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8 Attorney for Plaintiffs

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2013 JUL -2 PM 03 ✓

SANDRA K. SENA, CLERK
BY: _____

6 IN THE SUPERIOR COURT FOR 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,

11 Plaintiffs,

12 vs.

14 DONALD COX and CATHERINE COX,
15 husband and wife,

16 Defendants.

CASE NO. P1300CV20030399

**PLAINTIFFS' RULE 54(g)
MOTION FOR AWARD OF
ATTORNEYS' FEES AND NON-
TAXABLE COSTS**

(Oral Argument Requested)

17 Pursuant to Rule 54(g), Plaintiffs hereby move for an award of attorneys' fees. This
18 motion is supported by the following Memorandum of Points and Authorities, the affidavit of J.
19 Jeffrey Coughlin in Support of Application for Attorney's Fees and Costs which contains a total
20 of \$86,636.00 in attorneys' fees and \$2,772.63 in costs and the affidavit of David K. Wilhelmsen
21 in Support of Application for Attorney's Fees and Costs which contains a total of \$258,986.52 in
22 attorney's fees. The grand total of attorneys' fees is \$345,622.52 and the grand total of non-
23 taxable costs is \$2,772.63.
24
25

1 DATED this 2^d day of July, 2013.

2 J. JEFFREY COUGHLIN PLLC

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4 By: 

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6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7
8 In its minute entry dated June 14, 2013, this Court granted summary judgment in favor of
9 all of the consolidated plaintiffs. This Court acknowledged that the Court of Appeals had
10 previously found that the Defendants Cox were in violation of the Declaration of Restrictions at
11 issue in the case because they were operating a commercial business from their property. In
12 Count I of Plaintiffs' First Amended Complaint, Plaintiffs alleged that the "[D]efendants'
13 initiation, maintenance and/or expansion of their business enterprise on said real property
14 constitutes a violation and breach of the recorded Declaration of Restrictions". Having
15 accomplished the determination that the Defendants had breached the Restrictions at the Court of
16 Appeals level, issues remained on the remand to this Court as to the Defendants' defenses arising
17 out of the breach of contract claims, namely, the defenses of waiver and abandonment. This
18 Court determined that the properties in Coyote Springs Ranch remain rural and residential and
19 granted Plaintiffs' Motion for Summary Judgment on all of the remaining issues contained in
20 their First Amended Complaint, that is, waiver and abandonment.

21 In their First Amended Complaint and their Motion for Summary Judgment, Plaintiffs
22 included the following prayer for relief:

23 Accordingly, Plaintiffs pray for judgment against Defendants, and each of them, as
24 follows:

- 25
- A. Declaring that the recorded Declaration of Restrictions is valid and enforceable;
 - B. Declaring the rights and other legal relations of Plaintiffs and Defendants arising

1 from the recorded Declaration of Restrictions;

2 C. Permanently enjoining Defendants from initiating, maintaining or expanding
3 their current business enterprise on said property as violate of the recorded
restrictions and covenants pertaining to the real property;

4 D. Ordering Defendants to remove any and all conditions or activities on said land
5 that violates any restriction or covenant as provided in the recorded Declaration
of Restrictions;

6 E. Awarding Plaintiffs their reasonable attorney's fees and costs pursuant to
7 A.R.S. § 12-341.01; and,

8 E. For such other and further relief as the Court deems just and equitable under the
9 circumstances.

10 As the Court of Appeals stated in paragraph 12 of its decision, "a deed that contains a
11 restrictive covenant runs with the land and is a contract". *Powell*, above, at 555, ¶8, 125 P. 3d at
12 375. The Coyote Springs Ranch subdivision Declaration of Restrictions is a contract and as a
13 result, according to A.R.S. §12-341.01, Plaintiffs are entitled to an award of their reasonable
14 attorneys' fees from the outset of this case in 2003 to the conclusion of this case.

15 As this Court knows, the Court of Appeals remanded this case to this Court after
16 concluding that the absent property owners (all owners except Cox) were necessary parties. On
17 page 21 of its decision ¶36 the Court of Appeals stated "[U]nder the rule, necessary parties must
18 be joined if they are 'subject to service of process and [their joinder] will not deprive the court
19 of jurisdiction over the subject matter of the action.' Ariz. R. Civ. P. 19(a). The trial court must
20 determine on remand whether these parties are also indispensable under Rule 19(b)."

21 This Court is aware of the number of parties who were represented by defense counsel
22 during a portion of the time period following the Court of Appeals decision. An appropriate
23 division of responsibility for the allocation of Plaintiffs' attorneys' fees would be to divide those
24 fees among the Defendants starting with their formal entry into the case. The Adams Law Firm
25 PLLC filed answers for multiple defendants on multiple occasions.

1 **Attorneys' fees previously awarded.**

2 On January 10, 2006 this Court awarded the Defendants \$60,560.75 in attorneys' fees
3 and \$4,235.74 in costs after granting their Motion for Summary Judgment on the eve of trial. In
4 their application for fees, Defendants referred to Plaintiff's First Amended Complaint and
5 A.R.S. §12-341.01 as a basis for their claim that they had obtained a ruling from this Court that
6 the Defendants' use of their property did not violate Paragraph 2 of the Declaration of
7 Restrictions and were therefore entitled to an award of their attorneys' fees. They pointed to
8 Plaintiffs claims that Defendants had breached a contract – the Declaration – that the
9 Declaration constituted a contract, that Plaintiffs conceded that this case fell within the purview
10 of A.R.S. §12-341.01. Defendants argued that because this Courts' ruling in their favor meant
11 that they were the prevailing party, they were entitled to recovery of their attorneys' fees and
12 costs pursuant to A.R.S. §12-341.01. Defendants then analyzed the factors which Arizona
13 courts utilize to consider whether to award fees under A.R.S. §12-341.01 as set forth in
14 *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567, at 570, 694 P. 2d 1181 at 1184 (1985).

15 Plaintiffs will now do the same. The *Warner* factors are as follows:

- 16 1. Whether the litigation could have been avoided or settled and whether the
17 successful party's efforts were completely superfluous in achieving the result;
- 18 2. Whether assessing fees against the unsuccessful party would cause an extreme
19 hardship;
- 20 3. Whether the successful party prevailed with respect to all of the relief sought;
- 21 4. Whether the legal question presented was novel and whether such claim or
22 defense had previously been adjudicated in this jurisdiction; and
- 23 5. Whether a fee award would discourage other parties with tenable claims or
24 defenses from litigating or defending legitimate contract issues.

25 *Id.*

1 **A. Whether the litigation could have been avoided or settled and**
2 **whether the successful party's efforts were completely superfluous in achieving the**
3 **result;**

4 Section 19 of the Declaration of Restrictions governs the method available to owners in
5 the event someone else violates any of the restrictions. It states, in pertinent part:

6 19. If there shall be a violation or threatened or attempted
7 violation of any of said covenants, conditions, stipulations or
8 restrictions, **it shall be lawful for any person or persons owning**
9 **said premises or any portion thereof to prosecute proceedings at**
10 **law or in equity against all persons violating or attempting to, or**
11 **threatening to violate any such covenants, restrictions,**
12 **conditions or stipulations, and either prevent them or him from**
13 **so doing or to recover damages or other dues for such violations.**

14 Emphasis added.

15 Plaintiffs' only redress for the Defendants violating the Restrictions was to sue them.
16 Once Plaintiffs sued Defendants, Defendants raised defenses. The only defenses remaining
17 following the Court of Appeals decision were waiver and abandonment. This Court found in
18 Plaintiffs' favor with regard to those defenses, so it cannot be asserted that Plaintiffs' efforts
19 were anything but successful, let alone superfluous. Plaintiffs carry *Warner* factor number one.

20 **B. Whether assessing fees against the unsuccessful party would cause an**
21 **extreme hardship;**

22 Defendants are the owners of the property on which they conducted their
23 business. They own various businesses. They were offered an opportunity following the
24 decision by the Court of Appeals to walk away from the litigation with each side to pay their
25 own attorneys' fees; **they declined**. If there will be an extreme hardship as a result of this Court
awarding fees and costs, it will be a hardship that was self-imposed. Plaintiffs carry *Warner*
factor number two.

C. Whether the successful party prevailed with respect to all of the relief
sought;

1 This Court has granted Plaintiffs' Motion for Summary Judgment which addressed all
2 issues remaining in the case. This ruling disposes of all the issues in the case and Plaintiffs have
3 prevailed with respect to all of the relief sought. Plaintiffs carry *Warner* factor number three.
4

5 **D. Whether the legal question presented was novel and whether such**
6 **claim or defense had previously been adjudicated in this jurisdiction; and**

7 As the cases cited by the parties in their motions and appellate briefs demonstrate, the
8 legal questions in the areas of restrictive covenants, contracts, breach of contracts, waiver and
9 abandonment are not novel and have been previously adjudicated in this jurisdiction. Plaintiffs
10 carry *Warner* factor number four.

11 **E. Whether a fee award would discourage other parties with tenable**
12 **claims or defenses from litigating or defending legitimate contract issues**

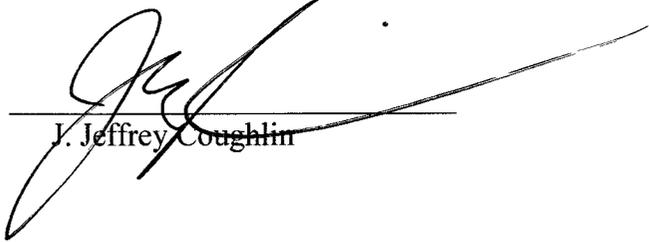
13 Defendants had an opportunity before incurring any attorneys' fees to examine the
14 Declaration of Restrictions, decide if it was worth the risk to litigate and they chose to litigate.
15 A fee award in this case will not discourage other parties with tenable claims from litigating; it
16 will cause them to be careful when presented with opportunities to avoid litigation. Plaintiffs
17 carry *Warner* factor number five.

18 Plaintiffs are entitled to an award of some or all of their reasonable attorney's fees
19 incurred in this case. They have paid or agreed to pay undersigned counsels attorney's fees
20 for all of the attorneys who helped achieve the final result in this case. Undersigned counsel
21 and staff has expended 538.90 hours of work for a total of \$93,944.50 in fees, and the firm
22 of Favour and Wilhelmsen PLLC has expended 1,512.50 hours of work for a total of
23 \$258,986.52 in fees for that firm's initial representation of the Plaintiffs in this case. See
24 Affidavit of J. Jeffrey Coughlin and itemization of attorney's fees attached thereto as Exhibit
25

1 "A", and Affidavit of David K. Wilhelmsen and itemization of attorney's fees attached
2 hereto as Exhibit "B", and incorporated herein by this reference.

3
4 DATED this 2nd day of July, 2013.

5 **J. JEFFREY COUGHLIN PLLC**

6
7 By: 
8 J. Jeffrey Coughlin

9
10 COPY of the foregoing, including billing statements,
11 mailed this 2d day of
12 July, 2013 to:

13 Jeffrey R. Adams
14 THE ADAMS LAW FIRM PLLC
15 125 Grove Avenue
16 P.O. Box 2522
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18 Attorney for Defendants listed in Answer to
19 First Amended Complaint by Joined Property Owner Defendants
20 Dated September 22, 2010

21 David K. Wilhelmsen
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9 Teri A. Thomson-Taylor

10 COPY of the foregoing, excluding billing statements,
11 mailed this 2d day of
12 July, 2013 with an invitation
13 to view the billing statements by request at
14 the Law Offices of
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4 By: C. Padilla

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