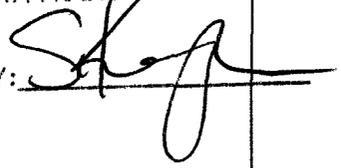


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9 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA  
10 IN AND FOR THE COUNTY OF YAVAPAI

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

17 Plaintiffs,

18 vs.

19 DONALD COX and CATHERINE COX,  
20 husband and wife,

21 Defendants.

CASE NO. P1300CV20030399

**REPLY IN SUPPORT OF  
NOTICE OF LODGING  
SEPARATE JUDGMENT FOR  
ATTORNEYS' FEES AND  
COSTS IN FAVOR OF  
PLAINTIFFS**

22 In its April 7, 2015 Ruling, this Court said:

23 **IT IS FURTHER ORDERED Plaintiff's revised Final Judgment is approved and  
24 signed by the Court on the date set forth below.**

25 Plaintiff's revised Final Judgment was filed with this Court on August 19, 2013 and is  
attached as Exhibit 1 (omitting the certificate of mailing, pages 14-34). On August 26, 2014

Judge Jones stayed a decision of the Form of Judgment stating:

///

///



1 COPY of the foregoing  
2 mailed this 12 day of  
3 May, 2015 to:

4 Jeffrey R. Adams  
5 THE ADAMS LAW FIRM PLLC  
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8 Prescott, AZ 86302  
9 Attorney for Defendants listed in Answer to  
10 First Amended Complaint by Joined Property Owner Defendants  
11 Dated September 22, 2010

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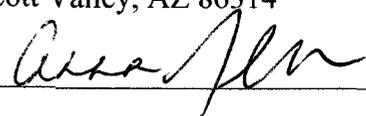
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10 **SUPERIOR COURT OF ARIZONA**  
11 **YAVAPAI COUNTY**

12 JOHN B. CUNDIFF and BARBARA C.  
13 CUNDIFF, husband and wife; ELIZABETH  
14 NASH, a married woman dealing with her  
15 separate properly; KENNETH PAGE and  
16 KATHRYN PAGE, as Trustee of the  
17 Kenneth Page and Catherine Page Trust,

18 Plaintiffs,

19 v.

20 DONALD COX and CATHERINE COX,  
21 husband and wife, et al., et ux.,

22 Defendants.

Case No. CV 2003-0399

Division 4

(Assigned to Hon. Kenton Jones)

**JAMES VARILEK'S REPLY TO  
RESPONSE AND OBJECTION TO  
PLAINTIFFS' REQUESTS FOR  
AWARD OF ATTORNEYS' FEES**

23 In replying to Defendants' self-described "monumental" *Response and Objection*,  
24 aligned Plaintiff property owner James Varilek ("Varilek") does not feel the need to  
25 burden the Court with a similarly monumental effort of his own. Defendants are  
26 understandably irritated that the last two of their affirmative defenses have turned into  
27 pumpkins and that Plaintiffs' and Varilek's victory is now complete; the *Response and*  
28 *Objection* reflects their anger as well as their desperation to avoid paying the attorney fees  
that they have caused Plaintiffs and Varilek to incur. Varilek simply urges the Court to  
keep in mind a few indisputable truths that effectively eviscerate everything Defendants  
have to say. Before addressing those truths, however, Varilek first wishes to clarify a few  
points specifically regarding his application for attorney fees:

1           **Varilek is responsible for the payment of his attorney fees.** The portion of the  
2 *Response and Objection* in which Defendants contend that non-party Alfie Ware is  
3 underwriting Plaintiffs' legal fees has no application to Varilek. Varilek is responsible for  
4 paying his own attorney fees pursuant to a written fee agreement, and there has been no  
5 discussion of Mr. Ware paying or reimbursing any of the attorney fees incurred by  
6 Varilek.

7           **Varilek seeks an award of his attorney fees only as against Defendants Cox.**  
8 Varilek seeks an award of attorney fees only as against Defendants Cox and not against  
9 the other Defendants who have simply ridden the Coxes' coattails. This is made clear in  
10 the form of *Final Judgment* that Plaintiffs and Varilek have lodged with the Court, in  
11 which attorney fees would be awarded only as against the Coxes. It was the Coxes'  
12 violation of the Declaration of Restrictions that precipitated this litigation, and it was the  
13 Coxes' persistence in their misguided affirmative defenses of waiver and abandonment  
14 that caused this litigation to drag on for many more years than it should have. The other  
15 Defendants have either taken no active role or merely joined in the Coxes' filings and  
16 have not caused Varilek to incur additional attorney fees. Varilek thus believes it would  
17 be unfair for an award of his attorney fees to be entered against any of the Defendants  
18 other than the Coxes.

19           **Varilek's agreement to dismiss his complaint against Veres in No.**  
20 **P1300CV20090822 included no promise to refrain from participating in No.**  
21 **P1300CV20030399.** Illustrative of Defendants' desperation and the depths to which they  
22 will sink is the absurd statement at pages 40-41 of the *Response and Objection*, "After the  
23 *Varilek v. Veres* case [No. P1300CV20090822] was consolidated with this case [No.  
24 P1300CV20030399], they stipulated to dismissal with each party to bear their own  
25 attorneys' fees, costs and expenses. In doing so, we believe that Varilek essentially agreed  
26 to take a back-seat position in this case to allow the Court to render a final decision and  
27 with both to be subject to that decision."  
28

1           The *Stipulation to Dismiss Without Prejudice* in No. P1300CV20090822 was filed  
2 on February 27, 2013, and the Court's order of dismissal was entered on March 6, 2013 –  
3 some two months *after* Varilek had filed his joinder in Plaintiffs' *Motion for Summary*  
4 *Judgment* in No. P1300CV20030399 (and a month *after* Veres himself had filed his  
5 response and controverting statement of facts)! Defendants did not have and could not  
6 have had any understanding that Varilek would "take a back-seat position" in this  
7 litigation, nor did Varilek "essentially agree" to anything of the kind, and Defendants'  
8 suggestion that he should be denied an award of attorney fees on this basis serves only to  
9 illustrate their desperation and the depths to which they will sink.

10           Varilek did not "consistently [take] the position that he was not properly  
11 joined as a party to the litigation." A further illustration of Defendants' desperation is  
12 provided by their argument at page 35 of the *Response and Objection* that Varilek cannot  
13 be a "successful party" within the meaning of A.R.S. § 12-341.01(A) because he  
14 "consistently took the position that he was not a party to the litigation." Defendants  
15 provide no examples of Varilek "consistently taking" such a position because *there are*  
16 *none*. The issue as to whether joinder had been properly accomplished was first raised by  
17 Varilek in his *Motion to Require Defendants Cox to Serve the Indispensable Parties with*  
18 *Documents Comporting with Due Process*, which was filed on April 8, 2013 – some three  
19 months *after* Varilek had joined in Plaintiffs' *Motion for Summary Judgment*.<sup>1</sup>

20           Judge Mackey's *Notice* of June 15, 2010 that was served on the indispensable  
21 parties notified them that the Court would determine from the nature of their responses  
22 whether they should be aligned with the Plaintiffs or the Defendants. Varilek was  
23 subsequently aligned with Plaintiffs and thereafter consistently took an active role in  
24 supporting Plaintiffs' positions without the faintest suggestion that he "was not a party to  
25 the litigation." He believes that his filings in support of Plaintiffs' *Motion for Summary*

26 <sup>1</sup> Varilek, through his counsel, had previously expressed concern as to whether the service on  
27 the indispensable parties comported with due process, but his motion was the first formal  
28 expression of this concern – and he certainly never took the position that he was not a party to  
the litigation.

1 *Judgment* were instrumental in the Court's decision to grant the motion. Varilek is clearly  
2 a "successful party" within the meaning of § 12-341.01(A), and Defendants' suggestion to  
3 the contrary serves only to illustrate their desperation.

4 In short, Varilek is a successful party within the meaning of § 12-341.01(A)  
5 because he participated actively in this litigation in support of Plaintiffs and contributed  
6 significantly to their victory on their *Motion for Summary Judgment*. The determination  
7 of successful parties is within the discretion of the Court, is reviewable only for an abuse  
8 of discretion, and will be upheld if there is any reasonable basis to support it. *Maleki v.*  
9 *Desert Palms Professional Properties, LLC*, 222 Ariz. 327, 334, 214 P.3d 415, 422 (App.  
10 2009).

11 Varilek will now turn to the indisputable truths that eviscerate Defendants'  
12 *Response and Objection*:

13 **Plaintiffs and Varilek have been as "successful" as they possibly could have**  
14 **been.** In the *Response and Objection*, Defendants spend an inordinate amount of time on  
15 bizarre arguments to the effect that Plaintiffs and Varilek have not really been all that  
16 successful. In fact, Plaintiffs have prevailed on precisely what they sought to establish by  
17 the filing of their *First Amended Complaint* – *i.e.*, that the Declaration of Restrictions of  
18 Coyote Springs Ranch is enforceable against the Coxes and that the Coxes' use of their  
19 property for a tree farm violates the Declaration. In so doing, Plaintiffs and Varilek have  
20 prevailed against every affirmative defense asserted by the Coxes – estoppel, laches,  
21 unclean hands, waiver and abandonment. When Defendants state at pages 2-3 of the  
22 *Response and Objection* that "Plaintiffs' fee request does not 'demonstrate a thoughtful  
23 and deliberate review of client billings to expunge excessive or duplicative time and to  
24 eliminate work related to issues or claims on which they did not prevail' as is required,"  
25 the short answer is: *There were no issues or claims on which Plaintiffs and Varilek did*  
26 *not prevail.*

27 Defendants seemingly have some odd notion that 10+ years of litigation must be  
28 scrutinized for purposes of § 12-341.01(A) on a motion-by-motion and minute entry-by-

1 minute entry basis, with every minor ruling in their favor being a “non-success” by  
2 Plaintiffs and thus excludable from the award of attorney fees. This is why, in  
3 Defendants’ minds, the preparation of the *Response and Objection* required them to  
4 “revisit virtually every event that occurred in the case over that time period and to review  
5 each and every motion, disclosure statement, discovery request and response, minute  
6 entry and ruling” (*Response and Objection* at pages 2-3).

7 This is simply not the law, and Defendants simply wasted their time in conducting  
8 their microscopic review. The seminal *China Doll* decision makes this clear:

9 [A] plaintiff (or appellant) may present *distinctly*  
10 *different claims for relief that are based on different facts and*  
11 *legal theories.* Where claims could have been *litigated*  
12 *separately*, fees should not be awarded for these unsuccessful  
13 separate and distinct claims which are unrelated to the claim on  
14 which the plaintiff prevailed.

15 On the other hand, one claim for relief may involve  
16 related legal theories. ... *Thus, where a party has*  
17 *accomplished the result sought in the litigation, fees should be*  
18 *awarded for time spent even on unsuccessful legal theories.*

19 *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 189, 673 P.2d 927, 933 (App.  
20 1983) (emphasis added).

21 A *multitude* of subsequent Arizona decisions recognize the distinction that  
22 Defendants ignore, between a lack of success on distinct claims or issues that could have  
23 been separately litigated and a lack of success on routine rulings during the course of  
24 litigation in which success is ultimately achieved. *See, e.g., Orfaly v. Tucson Symphony*  
25 *Soc.*, 209 Ariz. 260, 266, 99 P.3d 1030, 1036 (App. 2004). Here, Plaintiffs and Varilek  
26 prevailed on *every* claim and against *every* affirmative defense. There is *nothing* on  
27 which Defendants prevailed that could have been separately litigated. Whatever  
28 “victories” Defendants achieved were favorable interlocutory rulings that did not affect in  
the slightest the *complete* success that Plaintiffs and Varilek ultimately achieved.

In the same vein, Defendants argue at page 36 of their *Response and Objection* that  
“up until this Court's grant of summary judgment on Plaintiffs' December 28, 2012,

1 *Motion for Summary Judgment*, the sheer majority of decisions in this case were in favor  
2 of Defendants.” (Defendants’ argument here is weirdly similar to their misguided  
3 “violation counting” approach to abandonment, whereby they sought to establish an  
4 abandonment by pointing to scores of inconsequential violations of the Declaration of  
5 Restrictions while ignoring that abandonment requires violations so massive and  
6 pervasive as to alter the fundamental character of the development.) In light of Plaintiffs’  
7 and Varilek’s complete victory as described above, this statement would be irrelevant  
8 even if it were true – but it is *patently untrue*:

- 9 • Plaintiffs were awarded summary judgment in 2005 on the Coxes’ affirmative  
10 defenses of estoppel, laches and unclean hands. This award was affirmed by the  
11 Court of Appeals in its *Memorandum Decision* in No. 1 CA-CV 06-0165.
- 12 • The Coxes were *incorrectly* awarded summary judgment in 2005 on Plaintiffs’  
13 claim that the Coxes’ tree farm violated the Declaration of Restrictions. This  
14 award was reversed by the Court of Appeals in its *Memorandum Decision*, the  
15 court finding that the tree farm violated the Declaration as a matter of law.
- 16 • The Court of Appeals’ decision left the Coxes’ affirmative defenses of waiver  
17 and abandonment as the only substantive matters to be decided, and Plaintiffs  
18 and Varilek prevailed on those when their *Motion for Summary Judgment* was  
19 granted.
- 20 • The only matter of significance on which the Coxes’ can claim a victory of sorts  
21 is the Court of Appeals’ reversal of this Court’s denial of their *Motion to Join*  
22 *Indispensable Parties*. But as is explained below, the joinder of indispensable  
23 parties was necessitated *solely* by the Coxes’ *own* abandonment defense, so this  
24 can scarcely be claimed as a victory over Plaintiffs.

1 The reality is, Plaintiffs' and Varilek's victory in this case has been *complete*, and  
2 Defendants cannot make any argument to the contrary that will pass the "straight face  
3 test."<sup>2</sup>

4 **Defendants' arguments concerning joinder are red herrings.** Despite what  
5 Defendants persist in saying, the joinder of the other property owners in Coyote Springs  
6 Ranch was necessitated *solely* by the Coxes' abandonment defense. This was clearly  
7 recognized by the Court of Appeals, but Defendants in the *Response and Objection* once  
8 again stubbornly refuse to acknowledge this reality.

9 Plaintiffs' *First Amended Complaint* was against the Coxes for violations of the  
10 Declaration of Restrictions. The declaratory judgment that Plaintiffs sought was in this  
11 narrow context – *i.e.*, they sought a judgment that the Declaration of Restrictions  
12 remained enforceable against the Coxes for purposes of establishing the alleged  
13 violations. As the Court of Appeals recognized, a declaratory judgment that the  
14 Declaration remained enforceable against the Coxes would have had no binding effect on  
15 anyone except the Coxes: "Because none of the absent property owners is a party to this  
16 action, the doctrines of *res judicata* and collateral estoppel could not be employed to limit  
17 their claims or defenses in a subsequent case." *Mem. Op.* at 19, ¶ 32.

18  
19  
20 <sup>2</sup> In perhaps their ultimate act of grasping at straws, Defendants state at page 38 of the *Response*  
21 *and Objection* that "the claims or breach of contract that relate to paragraphs 7e and 15 of the  
22 Declaration have never been litigated." Hence, they say, "This case is not yet finished and  
23 Plaintiffs have not prevailed on all of the relief sought." The alleged violations of paragraphs  
24 7e (prohibiting structures other than residential ones) and 15 (prohibiting outside toilets) are  
25 trivial and ancillary to the core allegation that the Coxes' tree farm violates paragraph 2.  
26 Waiting until litigation has dragged on for 10+ years, a form of *Final Judgment* has been  
27 lodged with the Court, and an application for attorney fees is pending is surely "just a bit" too  
28 long to wait before attempting to inject an issue such as this. Moreover, Varilek feels certain  
that, should the Court deem it necessary in order to conclude this litigation, Plaintiffs would  
amend the *First Amended Complaint* to eliminate the allegations concerning paragraphs 7e and  
15. The key point is that, even if Defendants could manage to prolong this litigation for  
another ten years with endless wrangling over paragraphs 7e and 15, and even in the unlikely  
event they should prevail in regard to those alleged trivial violations, this could not alter the  
fact that Plaintiffs are the successful parties for purposes of § 12-341.01(A).

1 In contrast, the Coxes' affirmative defense of abandonment required a  
2 determination that wholesale violations of the Declaration had been ignored to such an  
3 extent that the character of *the entire development* had changed. In other words, it  
4 required a determination that *all* of the restrictions had been violated *throughout the*  
5 *development* to such an extent that *none* of them should be enforced *anywhere in Coyote*  
6 *Springs Ranch*.

7 Here is what the Court of Appeals actually said about abandonment and why it  
8 required joinder:

9 The Coxes argue, as they did below, that all owners of property  
10 subject to the Declaration must be joined as parties to this lawsuit  
11 because an issue in the case is whether the Declaration *has been*  
*abandoned*.

12 . . .  
13 A ruling in this case that the restrictions *have been abandoned*  
14 and are no longer enforceable against the Coxes' property would  
15 affect the property rights of all other owners subject to the  
16 Declaration.

17 [A North Carolina case held that] all property owners subject to  
18 the restrictions at issue in that case were necessary parties in the  
19 plaintiffs' suit to enforce the restrictions because the defendant had  
20 asserted a change-of-circumstances defense. . . . *That defense is,*  
21 *essentially, the abandonment defense the Coxes assert here.*

22 . . .  
23 However, even if a ruling *in favor of the Coxes on their*  
24 *affirmative defense of abandonment* were to apply only to the Coxes'  
25 property, all property owners' rights would still be affected simply by  
26 the Coxes' continued use of their property, or by any future use  
27 adverse to the restrictions. . . .

28 We conclude that the absent property owners are necessary  
parties *given the issue to be decided in this case [i.e., whether the*  
Declaration has been abandoned].

*Mem. Op.* at 17-21, ¶¶ 30-36 (emphasis added).

For Defendants to keep suggesting that Plaintiffs' *First Amended Compliant*  
precipitated the need for joinder flies in the face of logic and the Court of Appeals'  
decision. Nevertheless, Defendants continue to make statements to this effect in the  
*Response and Objection*. At page 29, for example, they state, "More than eight years ago,

1 Defendants recognized that a decision in this case would affect each and every one of the  
2 Absent Owners *as a result of Plaintiffs' pursuit of a declaration from the Court that the*  
3 *Declaration of Restrictions was fully enforceable* and Defendants' assertion that the  
4 Declaration of Restrictions was abandoned [emphasis added].”

5 Building on this misstatement, which is flatly contrary to what the Court of Appeals  
6 determined, Defendants then argue that this Court was precluded from ruling on  
7 Plaintiffs' and Varilek's *Motion for Summary Judgment* until all issues concerning joinder  
8 had been resolved: “Until the Court determines that all of the indispensable parties have  
9 properly been joined, the Court was proscribed from ruling on Plaintiffs' *Motion for*  
10 *Summary Judgment* and request for attorneys' fees.” This is simply incorrect. As Varilek  
11 pointed out in footnote 1 on page 2 of his *Motion to Require Defendants Cox to Serve the*  
12 *Indispensable Parties with Documents Comporting with Due Process*, “The filing of this  
13 motion should not affect the Court's ruling on Plaintiffs' pending *Motion for Summary*  
14 *Judgment* (in which Varilek has joined) concerning the Coxes' abandonment defense. If  
15 the *Motion for Summary Judgment* is granted, this motion will become moot because, as  
16 is explained herein, the Coxes' abandonment defense is the only aspect of this case that  
17 required the joinder of the absent owners as indispensable parties in the first place. If the  
18 *Motion for Summary Judgment* is denied, on the other hand, the Coxes' abandonment  
19 defense will remain alive and this motion will require a decision.” The correctness of this  
20 statement was tacitly acknowledged by the Court in its *Under Advisement Ruling* of June  
21 14, 2013, wherein it granted Plaintiffs' *Motion for Summary Judgment* and deemed  
22 Varilek's motion to be moot.

23 Defendants are flatly wrong when they state at page 16 of the *Response and*  
24 *Objection* that “the Court was affirmatively obligated to ensure that joinder was  
25 completed prior to rendering dispositive summary rulings. That is the case because, as  
26 recognized by the Court of Appeals, a ruling on the issue of abandonment will affect each  
27 of the Absent Owners in Coyote Springs Ranch.” Joinder was indeed completed, as Judge  
28 Mackey recognized when he accepted the *Notice of Compliance with June 17, 2010*

1 *Notice Re: Service of Property Owners* that Plaintiffs filed on April 18, 2011. Whether  
2 the joinder comported with due process, which was the subject of Varilek's motion,  
3 became a moot issue when the Court determined that no abandonment had occurred.  
4 Contrary to what Defendants state, the Court of Appeals recognized only that a ruling *in*  
5 *the Coxes' favor* on the issue of abandonment would affect the absent owners, and this  
6 Court properly recognized that a ruling *against the Coxes* on the issue of abandonment  
7 would render moot any issue as to whether joinder had been properly accomplished.<sup>3</sup>

8 **The Coxes are responsible for, and have profited from, this litigation dragging**  
9 **on for ten years.** The Coxes have been in no hurry to resolve this litigation because they  
10 have continued to operate their tree farm while it drags on. The handwriting was on the  
11 wall in 2007 when the Court of Appeals issued its *Memorandum Decision* finding that the  
12 Coxes' tree farm violated the Declaration of Restrictions as a matter of law, but the Coxes  
13 refused to see it. Rudimentary research into the Arizona case law would have informed  
14 the Coxes that their waiver defense was hopeless due to the ironclad non-waiver provision  
15 in the Declaration and that their abandonment defense would require a near-impossible  
16 showing that Coyote Springs Ranch was no longer a rural residential development. The  
17 statement at page 39 of the *Response and Objection* concerning a supposed change in the  
18 law during the pendency of this case ("While it may be true that the issues of enforcement  
19 of restrictive covenants is not new to the Arizona courts, it is also true that the law  
20 governing those issues changed during the pendency of this case when the *College Book*  
21 *Centers* decision was rendered by the Court of Appeals thereby changing the law in the  
22 midstream of this case") is absurd; the court in *College Book Centers* simply applied the  
23 standard that had been announced 56 years earlier in *Condos v. Home Development* (i.e.,  
24 that to constitute an abandonment, "the restrictions imposed upon the use of lots in a

25  
26 <sup>3</sup> Weirdly, at pages 31-32 of the *Response and Objection*, Defendants set forth a "relatively  
27 simple" seven-step procedure that, they now say, Plaintiffs should have followed in order to  
28 properly accomplish joinder. Of course, Defendants never suggested *any* of this to the Court  
or complained in the slightest about the procedure that Plaintiffs actually did follow, even  
though joinder was necessitated solely by the Coxes' abandonment defense.

1 subdivision [must] have been so thoroughly disregarded as to result in such a change in  
2 the area as to destroy the effectiveness of the restrictions, defeat the purposes for which  
3 they were imposed and consequently to amount to an abandonment thereof"). No, the  
4 Coxes simply failed to do their homework and to make a realistic assessment of their  
5 waiver and abandonment defenses.

6 It is near-comical for Defendants to suggest that the Coxes' affirmative defense of  
7 abandonment presented "novel" issues of law, that the joinder of indispensable parties  
8 (necessitated solely by the Coxes' abandonment defense) presented "extremely  
9 complicated" legal issues, and that Plaintiffs' suggestions to the contrary are "absolutely  
10 false." The reality is that the Coxes are single-handedly responsible for this litigation  
11 dragging on for 10+ years and for the attorney fees that Plaintiffs and Varilek have  
12 incurred. Indeed, 100% of Varilek's attorney fees relate directly to the Coxes' misguided  
13 waiver and abandonment defenses.

14 Equally comical and indicative of desperation is Defendants' suggestion that this  
15 litigation could have been over much sooner if Plaintiffs and Varilek had not waited so  
16 long to file their *Motion for Summary Judgment*: "Had Plaintiffs filed their December 28,  
17 2012, *Motion for Summary Judgment* much earlier in this case and long before the passing  
18 of ten years the fees incurred on behalf of Plaintiffs ... would not have been incurred."  
19 *Response and Objection* at 39. Defendants apparently believe that Plaintiffs and Varilek  
20 bear some responsibility for not pointing out much sooner that the affirmative defenses to  
21 which the Coxes were stubbornly clinging had no basis in fact or law! This would be a  
22 strange basis indeed for reducing a successful party's award of attorney fees pursuant to  
23 § 12-341.01(A).

24 While the *Response and Objection* may have been a "monumental" undertaking on  
25 the part of Defendants, it is filled with misstatements, untruths and obvious attempts to  
26 shift the Court's focus away from what really matters. *Nothing* that Defendants say in the  
27 *Response and Objection* can alter the reality that Plaintiffs and Varilek have achieved a  
28 complete victory, this litigation has dragged on for 10+ years only because the Coxes had

1 no real incentive to bring it to a conclusion and thus stubbornly clung to affirmative  
2 defenses having no hope of success, and all of the attorney fees incurred by Varilek  
3 flowed from the Coxes' abandonment defense and the joinder of indispensable parties that  
4 it necessitated.

5 An award of attorney fees pursuant to § 12-341.01(A) is within the discretion of the  
6 Court and is reviewable only for an abuse of discretion. *Maleki v. Desert Palms*  
7 *Professional Properties, LLC*, 222 Ariz. at 334, 214 P.3d at 422 (App. 2009). All of the  
8 factors identified in *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, 694 P.2d 1181  
9 (1985), and *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025  
10 (1985), point toward the conclusion that Varilek should be awarded the full amount of the  
11 attorney fees he has incurred:

- 12 • None of the Coxes' affirmative defenses was meritorious, and their key defenses  
13 bordered on frivolous.
- 14 • The Coxes showed *no* inclination to settle and, in fact, profited by dragging out  
15 this litigation for as long as they did.
- 16 • Because the Coxes could have brought this litigation to an end years ago but  
17 chose to cling to their waiver and abandonment defenses and to continue their  
18 operation of the tree farm, they are scarcely in a position to claim extreme  
19 hardship now.
- 20 • Plaintiffs and Varilek did indeed prevail with respect to all of the relief sought.
- 21 • Neither Plaintiffs' claims nor the Coxes' affirmative defenses presented any  
22 novel legal questions, and abundant Arizona case law should have told the  
23 Coxes that their waiver defense was hopeless and their abandonment defense  
24 virtually impossible to prove.
- 25 • There is no way that an award of attorney fees would have a chilling effect on  
26 future litigants with tenable claims or defenses; apart from the fact that the  
27 Coxes' have managed to drag it out for 10+ years, this is nothing more than a  
28

1 garden-variety "violation of restrictive covenants" case of the sort in which  
2 attorney fees are routinely granted.

3 For the foregoing reasons, Varilek respectfully requests that the Court award the  
4 full amount of his attorney fees as set forth in his *Motion for Award of Attorneys' Fees*  
5 (\$90,490.00), together with taxable costs of \$118 as set forth in his *Statement of Costs and*  
6 *Notice of Taxation.*

7 RESPECTFULLY SUBMITTED August 19, 2013.

8 FAVOUR & WILHELMSSEN, PLLC

9

10

By: 

11

David K. Wilhelmsen

12

Lance B. Payette

13

Attorneys for Property Owner James Varilek

14

Original and one copy of the  
foregoing *Reply* filed August 19,  
2013 with:

15

16

Clerk, Superior Court of Yavapai County  
120 S. Cortez Street  
Prescott, AZ 86302

17

18

Copy of the foregoing  
*Reply* hand-delivered  
August 19, 2013 to:

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21

The Honorable Kenton Jones  
Yavapai County Superior Court  
120 S. Cortez Street  
Prescott, AZ 86303

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8 Attorney for Plaintiffs

9 IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA  
10 IN AND FOR THE COUNTY OF YAVAPAI

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

17 Plaintiffs,

18 vs.

19 DONALD COX and CATHERINE COX,  
20 husband and wife,

21 Defendants.

CASE NO. P1300CV20030399

**SEPARATE JUDGMENT FOR  
ATTORNEYS' FEES AND  
COSTS IN FAVOR OF  
PLAINTIFFS**

22 The Court, by a Ruling entered on April 7, 2015, approved and signed Plaintiffs' revised  
23 Final Judgment lodged with the Court on August 21, 2013 and awarded Plaintiffs their  
24 reasonable attorneys' fees in the amount of \$258,986.52 pursuant to A.R.S. § 12-341.01(A) and  
25 taxable costs in the amount of \$4,117.74 pursuant to A.R.S. § 12-346 as against Defendants Cox.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs are awarded  
attorneys' fees in the amount of \$258,986.52 and costs in the amount of \$4,117.74, together with  
interest at the statutory rate of 4.25% from and after August 25, 2014 as against Donald Cox and  
Catherine Cox.

1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that, as provided in  
2 paragraph 13 of the *Final Judgment*, this *Separate Judgment for Attorneys' Fees and Costs in*  
3 *Favor of Plaintiffs* shall be binding upon Donald Cox and Catherine Cox and any heir, successor  
4 or assign of their interest in the real property described below, since the institution of this  
5 litigation in 2003, in whole or part:

6 All that portion of Section 25, Township 15 North, Range 1 West of  
7 the Gila and Salt River Base and Meridian, Yavapai County, Arizona,  
described as follows:

8 BEGINNING at the East quarter corner of Section 25 marked with a  
9 GLO brass cap monument;

10 Thence South 00 degrees, 04 minutes, 15 seconds East, 660.28 feet  
11 along the East line of Section 25 to a one half inch rebar and the  
TRUE POINT OF BEGINNING;

12 Thence South 00 degrees, 04 minutes, 15 seconds East, 660.28 feet to  
13 a one half inch rebar;

14 Thence North 89 degrees, 59 minutes, 02 seconds West, 1321.37 feet;

15 Thence North 00 degrees, 03 minutes, 08 seconds West, 660.32 feet;

16 Thence South 89 degrees, 58 minutes, 54 seconds East, 1321.15 feet  
17 to the TRUE POINT OF BEGINNING.

18 EXCEPT all oil, gas, coal and minerals as set forth in instrument  
recorded in Book 192 of Deeds, 415.

19 DONE IN OPEN COURT this \_\_\_\_\_ day of \_\_\_\_\_, 2015.  
20

21  
22 HON. JEFFREY G. PAUPORE  
23  
24  
25