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6 Attorneys for Defendant and Plaintiff Varilek

7 IN THE SUPERIOR COURT OF ARIZONA
8 COUNTY OF YAVAPAI

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

14 vs.

15 **DONALD COX** and **CATHERINE COX,**)
husband and wife,)
16 Defendants.)

17 _____)
18 **JAMES L. VARILEK**, Trustee, James L.)
Varilek Revocable Trust Dated November 16,)
19 1994,)

20 Plaintiff,

21 vs.

22 **ROBERT D. VERES**, an unmarried man,)
23 Defendant.)
24 _____)

Case No. P1300CV20030399

and

Case No. P1300CV20090822

**REQUEST FOR JUDICIAL
RE-ASSIGNMENT**

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

1 motion by counsel for Robert Veres and by order of Division 4, hereby requests that this Court re-
2 assign the case based upon Varilek's previous request under Rule 42(f) when his action was assigned
3 to this Court.

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

6 RESPECTFULLY SUBMITTED this 25th day of March, 2011.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 **I. STATEMENT OF CASE**

9 Varilek initiated an action against Veres seeking to enforce the restrictive covenants for
10 Coyote Springs, in particular the provision prohibiting the sub-division of lots to less than 9 acres.
11 The case was originally assigned to this Court, and Varilek exercised his right under Rule 42(f) for
12 a change of judge. *Varilek v. Veres, Notice of Change of Judge, July 27, 2009 (attached as Exhibit*
13 *1)*. The matter was then re-assigned to Judge Hinson, and upon his retirement, to Judge Jones. *Order*
14 *Reassigning Matter, July 29, 2009 (Exhibit 2)*. Upon Veres' motion to consolidate this action with
15 *Cundiff v. Cox*, which was granted by Judge Jones¹, Varilek's action is now again assigned to this
16 Court, (*Minute Entry, January 25, 2011 (Exhibit 3)*), despite Varilek's objection noting for Judge
17 Jones' benefit that he had previously exercised his peremptory challenge of assignment of the case
18 to the present Court. *Varilek's Response to Motion to Consolidate, January 8, 2010, at pp.4-6.*

19 **II. THIS COURT HAVING BEEN PROPERLY NOTICED UNDER RULE 42(f)**

20 **IS PRECLUDED FROM HEARING THE VARILEK CASE**

21 **NOW CONSOLIDATED WITH CUNDIFF v. COX**

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¹
24 Judge Jones initially granted Veres' motion to consolidate before the time had expired for
25 Varilek to file his response. *Minute Entry, December 23, 2009*. It is assumed that this order
26 granting consolidation was issued in error, as the Court had not yet had the benefit of being
fully briefed on the issue. Thus, this motion rests upon Judge Jones' later order to
consolidate issued January 25, 2011.

1 Rule 42(f) is a significant provision that affords litigants a peremptory challenge to the
2 assignment of their case to a judge without having to “involve themselves in an imbroglio which
3 might result in everlasting bitterness on the part of the judge and the lawyer.” *Anonymous v.*
4 *Superior Court In and For Pima County*, 14 Ariz. App. 502, 504, 484 P.2d 655 (1971).
5 Consequently, once a notice for change of judge has been timely filed, “the noticed judge ‘has no
6 jurisdiction to do more than order the cause transferred to another judge.’”² *Taliaferro v. Taliaferro*,
7 184 Ariz. 613, 616, 911 P.2d 619, 622 (App. 1995) quoting *Huck v. Haralambrie*, 122 Ariz. 63, 64,
8 593 P.2d 286, 287 (1979) (emphasis in original omitted); citing *Hordyk v. Farley*, 94 Ariz. 189, 382
9 P.2d 668 (1963); *Murray v. Thomas*, 80 Ariz. 378, 298 P.2d 795 (1956); (other internal citations
10 omitted); rev. granted, vacated on other grounds, 186 Ariz 221, 921 P.2d 21, on remand 188 Ariz.
11 333, 935 P.2d 911, rev. denied.

12 This case is distinct from the recent decision in *Huerta v. Nelson*, 222 Ariz. 44, 213 P.3d 193
13 (App. Div.1 2009), also involving consolidated actions. In that case, the trial court consolidated a
14 decedent’s heir’s civil action for conversion of probate assets with the probate action. The heir had
15 already exercised his peremptory challenge in the probate action prior to consolidation; and, when
16 his civil action was consolidated, he was thus prohibited from exercising a second peremptory
17 challenge on the grounds that he was aligned on the same “side” in the probate action. *Id.*, 222 Ariz.
18 at 46-47, 213 P.3d at 195-96.

19 The present case is critically different than the situation in *Huerta*. This case does not
20 involve a post-consolidation attempt to peremptorily notice this Court. Rather, this case concerns

21
22 ²

23 With the limited exception that the noticed judge may first determine the validity of the
24 notice. *Anderson v. Contes*, 212 Ariz. 122, 124 at fn.2, 128 P.3d 239, 241 (App. Div.1
25 2006) citing *Guberman v. Chatwin*, 19 Ariz.App. 590, 593, 509 P.2d 721, 724 (1973)
26 “(reasoning the noticed judge is best qualified to decide teimeliness and waiver issues under
Rule 42(f)).” Varilek timely filed his notice of peremptory challenge when his case was first
assigned to this division, and finding no infirmity in that notice, this Court forwarding the
file to the then presiding judge for re-assignment.

1 Varilek's pre-consolidation peremptory challenge. Regardless of how he is aligned in the
2 consolidated action, having already objected to this Court hearing his case, it would lead to the
3 inescapably anomalous result of this Court reversing its own prior order of re-assignment simply
4 because of a later unforeseen (and vigorously opposed) consolidation.

5 **III. CONCLUSION**

6 Varilek properly and timely filed his peremptory challenge under Rule 42(f) when his case
7 was initially assigned to this Court. Consolidation does not operate to vitiate that challenge.
8 Consequently, Varilek's pre-consolidation peremptory warrants this Court's re-assignment of the
9 consolidated action.

10 DATED this 25th day of March, 2011.

11
12 FAVOUR, MOORE & WILHELMSSEN, P.A.

13
14
15 By


David K. Wilhelmsen
Marguerite Kirk
Post Office Box 1391
Prescott, AZ 86302-1391
Attorneys for Plaintiffs

16
17
18 ORIGINAL of the foregoing
19 filed with the Clerk of the Superior
20 Court this 25th day of March, 2011

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

22 Honorable David L. Mackey Div. 1
23 Yavapai County Superior Court
24 Prescott, Arizona 86301

25 Honorable Kenton Jones Div. 4
26 Yavapai County Superior Court
Prescott, Arizona 86301

1 and copies mailed this same date to:

2 Jeff Adams
3 THE ADAMS LAW FIRM PLLC
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to First Amended Complaint by Joined
Property Owner Defendants
Filed October 5, 2010

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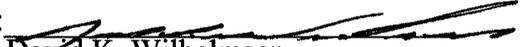
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By: 
David K. Wilhelmsen
Marguerite Kirk

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

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|--|--|---|
| <p>JAMES L. VARILEK, Trustee, James L. Varilek Revocable Trust Dated November 16, 1994,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">-vs-</p> <p>ROBERT D. VERES, an unmarried man</p> <p style="text-align: center;">Defendant.</p> | <p>Case No. CV2009-0822</p> <p>NOTICE RE: CHANGE OF JUDGE</p> | <p style="text-align: center;">FILED JUL 28 2009</p> <p>DATE: _____ <u>9</u> O'Clock <u>A</u> .M.</p> <p style="text-align: center;">JEANNE HICKS, CLERK</p> <p>BY: <u>SHEETA PATEL</u> Deputy</p> |
|--|--|---|

| | |
|--|---|
| <p>HONORABLE DAVID L. MACKEY</p> <p>DIVISION 1</p> | <p>BY: Cheryl Wagster Judicial Assistant</p> <p>DATE: July 27, 2009</p> |
|--|---|

Notice of Change of Judge having been filed by Plaintiff.

IT IS ORDERED assigning this matter to the Presiding Judge for reassignment.

IT IS FURTHER ORDERED vacating all previously set hearings in Division 1.

cc: David K. Wilhelmsen/Marguerite Kirk – Favour Moore & Wilhelmsen, P.O. Box 1391,
Prescott, AZ 86302
Mark W. Drutz/Sharon Sargent-Flack – Musgrove, Drutz & Kack, P.O. Box 2720,
Prescott, AZ 86302
Case Flow Manager (w/ file)

JUL 27 2009

AFTER 2 P.M.

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

| | | |
|--|--|---|
| <p>JAMES L. VARILEK, Trustee, James L. Varilek Revocable Trust Dated November 16, 1994, (Plaintiffs)</p> <p>vs.</p> <p>ROBERT D. VERES, an unmarried man, (Defendants)</p> | <p>Case No. CV2009-0822</p> <p>Order Reassigning Matter</p> | <p align="center">FILED</p> <p>DATE: <u> JUL 29 2009 </u> <u>8</u> O'Clock <u>A</u> M. ✓</p> <p align="center">JEANNE HICKS, CLERK</p> <p>BY: SHEETAL PATEL Deputy</p> |
|--|--|---|

| | |
|---|---|
| <p>HONORABLE ROBERT M. BRUTINEL</p> <p>DIVISION 2</p> | <p>BY: Diane LaBarbera, Caseflow Manager Office of the Court Administrator</p> <p>DATE: July 29, 2009</p> |
|---|---|

This matter having been assigned to the Presiding Judge for reassignment,

IT IS ORDERED assigning this matter to the Honorable Howard D. Hinson, Jr., Division 4 for all further proceedings. Any previously vacated hearings shall be set by the new division.

- cc: Honorable Howard D. Hinson, Jr., Division 4 - w/file
David K. Wilhelmsen/Marguerite Kirk - Favour, Moore & Wilhelmsen, P.O. Box 1391,
Prescott, AZ 86302
Mark W. Drutz/Sharon Sargent-Flack - Musgrove, Drutz & Kack, P.O. Box 2720, Prescott, AZ 86302

FOR OFFICE USE ONLY

Change Case Master _____

Change Label _____

Change Attorney _____

Change File Tracking _____

SUPERIOR COURT, STATE OF ARIZONA, IN AND FOR THE COUNTY OF YAVAPAI

| | | |
|--|--|--|
| <p>JAMES L. VARILEK, Trustee, James L. Varilek Revocable Trust Dated November 16, 1994,</p> <p>Plaintiff(s),</p> <p>vs.</p> <p>ROBERT D. VERES, an unmarried man,</p> <p>Defendant(s).</p> | <p>Case No. P1300CV20090822</p> <p>RULING</p> | <p>FILED</p> <p>DATE: JAN 25 2011</p> <p>2 O'Clock P. M.</p> <p>JEANNE HICKS, CLERK</p> <p>BY: SHEETAL PATEL Deputy</p> |
| <p>HONORABLE KENTON D. JONES</p> <p>DIVISION 4</p> | | <p>BY: Kathleen Cartier, Judicial Assistant</p> <p>DATE: January 24, 2011</p> |

THIS MATTER comes before the Court on Plaintiffs' Motion for Reconsideration of the Court's September 14, 2010, Ruling, with the Court allowing Defendant to Respond and the Court having reviewed both,

THE COURT finds, as it did in its prior Ruling, that this case is inextricably bound to *Cox v Cundiff*, as regards whether the Declaration of Restrictions remains enforceable or has been abandoned. The "Declaration of Restrictions" being challenged is that currently in place in the Coyote Springs Ranch Property. This Court had attempted to fashion its September 14, 2010, Ruling so as to allow the expeditious handling of this matter following a determination in *Cox v Cundiff* regarding the continued legitimacy of the Declaration of Restrictions. However, on Reconsideration of the Memorandum Decision of our Court of Appeals, it is clear that:

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

Page 19, Paragraph 32.

Further, the Court of Appeals stated:

"...[e]ven if a ruling in favor of the Coxes on their affirmative defense of abandonment were to apply only to the Coxes' property, all property owners rights would still be affected simply by the Coxes' continued use of their property, or by any future use adverse to the restrictions...."

Page 20, Paragraph 35.

While this Court incorrectly referred to Varilek and Veres as "indispensable parties" in regard to *Cox v Cundiff*, in its September 14, 2010, Ruling, as land owners within the Coyote Springs development, they are certainly "necessary" parties, as the Court of Appeals held:

James L. Varilek, Trustee v Robert D. Veres
P1300CV20090822
January 24, 2011

“...We conclude that the absent property owners are necessary parties given the issue to be decided in this case. Under the rule, necessary parties must be joined if they are ‘subject to service of process and. . .

[their joinder] will not deprive the court of jurisdiction over the subject matter of the action.’ Ariz. R. Civ. P. 19(a)...”

Page 21, Paragraph 36.

Being necessary parties to *Cox v Cundiff*, and as they are subject to service of process and their joinder will not deprive the court of jurisdiction over the subject matter of the action, the Parties in the instant action must be joined, and the Court can discern no basis to deny them the opportunity to appear in that action and defend their respective property interests within those proceedings. This Court’s earlier ruling would have held the immediate matter in abeyance until the ruling in that case was rendered and the claim of abandonment of the Declaration of Restrictions had been decided, but would have denied them the ability to defend their respective interests in those proceedings.

THEREFORE, the Motion for Reconsideration is **GRANTED**, and the Court hereby **REVERSES** its earlier Ruling and Defendant’s Motion to Consolidate Case Numbers P1300CV20030399 And P1300CV200090822 is **GRANTED**.

cc: David K. Wilhelmsen/Marguerite Kirk – Favour, Moore & Wilhelmsen, P.A.
Mark W. Drutz/Sharon Sargent-Flack – Musgrove, Drutz & Kack, P.C.