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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
2013 APR 25 PM 4:10 ✓
SANDRA K MARKHAM, CLERK
BY: T SENA

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

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

14 **Plaintiffs,**

15 **v.**

16 **DONALD COX and CATHERINE COX,**
17 **husband and wife, ET UX ET AL.,**

18 **Defendants,**

No. P1300CV20030399

Division 4

RESPONSE TO JAMES VARILEK'S
MOTION TO REQUIRE
DEFENDANTS COX TO SERVE THE
INDISPENSIBLE PARTIES WITH
DOCUMENTS COMPORTING WITH
DUE PROCESS
AND
MOTION TO DISMISS FOR FAILURE
OF PLAINTIFFS TO JOIN
INDISPENSIBLE PARTIES

(Assigned to the Hon. Kenton Jones)

(Oral Argument Requested)

20 Defendants and Joined Defendants (collectively, "**Defendants**" herein), by and through
21 undersigned counsel, hereby Respond to James Varilek's Motion to Require Defendants Cox to
22 Serve the Indispensible Parties with Documents Comporting with Due Process. Defendants and
23 Joined Defendants further move to dismiss this matter pursuant to Rules 12(b)(7) and 19, Ariz.
24 R. Civ. P., as Plaintiffs have failed to comply with this Court's Order that "the Plaintiff[s] shall
25 join all landowners subject to the Declaration of Restrictions dated June 12, 1974." See August
26 25, 2008, Ruling. This Response and Motion to Dismiss are supported by the accompanying
27
28

1 Memorandum of Points and Authorities and the Record on File, which shall be incorporated by
2 reference.

3 Respectfully submitted this 21 day of April, 2013.

4 THE ADAMS LAW FIRM, PLLC

5 By: 

6 Jeffrey R. Adams, Esq.

7 Attorneys for Defendants and Joined
8 Defendants

9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 **I. Summary of Procedural History Relevant to this Response and Motion to Dismiss.**

11 1. Plaintiffs filed their First Amended Complaint on March 18, 2004, in which they
12 seek declaratory judgment premised upon the following allegations in paragraphs 26, 27 and 28:
13

14 26. A controversy exists between the parties as plaintiffs
15 contend that the Declaration of Restrictions constitute
16 covenants and restrictions running with the land to ensure
17 the continuing rural and residential nature of the use of the
18 property to which said Declaration of Restrictions apply,
19 and are enforceable by any landowner against any other
20 landowner whose conduct or activity constitutes a violation
21 thereof.

22 27. Defendants have refused or otherwise declined to cease and
23 desist from their commercial business enterprise, installation
24 and maintenance of outdoor toilet and/or sanitary facilities,
25 and installation and maintenance of more than one single
26 family residence on their property, by their continued
27 activity constituting violations of the recorded covenants and
28 restrictions. Further, defendants have refused or otherwise
declined to comply with said covenants and restrictions by
evidencing their intent to expand or increase their current
business enterprise on said real property.

29 28. By reason of the foregoing, a declaratory judgment is both
30 necessary and proper in order to set forth and determine the
rights, obligations and liabilities that exist among the parties

1 as owners of real property subject to the recorded
2 Declaration of Restrictions.

3 *See* First Amended Complaint filed on March 18, 2004

4 2. As part of the relief sought by Plaintiffs in their First Amended Complaint,
5 Plaintiffs prayed for judgment against Defendants:

6 A. declaring that the recorded Declaration of Restrictions is
7 valid and enforceable;

8 B. declaring the rights and other legal relations and of Plaintiffs
9 and Defendants arising from the recorded Declaration of
10 Restrictions;

11 *Id.* Thus, contrary to Plaintiff Varilek's assertion otherwise, Plaintiffs did not and are not simply
12 seeking to enforce singular provisions of the Declaration of Restrictions; rather, they are seeking
13 a global determination by this Court that no facts or law have impaired the enforceability of *any*
14 provision of the Declaration of Restrictions.

15 3. On June 24, 2005, Defendants Cox filed their Motion to Join Indispensible Parties
16 ("Motion to Join") seeking the Plaintiffs' joinder of all property owners owning property in
17 Coyote Springs Ranch governed by the Declaration of Restrictions dated June 12, 1974 ("Absent
18 Owners"), premised upon the above-referenced claim seeking a declaratory judgment that the
19 Declaration of Restrictions is valid and enforceable.

20 4. While the Motion to Join was denied by this Court, that decision was reversed on
21 appeal. *See* March 24, 2007, Memorandum Decision ("Memo Dec.") at ¶36. Further, contrary
22 to Plaintiffs' contention otherwise, the Court of Appeals determined that "[a] ruling in this case
23 that the restrictions have been abandoned and are no longer enforceable against the Coxes'
24 property would affect the property rights of all other owners subject to the Declaration." *Id.* at
25 ¶32. In other words, the Court of Appeals held that if the trial court granted judgment in favor
26 of Plaintiffs, the Court of Appeals would reverse that judgment. *Id.* at ¶32. In other words, the Court of Appeals held that if the trial court granted judgment in favor
27 of Plaintiffs, the Court of Appeals would reverse that judgment. *Id.* at ¶32. In other words, the Court of Appeals held that if the trial court granted judgment in favor
28 of Plaintiffs, the Court of Appeals would reverse that judgment. *Id.* at ¶32. In other words, the Court of Appeals held that if the trial court granted judgment in favor

1 of Defendants Cox on Plaintiffs' declaratory judgment claim resulting in a judicial determination
2 that the Declaration of Restrictions were not valid and enforceable, that decision would affect all
3 of the Absent Owners by leaving a "patchwork" of restrictions. *Id.* at ¶ 35.

4 5. Following the Court's March 10, 2008, Oral Argument on the parties' competing
5 memorandums pertaining to the issues of feasibility and indispensibility, the Court determined that
6 the Absent Owners were necessary and indispensable and entered the following Orders:
7

- 8 (i) Plaintiffs *shall* join all landowners subject to the Declaration of Restrictions dated
9 June 12, 1974.
- 10 (ii) [W]ithin 60 days of [March 10, 2008,] the Plaintiffs shall file a notice with this Court
11 that includes a map of the properties subject to the Declaration of Restrictions as well
12 as a list designating the parcel numbers as well as names and address of *each*
13 property owner."
- 14 (iii) [U]pon filing that notice [referenced in (ii) above], the Plaintiff shall also file a plan
15 for joinder of all the property owners subject to the Declaration of Restrictions.

16 *See* March 10, 2008, Nature of Proceedings (emphasis added). By virtue of the foregoing, the
17 Court imposed upon the Plaintiffs the obligation of following the proper procedural mechanisms
18 that would be necessary to properly and lawfully join all of the Absent Owners. And at no time
19 was it necessary or required by Defendants to educate Plaintiffs or their counsel as to those
20 procedural mechanisms that would be necessary to properly and lawfully join the Absent Owners.

21 6. On August 25, 2008, the Court again addressed Plaintiffs' failure up to that point
22 in time to join the Absent Owners finding that as of August 25, 2008, Plaintiffs had failed to
23 comply with Orders set forth above, Ordered that the cost of joinder would have to be borne by
24 Plaintiffs alone and advised that Plaintiffs would only be given one more opportunity to join the
25 Absent Owners lest this case be dismissed. *See* August 25, 2008, Ruling. In this regard, the
26 Court stated:
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1 While the Court believes that [a finding that Plaintiffs had failed to
2 properly join the Absent Owners] should resolve the matter and lead
3 to the dismissal of the action due to Plaintiffs' refusal to even
4 attempt to join necessary parties over a year after being directed to
5 do so by this Court, the Court of appeals directed this Court to
6 consider whether property owners are indispensable pursuant to
7 Rule 19(b), Ariz. R. Civ. P. so this Court will do so.

8 *Id.* at p. 2.

9 * * *

10 The Court finds based upon the factors set forth above that "in
11 equity and good conscience the action ... should be dismissed"
12 since all property owners subject to the Declaration of Conditions
13 are necessary and indispensable parties. The Plaintiffs have
14 delayed this matter long enough. However, the Court will give the
15 Plaintiffs one final chance to comply with the Court's orders for
16 Joinder.

17 *Id.* (emphasis added).

18 * * *

19 IT IS ORDERED that in the event Plaintiffs do not take substantial
20 steps to join all necessary and indispensable parties within the next
21 ninety (90) days, this matter will be dismissed.

22 *Id.* at p. 4. Thus, Plaintiffs had until November 23, 2008, to "take substantial steps" to join the
23 Absent Owners.

24 7. However, rather than "take substantial steps" to join the Absent Owners, Plaintiffs
25 shifted their attention to an effort to remove Judge Mackey and sought to further contest this
26 Court's Order regarding the joinder of the Absent Owners and returned to the Court of Appeals
27 and ultimately the Arizona Supreme Court on both issues. However, those efforts proved
28 unsuccessful although Plaintiffs were extremely successful in delaying this case for yet another
year and a half.

8. On May 6, 2010, Plaintiffs were Ordered to serve the Absent Owners within 120
days so as to complete their joinder. See May 6, 2010, Under Advisement Ruling. However, the

1 Court subsequently extended Plaintiffs' deadline to complete joinder due to the delay in receiving
2 the Notice to be enclosed with the alias Summonses and First Amended Complaint and Ordered
3 Plaintiffs to complete service within 120 days of July 14, 2010. Thus, Plaintiffs had until October
4 12, 2010, to complete the joinder of the Absent Owners.

5
6 9. Notwithstanding the foregoing, Plaintiffs failed to join all Absent Owners by
7 October, 12, 2010, as Ordered by the Court. Further, on December 7, 2010, Plaintiffs requested
8 yet more time to complete joinder in their Motion for Permission to Serve Remaining Property
9 Owners by Publication to which Defendants Cox objected on December 14, 2010, and in which
10 objection Absent Owner Robert Veres joined on December 21, 2010.

11
12 10. On January 26, 2011, the Court granted Plaintiffs an additional 90 days to complete
13 joinder, service and to file proof of the same with the Court on all of the Absent Owners. Thus,
14 Plaintiffs had until April 26, 2011, to complete their joinder of the Absent Owners and to provide
15 the Court with proof of the same. *See* January 26, 2011, Ruling (filed with the Clerk on February
16 1, 2011).

17
18 11. On April 13, 2011, Plaintiffs filed their Affidavit of Publication reflecting their
19 publication of a Summons in The Camp Verde Journal reflecting publication dates of March 16,
20 23 and 30, 2011, and April 6, 2011.

21
22 12. On May 29, 2012, the Court held a status conference to address multiple matters
23 including a trial schedule. During that status conference, the issue of service and joinder was
24 addressed again during which undersigned raised the issue of Plaintiffs' recording and filing of
25 a Notice of *Lis Pendens*, suggesting that doing so should have been done and was appropriate to
26 account for potential transfers of ownership and a request for such an Order was made. However,
27 as reflected in the May 29, 2012, Nature of Proceedings, no such Order was entered.

1 13. On June 18, 2012, the Court held a Scheduling Conference during which the Court
2 set this matter for trial beginning on April 16, 2013, as well as applicable deadlines pertaining to
3 discovery, disclosures, witnesses, dispositive motions, motions *in limine* and pre-trial matters.

4 14. On March 6, 2013, the Court filed its Notice/Order in which it noted that it was
5 not in receipt of “new property owners that have not been served following their purchase of
6 property within the subdivision following the initiation of these proceedings and the initial service
7 upon the prior owner.”

8 15. On April 8, 2013, Plaintiff James Varilek filed the instant Motion to which this
9 Response is directed.
10

11 16. On April 16, 2013, the Court held Oral Argument on Plaintiffs’ Motion for
12 Summary Judgment and on Defendants’ Motion to Strike and in Limine pertaining to videos and
13 the affidavit of John Cundiff that were attached to Plaintiffs’ Statement of Facts filed in Support
14 of their Motion for Summary Judgment. Following the Oral Argument described above, the Court
15 held a status conference during which the issue of joinder was briefly discussed primarily between
16 the Court and counsel for Plaintiff Varilek. The Court also considered comments from Jerry
17 Carver who advised the Court that, while a property owner within the subject subdivision, he does
18 not believe that he has been properly joined as, and is not, a party herein.
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21 17. At no time since the Court Ordered Plaintiffs to join the Absent Owners as parties
22 to this case, did Plaintiff seek leave to amend the First Amended Complaint to name and identify
23 the Absent Owners as parties to this case; nor did they ever actually amend the First Amended
24 Complaint to do so. Plaintiffs also never filed or recorded a Notice of Pendency of Action
25 pursuant to A.R.S. § 12-1191(A), so as to put all of the Absent Owners and/or their successors
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1 and assignees on notice that this case was pending before the Court and that the title to their
2 properties could be affected by the outcome herein.

3 **II. Introduction.**

4 In his Motion, Plaintiff Varilek makes two rather bold introductory statements that he
5 believes require the Court's consideration. The first is that the Defendants' affirmative defense
6 of abandonment is the sole reason joinder is required. The second is that at the time joinder
7 became an issue, the defenses of abandonment and waiver being asserted by Defendants Cox
8 "were the only matters remaining to be adjudicated." However, neither contention is true.

9
10 The fact of the matter is that this case required joinder of all of the Absent Owners at the
11 time it was filed for one simple reason - namely because Plaintiffs sought a declaratory
12 judgement that the Declaration of Restrictions is valid and enforceable. Because Plaintiffs sought
13 such declaratory relief, and because the Declarations of Restrictions, its enforceability and a ruling
14 thereon will inevitably affect all of the parties' and the Absent Owners' property rights, both this
15 Court and the Arizona Court of Appeals have determined that this case cannot proceed without
16 the joinder of all of the Absent Owners. However, because Plaintiffs have failed to properly and
17 lawfully join all of the Absent Owners despite having more than five years within which to do so,
18 this case must be dismissed.

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21 **III. Plaintiff Varilek's "Stakes" Argument is a Red Herring Aimed at Revisiting**
22 **Plaintiffs' Opposition to Joinder of the Absent Owners; It Also Incorrectly States The**
23 **Facts and Ignores the Law in Arizona.**

24 Plaintiffs argue that the "stakes" of this case are higher now than they were prior to the
25 Court's Order that the Absent Owners be joined. In support of this premise, Plaintiffs argue that had
26 this Court ruled that the Declaration of Restrictions were deemed abandoned without the joinder of
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1 the Absent Owners, that ruling would “not have extended beyond the boundaries of the Coxes’
2 parcel.” See Plaintiff Varilek’s Motion at 4:28. However, Plaintiffs’ argument lacks merit.

3 The fact is that the “stakes” of this case have never changed. As noted above, Plaintiffs have
4 sought, as one of their claims, a declaratory judgment asking that this Court declare that the
5 Declaration of Restrictions is valid and enforceable. Accordingly, Plaintiffs, not Defendants,
6 initially sought declaratory relief from the Court that would affect not just the Plaintiffs and
7 Defendants but the Absent Owners as well. Accordingly, if the Court would have proceeded with
8 this case *sans* the Absent Owners and ruled in favor of Defendants Cox on the issues of (i) the
9 validity and enforceability of the Declaration of Restrictions and/or (ii) abandonment and waiver of
10 the Declaration of Restrictions, nothing would have prevented any of the Absent Owners from filing
11 an action of their own against Defendants Cox seeking the same relief sought by Plaintiffs thereby
12 rendering a ruling by this Court on the issues of a (i) the validity and enforceability of the
13 Declaration of Restrictions and (ii) abandonment and waiver of the Declaration of Restrictions
14 pointless and unenforceable by Defendants Cox. And it was that undeniable fact, that has existed
15 in this case from its commencement, upon which this Court and the Arizona Court of Appeals have
16 required the joinder of the Absent Owners. As a result, the “stakes” in this case have not changed.

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20 However, nothing about the alleged “stakes” in this case has anything to do with the posture
21 of this case at this juncture. The fact is that this Court cannot render a decision in this case on either
22 Plaintiffs’ claims or Defendants’ defenses without the joinder of the Absent Owners. Furthermore,
23 because it is now rather apparent that notwithstanding having had more than five years within which
24 to properly and lawfully join all of the Absent Owners, justice, fairness and equity require that this
25 case be dismissed for Plaintiffs’ failure to join the necessary and indispensable Absent Owners.
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1 As noted above, at no time since joinder of the Absent Owners was required five years ago
2 have Plaintiffs amended their First Amended Complaint to name and identify the Absent Owners
3 as parties to this case. Further, the alias Summonses utilized and served by Plaintiffs on Absent
4 Owners is facially defective in that even it does not adequately apprise the Absent Owners that they
5 are parties to this case be it as party plaintiffs or party defendants. By way of example, the alias
6 Summonses utilized and served by Plaintiffs to the Absent Owners is directed to them as follows:
7

8 **THE STATE OF ARIZONA TO:**

9 **ALL PROPERTY OWNERS AT COYOTE SPRINGS RANCH,**

10 **PHASE I**

11 *See e.g.*, alias Summons reflected in Plaintiffs' April 13, 2011, Affidavit of Publication. The
12 foregoing is ambiguous at best for at least three reasons. First, it does not identify a name of an
13 owner of any property within the area described above. Second, it provides only a limited
14 description of the real property involved instead of an individual parcel actually owned by a specific
15 owner or owners. Third, it does not provide a complete legal description of the entirety of the real
16 property governed by the subject Declaration of Restrictions.
17

18 In our view, once Plaintiffs were Ordered to join all of the Absent Owners, Plaintiffs
19 procedurally were required to do five things to properly join the Absent Owners. First, they should
20 have moved to amend the First Amended Complaint to properly name each of the Absent Owners
21 as parties in this case who would be subject to the Court's determination on Plaintiffs' claim for
22 declaratory judgment. Second, assuming the Court would grant such a motion, Plaintiffs should
23 have actually filed an amended Complaint that (i) named each of the Absent Owners as parties to
24 this case, (ii) established the jurisdictional basis for each Absent Owners' inclusion as parties to this
25 case (either through their ownership of an individual parcel of real property with that legal
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1 description included or through their ownership of the larger parcel of property governed by the
2 Declaration of Restrictions as legally described therein) and (iii) articulated the relief sought as it
3 pertained to each of the Absent Owners. Third, Plaintiffs should have had the Clerk issue
4 Summonses that were directed to each of the Absent Owner. Fourth, Plaintiffs should have served
5 each of the Absent Owners with the Summonses and amended Complaint. Fifth, simultaneous with
6 the filing of the amended Complaint, Plaintiffs should have filed and recorded a Notice of Pendency
7 of Action pursuant to A.R.S. §12-1191(A) (which would have eliminated the present dilemma of
8 transfers of property following Plaintiffs' service efforts). However, Plaintiffs did none of the
9 foregoing and as a result, it appears that none of the Absent Owners have been lawfully joined as
10 parties to this case.
11

12 The subject of joinder of necessary and indispensable parties is discussed in some detail in
13 the Arizona Civil Rules Handbook, Vol. 2B, Daniel J. McAulliffe, at 216 (2012 ed.), and should
14 provide this Court with necessary guidance. Therein, it states:
15

16 The defense of failure to join a party under Rule 19 may be asserted
17 by motion under Rule 12 or preserved in the responsive pleading. It
18 is never waived and can be raised for the first time on appeal. *Riley*
19 *v. Cochise County*, 10 Ariz.App. 55, 455 P.2d 1005 (Ct.App. 1969);
20 *City of Flagstaff v. Babbitt*, 8 Ariz.App. 123, 43 P.2d 938 (Ct.App.
21 1968)... Where a "party under Rule 19" has not been joined in the
22 action, and is subject of the Court's jurisdiction, then joinder of that
23 party should be ordered rather than dismissal.

24 In this case, the Court of Appeals and this Court already has determined that the Absent Owners are
25 necessary and that the Absent Owners are indispensable and this Court further has Ordered the
26 joinder of the Absent Owners at Plaintiffs' cost and expense. Now, five years following the
27 foregoing, Plaintiff Varilek asserts that because all of the Absent Owners have not been joined, the
28 Court should shift the burden of joinder to Defendants and further that Defendants should bear the
cost and expense of the same. In other words, Plaintiff Varilek is taking the position that because

1 Plaintiffs efforts at joinder of the Absent Owners has proven ineffective, the Court should further
2 delay this matter by making Defendants to undertake a task the Court Ordered Plaintiffs to complete,
3 which is absurd.

4 What the docket in this case reflects is that Plaintiffs do not wish for this case to be tried with
5 all of the Absent Owners as parties and they will undertake any effort necessary to prevent this case
6 from going to trial, which delays this Court must end. The Court has given Plaintiffs more than five
7 years to join the Absent Owners, which by any stretch of the imagination is beyond reasonable.
8 Plaintiffs were put on clear notice long ago that they risked dismissal absent their successful
9 completion of joinder. Plaintiffs are the parties who filed the instant lawsuit seeking declaratory
10 relief concerning the entirety of the Declaration of Restrictions. Plaintiffs are the parties who were
11 Ordered to join the Absent Owners in a timely manner. And Plaintiffs are the parties who have
12 failed to comply with the Court's Order as to the timely joinder of the Absent Owners. Accordingly,
13 justice, equity and fairness, especially when taking into account the Court's previous warnings that
14 this case would be dismissed absent Plaintiffs' prompt joinder of the Absent Owners, this Court
15 should, in good conscience, dismiss this case and stop the hemorrhaging of attorneys fees for the
16 Defendants. Based upon the foregoing, Defendants, pursuant to Rules 12(b)(7) and 19, Ariz. R. Civ.
17 P., request that this Court dismiss this case for Plaintiffs' failure to join indispensable parties.

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21 **III. Plaintiffs' Argument Regarding Adequate Notice Erroneously Focuses On The Wrong**
22 **Issue; The Critical Inquiry Is Whether Plaintiffs Complied With The Court's Order**
23 **That All Of The Absent Owners Be Joined, Which They Have Not.**

24 The gravaman of Plaintiff Varilek's current request of the Court focuses on his assertion that
25 the Absent Owners who have been served received inadequate notice of the pending action and that
26 they have not been afforded due process. In support of this argument, Plaintiff Varilek asserts that
27 Notice that was crafted by the Court to accompany the summonses to be served on the Absent
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1 Owners lacked sufficient details concerning the nature of the pending proceedings, the risks to which
2 they were exposed and the impact a decision in this case could have on them. While Defendants
3 disagree with the basis for Plaintiff Varilek's argument, we do agree that the Absent Owners have
4 not been properly joined by Plaintiffs as Ordered by the Court notwithstanding the fact that they have
5 had more than five years to do so and in this regard, we incorporate the arguments above and ask that
6 the case be dismissed.
7

8 Regarding Plaintiff Varilek's arguments premised upon the Notice crafted by the Court, we
9 believe Plaintiff is in error. As this Court is aware, Arizona courts follow "a notice pleading
10 standard, the purpose of which is to 'give the opponent fair notice of the nature and basis of the
11 claim and indicate generally the type of litigation involved.'" *Cullen v. Auto-Owners Ins. Co.*, 218
12 Ariz. 417, 419, ¶ 6, 189 P.3d 344, 346 (2008) (citation omitted). In our view, the Notice was
13 sufficient to provide the Absent Owners with necessary information upon which to determine the
14 claims that were being asserted by Plaintiffs and defenses that were being asserted by the
15 Defendants. The foregoing Notice, when coupled with the First Amended Complaint, most certainly
16 provided Absent Owners who were served with the same with notice of the claims being asserted
17 by the Plaintiffs. Further, the Notice states that the Absent Owners will be bound by this Court's
18 decision. Finally, while Plaintiff Varilek argues that the Absent Owners have been denied due
19 process because the First Amended Complaint does not include Defendants' defenses of
20 abandonment and waiver, the service of the First Amended Complaint and the Absent Owners'
21 actual notice of the pendency of this case enabled them to obtain a copy of Defendants' Answers if
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1 they so chose so as to identify those defenses asserted by Defendants. Thus, Defendants disagree
2 that the Notice and First Amended Complaint were either misleading or inadequate.¹

3 In further arguing that there has been a lack of due process afforded the Absent Owners,
4 Plaintiff Varilek argues that the Absent Owners were entitled to (i) specific notice of the Court of
5 Appeals decision as to Defendants Coxes' use of their property for a tree farm, (ii) decisions made
6 already by this Court concerning Defendants' defenses, (iii) a definition of abandonment, and (iv)
7 an explanation of what the abandonment of the Declaration of Restrictions would mean to the
8 Absent Owners and how such a determination would affect them. However, nothing in notice
9 pleading procedures set forth in Rules 8 or 19, Ariz. R. Civ. P., requires that such information or
10 details be given to a party joined under Rule 19. Again, Arizona is a notice pleading state and all
11 that is required is to generally apprise a litigant of the claims being asserted and the relief being
12 sought, which as to the Absent Owners was a declaration from the Court that the Declaration of
13 Restrictions is valid and enforceable and which the Notice and First Amended Complaint provides.
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16 However, as noted above, a more fundamental problem exists. In this case, notwithstanding
17 our view that neither the Notice nor the First Amended Complaint were or are inherently defective,
18 the fact remains that all of the Absent Owners have not yet been joined. That is because the
19 Summonses served on those Absent Owners who were actually served was facially defective. More
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21

22 ¹Defendants do not respond to Plaintiff Varilek's arguments premised upon class-action
23 cases. On this point, we direct this Court's attention to the litigation that ensued several years ago
24 upon Plaintiffs' efforts to have this case certified as a class action. On review of the foregoing, the
25 Court will note that Plaintiffs certification efforts were denied, in part, because Absent Owners had
26 the right to opt out of the class that would result in them not being bound by this Court's ultimate
27 decision on the merits of this case, which is precisely why the Court Ordered the Absent Owners'
28 joinder by the Plaintiffs. Candidly, Plaintiff Varilek's citation and reliance upon class-action cases
and their discussion of due process is a renewed effort on Mr. Wilhelmsen's part to reargue class
certification, which we adamantly oppose for the very same reasons it was already denied by this
Court.

1 importantly, as admitted by one of the Plaintiffs in this case, namely Mr. Varilek, Plaintiffs have
2 failed to effectuate service of even a defective Summons, the Notice and the First Amended
3 Complaint on each and every Absent Owner thus leaving a multitude of Absent Owners unjoined
4 in this case notwithstanding the fact that Plaintiffs have had more than five years to do so.
5 Accordingly, pursuant to Rules 12(b)(7) and 19, Ariz. R. Civ. P., this case must be dismissed.

6
7 **IV. Conclusion.**

8 While Defendants disagree with the basis for Plaintiff Varilek's Motion i.e. that the Notice
9 to be served on the Absent Owners by Plaintiffs together with the First Amended Complaint is
10 defective thereby denying the Absent Owners due process, we nonetheless believe that not all of the
11 Absent Owners have been lawfully joined as parties to this case as (i) the Summons that was served
12 on those actually served was facially defective and (ii) multiple Absent Owners haven't been served
13 with anything at this point. Again, Plaintiffs, not Defendants, were Ordered to complete joinder of
14 the Absent Owners five years ago. However, they have failed to do so. Accordingly, this case must
15 be dismissed.

16
17 Respectfully submitted this 25 day of April, 2013.

18 THE ADAMS LAW FIRM, PLLC

19 By. 

20 Jeffrey R. Adams, Esq.

21 *Attorneys for Defendants Cox and*
22 *Joined Defendants*

23 COPY of the foregoing hand-delivered
24 this 25 day of ~~March~~ ^{April}, 2013, to:

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9 COPY of the foregoing mailed this
10 26 day of ~~March~~, 2013, to:
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8 Prescott Valley, AZ 86315
pro se
9
10 Rynda and Jimmy Hoffman
9650 E. Spurr Lane
11 Prescott Valley, AZ 86315
pro se
12
13 William and Shaunla Heckethorn
9715 E. Far Away Place
14 Prescott Valley, AZ 86315
pro se
15
16 Leo M. and Marilyn Murphy
9366 E. Turtlerock Road
17 Prescott Valley, AZ 86315
pro se
18
19 James C. and Leslie M. Richie
9800 E. Plum Creek Way
20 Prescott Valley, AZ 86315
pro se
21
22 Rhonda L. Folsom
9305 N. Coyote Springs Road
23 Prescott Valley, AZ 86315-4517
pro se
24
25 Kenneth Paloutzian
8200 Long Mesa Drive
26 Prescott Valley, AZ 86315
pro se
27
28

1 Bonnie Rosson
8950 E. Plum Creek Way
2 Prescott Valley, AZ 86315
pro se
3
4 John and Rebecca Feddema
9550 E. Spurr Lane
5 Prescott Valley, AZ 86315
pro se
6
7 Robert Lee Stack and Patti Ann Stack
Trustees of the Robert Lee and Patti
8 Ann Trust utd March 13, 2007
10375 Lawrence Lane
9 Prescott Valley, AZ 86315
pro se
10
11 John D. and Dusti L. Audsley
6459 E. Clifton Terrace
12 Prescott Valley, AZ 86314
pro se
13
14 Dane E. and Sherrilyn G. Tapp
8595 E. Easy Street
15 Prescott Valley, AZ 86315
pro se
16
17 Richard and Beverly Strissel
9350 E. Slash Arrow Drive
18 Prescott Valley, AZ 86314
pro se
19
20 Jesus Manjarres
105 Paseo Sarta #C
21 Green Valley, AZ 85614
pro se
22
23 Nicholas Corea
4 Denia
24 Laguna Niguel, CA 92677
pro se
25
26 Jack and Dolores Richardson
505 Oppenheimer Drive, #4
27 Los Alamos, NM 87544
pro se
28

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Eric Cleveland
9605 E. Disway
Prescott Valley, AZ 86315
pro se

Robert and Patricia Janis
7685 N. Coyote Springs Road
Prescott Valley, AZ 86315
pro se

Mike and Julia Davis
9147 E. Morning Star Road
Prescott Valley, AZ 86315
pro se

Richard and Patricia Pinney
10980 N. Coyote Road
Prescott Valley, AZ 86315
pro se


