme  
28 9410 Slash Arrow  
Prescott Valley, AZ 86315

1 Charles and Billie Hutchison  
2 5737 N. 40th Lane  
3 Phoenix, AZ 85019

4 Gerald and Laurel Osher  
5 9015 E. Mummy View Dr.  
6 Prescott Valley, AZ 86315

7 Wiechens Living Trust  
8 2501 S. Avenue 44 E  
9 Roll, AZ 85347

10 Grass Family Trust  
11 1640 W. Acoma Drive  
12 Phoenix, AZ 85023

13 Bolen Trust  
14 9525 Mummy View Dr.  
15 Prescott Valley, AZ 86314

16 Linda J. Hahn Revocable Living Trust  
17 10367 W. Mohawk Lane  
18 Peoria, AZ 85382

19 William R. and Judith K. Stegeman Trust  
20 9200 E. Far Away Place  
21 Prescott Valley, AZ 86315

22 Travis Clinton Black  
23 9148 E. Mummy View Drive  
24 Prescott Valley, AZ 86315

25 Edward A. and Jane M. Toasperm  
26 Brent E. and D A Schoeneck Trust  
27 2526 E. Huntington Dr.  
28 Tempe, AZ 85282

Plan B Holdings, L.L.C.  
340 W. Willis St. #2  
Prescott, AZ 86301

Bradley T. Copper  
1401 E. Westcott  
Phoenix, AZ 85024

Robert Taylor  
10555 N. Orion Way  
Prescott Valley, AZ 86315

Robert and Heather Gardiner  
9690 Plum Creek Way  
Prescott Valley, AZ 86315

1 Eric Cleveland Trust  
9605 E. Disway  
2 Prescott Valley, AZ 86315

3 Donald D. Chase  
3125 Duke Drive  
4 Prescott, AZ 86301

5 Linda Annette Gravatt  
9612 E. Mummy View Dr.  
6 Prescott Valley, AZ 86315

7 David and Michelle Krause Revocable Trust  
3824 Topeka Dr.  
8 Glendale, AZ 85308

9 Madelein C. Alston Trust  
10 9270 E. Turtle Rock Road  
Prescott Valley, AZ 86315

11 Leo and Marilyn Murphy  
12 9366 E. Turtle Rock Road  
Prescott Valley, AZ 86315

13 Ross and Kara Rozendaal  
14 9336 E. Turtle Rock Road  
Prescott Valley, AZ 86315

15 James and Kathryn McCormack  
16 11780 N. Dusty Rd.  
Prescott Valley, AZ 86315

17 Leslie J. Laird  
18 11795 North Hawthorne Lane  
Prescott Valley, AZ 86315

19 Koller Family Revocable Trust  
20 P.O. Bo 27191  
Prescott Valley, AZ 86312

21 Fannie Mae  
22 14523 SW Millikan Way #200  
23 Beaverton, OR 97005

24 1981 Bolin Trust  
9525 E. Mummy View Drive  
25 Prescott Valley, AZ 86315

26 Mantione Family Living Trust  
7761 E. Day Break Circle  
27 Prescott Valley, AZ 86315

28

- 1 Francis H. Jr. and Patricia A. Smith  
11605 N. Hawthorne Lane  
2 Prescott Valley, AZ 86315
- 3 Robert and Gladys Tarr  
11550 N. Dusty Road  
4 Prescott Valley, AZ 86314
- 5 Wayne and Jeanette Doerksen  
10610 N. Wits End  
6 Prescott Valley, AZ 86315
- 7 Spurr Holding L.L.C.  
14153 Grand Island Rd.  
8 Walnut Grove, CA 95690
- 9 Jerry and Paulette Getz  
10 P.O. Box 25567  
Prescott Valley, AZ 86312
- 11 Gary W. Cordes  
12 8370 E. Spurr Ln.  
Prescott Valley, AZ 86315
- 13 Holly Lucero  
14 aka Holly Denise Bowers  
1426 S. Rita Lane  
15 Tempe, AZ 85281
- 16 Harold and Diana Muckelroy  
6650 E. Sunset Lane  
17 Prescott Valley, AZ 86314
- 18 HVS LLC  
3287 E. Raven Ct.  
19 Chandler, AZ 85286
- 20 John Mitchell and Troy Stoll  
P.O. Box 249  
21 Fort Bridger, WY 82933
- 22 Michael Zager and Susan Bette-Zager  
9397 Mountain View Road  
23 Prescott Valley, AZ 86315
- 24 Karen Messenlehner  
25 3650 N. Zircon Drive  
Prescott Valley, AZ 86314
- 26 Michael Furness  
27 9990 E. Turtle Rock Road  
Prescott Valley, AZ 86315
- 28

1 Aaron and Kathleen Cormier  
2 9860 E. Turtle Rock Road  
3 Prescott Valley, AZ 86315

4 Dennis J. Booth  
5 9425 E. Mummy View Drive  
6 Prescott Valley, AZ 86315

7 William E. Probst  
8 9440 E. Far Away Place  
9 Prescott Valley, AZ 86315

10 Kathryn M. Pyles  
11 P.O. Box 56  
12 Humboldt, AZ 86329

13 Timothy and Virginia Kilduff  
14 9315 E. Spurr Lane  
15 Prescott Valley, AZ 86315

16 Kenneth and Sharon Petrone  
17 3267 WW Avenue  
18 Wellman, IA 52356

19 John D. Rutledge and Elaine Gordon  
20 9425 E. Spurr Lane  
21 Prescott Valley, AZ 86315

22 Daniel C. Mussey  
23 7777 E. Main St. #355  
24 Scottsdale, AZ 85251

25 Michael and Lisa Faircloth  
26 9100 E. Lonesome Valley Rd.  
27 Prescott Valley, AZ 86315

28 Michael and Julie Davis  
9147 E. Morning Star Ranch Road  
Prescott Valley, AZ 86315

Ann and Noel Fidel  
1010 W. Monte Vista Road  
Phoenix, AZ 85007

Dick Living Trust  
9955 E. Disway  
Prescott Valley, AZ 86315

Ronald J. Smith  
9180 E. Spurr Ln.  
Prescott Valley, AZ 86315

28

- 1 Gary and Sabra Feddema  
9601 E. Far Away Place  
2 Prescott Valley, AZ 86315
- 3 David L. and Lisa P. Bradley  
9450 E. Spurr Ln.  
4 Prescott Valley AZ 86315
- 5 David and Lori Rentschler Revocable Living Trust  
9251 E. Far Away Place  
6 Prescott Valley, AZ 86314
- 7 Madelein C. Alston and Nicholas Faulstick  
8 Madelein C. Alston Trust  
9270 E. Turtle Rock Road  
9 Prescott Valley, AZ 86314
- 10 Angel and Lillian Aguilera  
9220 E. Turtle Rock Road  
11 Prescott Valley, AZ 86315
- 12 Joyce E. Ridgway  
4060 Salt Creek Road  
13 Templeton, CA 93456
- 14 Robert L. Weaver and Diana K. Garcia  
P.O. Box 25717  
15 Prescott Valley, AZ 86312
- 16 James and Jennifer Woods  
4554 N. Grafton Drive  
17 Prescott Valley, AZ 86314
- 18 George and Romala Heady  
705 W. Happy Valley Road  
19 Phoenix, AZ 85085
- 20 Warren Don Oster  
3401 W. Mauna Loa Lane  
21 Phoenix, AZ 85053
- 22 Todd and Barbara Bloomfield  
9010 E. Plum Creek Way  
23 Prescott Valley, AZ 86315
- 24 Launders Family Trust  
9295 E. Spurr Lane  
25 Prescott Valley, AZ 86315
- 26 Michaelis Family Trust  
6930 Parsons Trail  
27 Tujuga, CA 91042
- 28

- 1 Dave Slate  
9910 E. Spurr Lane  
2 Prescott Valley, AZ 86315
- 3 Donn and Valerie Jahnke  
9950 E. Spurr Lane  
4 Prescott Valley, AZ 86315
- 5 Patricia A. Hennis  
9825 E. Mummy View Dr.  
6 Prescott Valley, AZ 86315
- 7 Regina A. Anglin  
508 W. Villa Rita Dr.  
8 Phoenix, AZ 85023
- 9 William and Shaunla Heckethorn  
10 9715 E. Far Away Place  
Prescott Valley, AZ 86315
- 11 Rynda and Jimmy Hoffman  
12 9650 E. Spurr Lane  
Prescott Valley, AZ 86315
- 13 John and Rebecca Feddema  
14 9550 E. Spurr Lane  
Prescott Valley, AZ 86315
- 15 Daniel and Cynthia Warta  
16 9125 E. Pronghorn Lane  
Prescott Valley, AZ 86315
- 17 Kenneth and Jacquelyn Kimsey  
18 537 N. Hassayampa Drive  
Prescott, AZ 86303
- 19 James R. Griset  
20 444 Old Newport Blvd. #A  
Newport Beach, CA 92663
- 21 Kathleen Marie Wargo  
22 5801 Woodlawn Gable Dr. #D  
Alexandria, VA 22309
- 23 Michael and Karen Wargo  
24 9200 E. Spurr Lane  
25 Prescott Valley, AZ 86315
- 26 Arvid and Donna Severson  
27 9920 E. Far Away Place  
Prescott Valley, AZ 86315
- 28

1 Leon F. Cardini  
275 S. 4th Street  
2 Camp Verde, AZ 86322

3 Nancy L. Reed and Kimberly Hodges  
9825 E. Mummy View Dr.  
4 Prescott Valley, AZ, 86315

5 Debra A. Krakower  
13941 E. Vista Verde Drive  
6 Chandler, AZ 85249

7 Michael R. & Lynda K. Vyne  
12864 N. 65th Pl.  
8 Scottsdale, AZ 85254

9 James Leroy & Velia Lupe Wafflard  
19711 W. Encanto Blvd.  
10 Buckeye, AZ 85326

11 James A. & Linda D.  
Kirk Family Trust  
12 105 2nd St.  
13 Buckeye, AZ 85326

14 Yavapai Title Co.  
Dennis J. Huber Living Trust  
15 721 W. Summit Pl.  
16 Chandler, AZ 85225

17 John C. Kennedy  
8577 E. Saddlehorn Trl.  
18 Prescott Valley, AZ 86315

19 James D. & Cheryl J. Nardo  
11410 N. Coyote Springs Rd.  
20 Prescott Valley, AZ 86315

21 Carl G. Pisarik  
8610 E. Mummy View Dr.  
22 Prescott Valley, AZ 86314

23 Kaaren L. Trone  
8690 Mummy View Dr.  
24 Prescott Valley, AZ 86314

25 Furbee Family Trust  
William W. & Linda Furbee  
26 3019 Amity Rd.  
Percy, AR 71964

27 Steven Lee Grahlmann  
28 P.O. Box 25271  
Prescott Valley, AZ 86312

1 Carl Hendrickson Living Trust  
2 Carl Hendrickson  
3 1112 Woburn Green  
4 Bloomfield Hills, MI 48302

5 Elvera M. Barycki  
6 2828 Monogram Ave.  
7 Long Beach, CA 90815

8 Timothy L. Konkol  
9 8685 E. Mummy View Dr.  
10 Prescott Valley, AZ 86315

11 Patrick & Ann Bresett  
12 25313 W. Pueblo Ave.  
13 Buckeye, AZ 85326

14 Todd D. Steven  
15 8575 Mummy View Dr.  
16 Prescott Valley, AZ 86315

17 David J. & Susan M. Waters  
18 9111 Alicia Dawn Dr.  
19 Rogers, AR 72758

20 Howard and Elaine Boucher  
21 P.O. Box 27845  
22 Prescott Valley, AZ 86312

23 Roberta Hartmann  
24 8555 E. Plum Creek Way  
25 Prescott Valley, AZ 86315

26 Timothy Jon Miller  
27 10125 N. Orion Way  
28 Prescott Valley, AZ 86315

Paul M. Shifrin Trust  
Paul M. Shifrin  
2040 E. Camero Ave.  
Las Vegas, NV 89123

Jose A. & Gloria G. Garza  
9200 E. Lonesome Valley Rd.  
Prescott Valley, AZ 86315

Mark S. Phillips  
8480 N. Coyote Springs Rd.  
Prescott Valley, AZ 86315

Scott & Audrey Hovelsrud  
9085 E. Mountain View Rd.  
Prescott Valley, AZ 86315

1 Jesus & Beatriz Martinez  
9150 E. Slash Arrow Dr.  
2 Prescott Valley, AZ 86315

3 Pauline Matheson Trust  
Pauline Matheson  
4 4755 E. Main St.  
5 Mesa, AZ 85205

6 Christopher Mattson  
7515 N. Coyote Springs Rd.  
7 Prescott Valley, AZ 86315

8 Prescott Valley Growers, L.L.C.  
6750 N. Viewpoint Dr.  
9 Prescott Valley, AZ 86314

10 William H. "Bill" Jensen  
2428 West Coronado Avenue  
11 Flagstaff, AZ 86001

12 Lloyd E. and Melva J. Self  
9250 E. Slash Arrow Drive  
13 Prescott Valley, AZ 86315

14 James C. and Leslie M. Richie  
9800 Plum Creek Way  
15 Prescott Valley, AZ 86315

16 John D. and Dusti Audsley  
6459 E. Clifton Terrace  
17 Prescott Valley, AZ 86314

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By   
David K. Wilhelmsen