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FILED

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7 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

8 **IN AND FOR THE COUNTY OF YAVAPAI**

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

15 Plaintiffs,

16 v.

17 DONALD COX and CATHERINE COX,  
18 husband and wife,

19 Defendants.

Case No. CV 2003-0399

Division No. 1

20 **DEFENDANTS' RESPONSE TO  
21 PLAINTIFFS' LEGAL MEMORANDUM  
22 RE JOINDER UNDER RULE 19 OF ALL  
23 COYOTE SPRINGS RANCH  
24 PROPERTY OWNERS SUBJECT TO  
25 RECORDED COVENANTS, JUNE 13,  
26 1974**

(Assigned to the Honorable David L.  
Mackey)

*(Oral Argument Requested)*

21 Defendants, through counsel undersigned, hereby respond to Plaintiffs' Legal Memorandum  
22 Re Joinder Under Rule 19 of All Coyote Springs Ranch Property Owners Subject to Recorded  
23 Covenants, June 13, 1974 ("**Plaintiffs' Memo**"). Review of Plaintiffs' Memo reveals that Plaintiffs  
24 failed to meet their burden, which according to the Court's August 23, 2007 Order, was to establish  
25 that (i) joinder of the absent owners is not feasible and (ii) this case should proceed based upon the  
26 factors set forth in Rule 19(b), Ariz. R. Civ. P. Because Plaintiffs failed to meet their burden, this  
27 Court must either (i) order the joinder of the absent Coyote Springs Ranch property owners  
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1 (“Affected Owners”) or (ii) dismiss this case on the basis that the Affected Owners are  
2 indispensable. This Response is supported by the following Memorandum of Points and Authorities,  
3 the Memorandum Decision issued by the Court of Appeals and the Court’s August 23, 2007 Order,  
4 the Court’s Notice Setting Briefing Schedule and Oral Argument (“August 23 Order”), and the  
5 record on file, each which shall be incorporated by reference.  
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8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Introduction.**

10 On the issue of joinder of the Affected Owners, the Court of Appeals held specifically that  
11 (i) the Defendants’ Motion to Join Indispensable Parties Pursuant to Rule 19(a), Ariz. R. Civ. P., or,  
12 in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(7), Ariz. R. Civ. P., (“**Defendants’**  
13 **Joinder Motion**”) was well founded and supported by Rule 19(a), Ariz. R. Civ. P., (ii) that the  
14 Declaration of Restrictions at issue constitute property rights which run with title to the land owned  
15 by the Affected Owners, (iii) that a ruling in this case in Defendants’ favor on the issue of  
16 abandonment would affect the real property rights of the Affected Owners and (iv) that the Affected  
17 Owners are necessary parties to this case as long as (a) they are subject to service of process and (b)  
18 their joinder will not deprive the trial court of jurisdiction. See Memorandum Decision at ¶¶ 29, 32,  
19 35 and 36. As a result, the Court of Appeals ordered this Court to determine, on remand, whether  
20 the Affected Owners are also indispensable under Rule 19(b), Ariz. R. Civ. P. Id. at ¶ 36. Following  
21 receipt of the Memorandum Decision and the parties arguments following the Defendants’  
22 submission of their proposed Judgment on Mandate, this Court ordered Plaintiffs to establish that  
23 “joinder is not feasible and that the Court should proceed with this action based upon the factors set  
24 forth in Rule 19(b), Ariz. R. Civ. P.”, which provides:  
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1 If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the  
2 court shall determine whether in equity and good conscience the action should  
3 proceed among the parties before it, or should be dismissed, the absent person being  
4 thus regarded as indispensable. The factors to be considered by the court include:  
5 first, to what extent a judgment rendered in the person's absence might be prejudicial  
6 to the person or those already parties; second, the extent to which, by protective  
7 provisions in the judgment, by the shaping of relief, or other measure, the prejudice  
8 can be lessened or avoided; third, whether a judgment rendered in the person's  
9 absence will be adequate; fourth, whether the plaintiff will have an adequate remedy  
10 if the action is dismissed for nonjoinder.

11 Notwithstanding the foregoing Order of this Court, Plaintiffs have failed to establish either (i) that  
12 the joinder of the Affected Owners *is not* feasible or (ii) that the action *should* proceed based upon  
13 the factors set forth above in Rule 19(b), Ariz. R. Civ. P.

14 **II. Plaintiffs Have Failed To Establish That Joinder Of The Affected Owners Is**  
15 **Not Feasible.**

16 Surprisingly, Plaintiffs have completely ignored the Court of Appeals' decision and the  
17 August 23 Order of this Court. Instead of following the Court of Appeals' decision and the  
18 August 23 Order, Plaintiffs have continued to argue that the Affected Owners are not necessary  
19 parties to this action. Plaintiffs have failed to address the first mandate of this Court's August 23  
20 Order by establishing that joinder of the Affected Owners is not feasible.

21 In their memorandum, Plaintiffs assert that joinder of the Affected Owners is not necessary  
22 under Rule 19(a)(1) or (2), Ariz. R. Civ. P. In making this assertion, Plaintiffs propound three  
23 arguments. First, Plaintiffs argue that the Affected Owners are unnecessary under Rule 19(a)(1),  
24 Ariz. R. Civ. P., because (i) this Court can grant complete relief in this case as to the present parties  
25 and (ii) the Affected Owners have not expressed any interest in this case. See Plaintiffs' Memo at  
26 6:15-6:21. Second, Plaintiffs argue the Affected Owners are unnecessary under Rule 19(a)(2)(ii),  
27 Ariz. R. Civ. P., because the Defendants will not be subject to any risk of any later inconsistent  
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1 obligations. See Plaintiffs’ Memo at 7:1-8:14. Third, Plaintiffs argue that the Affected Owners are  
2 unnecessary under Rule 19(a)(2), Ariz. R. Civ. P., because Defendants “have not advanced any  
3 ‘legally protected interest’ claimed by [the Affected Owners] that relates to the subject matter of the  
4 litigation.” See Plaintiffs’ Memo at 8:15-21. Unfortunately for Plaintiffs, the Court of Appeals  
5 already definitively resolved the issue of the necessity of joinder of the Affected Owners under Rule  
6 19(a)(1) and (2), Ariz. R. Civ. P.

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8  
9 In its Memorandum Decision, the Court of Appeals ruled that the outcome of this case could  
10 significantly affect each of the Affected Owners and each of their respective real property rights by  
11 potentially creating a patchwork of restrictive covenants. In this regard, the Court stated:

12  
13 “Restrictions as to the use of land are mutual, reciprocal, equitable easements  
14 in the nature of servitudes in favor of owners of other lots within the restricted area,  
15 and constitute property rights which run with the land.” *La Esperanza Townhome*  
16 *Ass’n, Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 238, 689 P.2d 178, 181 (App.  
17 1984) (quoting *Montoya v. Barreras*, 473 P.2d 363, 365 (N.M. 1970)). **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.**

18 Memorandum Decision at ¶ 32 (emphasis added).

19  
20 [E]ven if a ruling in favor of the Coxes on their affirmative defense of  
21 abandonment were to apply only to the Coxes’ property, **all property owners rights**  
22 **would still be affected** by the Coxes’ continued use of their property, or by any future  
23 use adverse to the restrictions. We have previously found that amendments to  
24 covenants must apply to all property subject to them or not at all. *See La Esperanza*  
*Townhomes*, 142 Ariz. at 238, 689 P.2d at 181; *Riley v. Boyle*, 6 Ariz.App. 523, 434  
25 P.2d 525, 528 (1967). **Similarly, ruling in favor of the Coxes in this case could**  
**cause the same unintended “patchwork” of restrictions those cases sought to**  
**avoid.**

26 Memorandum Decision at ¶¶ 35 (emphasis added). Following the foregoing analysis, the Court  
27 unequivocally determined that the Affected Owners are necessary parties to this case.  
28

1           Because the Court of Appeals has ruled already that the Affected Owners are necessary  
2 parties to this case, all that is left to determine is whether their joinder is feasible, i.e., whether the  
3 Affected Owners are subject to service of process or whether the joinder of the Affected Owners will  
4 deprive this Court of jurisdiction over this case. Because Plaintiffs have failed to meet their burden,  
5 not Defendants', in proving either that (i) the Affected Owners are not subject to service of process<sup>1</sup>  
6 or (ii) the joinder of the Affected Owners would divest this Court of jurisdiction, the Affected  
7 Owners must be joined accordingly or this case must be dismissed.  
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10           **III. Plaintiffs Have Failed To Establish That This Action Should Proceed Under**  
11           **Rule 19(b), Ariz. R. Civ. P., Absent Joinder Of The Affected Owners.**

12           Rule 19(b), Ariz. R. Civ. P., provides that the factors to be considered in determining whether  
13 an action should proceed should persons deemed necessary to an action under Rule 19(a), Ariz. R.  
14 Civ. P., are not joined. Those factors include (i) to what extent a judgment rendered in the person's  
15 absence might be prejudicial to the person or those already parties; (ii) the extent to which, by  
16 protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can  
17 be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate;  
18 and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.  
19  
20 See Rule 19(b).  
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24           <sup>1</sup>The Affected Property Owners could either be personally served or served by publication  
25 since Plaintiffs' action is *in rem*. The Court of Appeals stated as follows:

26           However, "the court decides who is an indispensable party after it finds that the party  
27 is necessary but cannot be joined." [citation omitted] No evidence was presented  
28 below that the other property owners could not be joined if necessary.

See Memorandum Decision at ¶30, fn. 2.

1 In this case, Defendants have asserted that the restrictive covenants at issue have been  
2 abandoned. If the Court rules that the Declaration of Restrictions has been abandoned, the restrictive  
3 covenants contained therein will, at a minimum, be unenforceable against these Defendants by  
4 Plaintiffs herein and also by all of the Affected Owners. As a result, Defendants would be free to  
5 continue their use of their property over any future objections by any other Affected Owner thereby  
6 stripping all of the Affected Owners of valuable property rights that exist by virtue of the restrictive  
7 covenants. See La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz., 142 Ariz. at 238,  
8 689 P.2d at 181. This certainly would prejudice the Affected Owners property rights. The result  
9 would be the creation of a "patchwork" of restrictions within the Coyote Springs Ranch subdivision  
10 that clearly was not intended when the Declaration of Restrictions was created. In fact, Division One  
11 of the Court of Appeals has already deemed such an outcome unacceptable given the Arizona case  
12 law.  
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16 There is no question that the Court of Appeals already has determined that a judgment  
17 rendered in Defendants' favor would, without question, result in prejudice, harm and a loss of  
18 substantive real property rights by all other Affected Owners. If this case were to proceed without  
19 the Affected Owners and the Defendants prevail, no effort to shape the relief to be granted by this  
20 Court could ever be adequate; nor could such relief ever operate to provide the Affected Owners with  
21 any remedy for the harm caused or any consolation for their lost rights. If, on the other hand, this  
22 Court were to dismiss this case due to non-joinder of the Affected Owners, Plaintiffs still would have  
23 an adequate remedy because they would retain the opportunity to bring an new action in the future  
24 and with the involvement and participation of all owners in the subdivision and in which they could  
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1 seek the Court's declaration that the Declaration of Restrictions is valid and enforceable as to all  
2 Affected Owners or that it has been abandoned and thus not enforceable by any Affected Owner.

3  
4 It is clear that Plaintiffs are unhappy with the Court of Appeals' decision on the issue of  
5 joinder of the Affected Owners. However, they did not file a Petition for Review to the Arizona  
6 Supreme Court. Hence, Plaintiffs (and this Court) must following the Court of Appeals' decision  
7 that the Affected Owners are necessary parties to this case.

8  
9 Further, it was Plaintiffs' burden, not Defendants,<sup>2</sup> to establish, given the factors set forth in  
10 Rule 19(b), Ariz. R. Civ. P., that joinder is not feasible nor warranted, the Affected Owners being  
11 "regarded as indispensable." Plaintiffs have failed to meet their burden in providing this Court with  
12 any basis upon which to conclude that the Affected Owners should not be joined when considering  
13 and applying the factors articulated in Rule 19(b), Ariz. R. Civ. P. Plaintiffs certainly have not  
14 demonstrated that the joinder of the Affected Owners is not feasible. Consequently, this Court must  
15 either (i) order joinder of the Affected Owners as they are necessary parties or (ii) dismiss this case.

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18 **IV. Conclusion.**

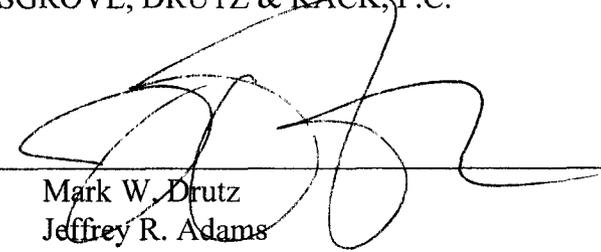
19 Plaintiffs had a mandate from this Court following its August 23 Order – namely to establish  
20 (i) that joinder of the Affected Owners is not feasible and (ii) establish why this case should proceed  
21 without joinder of the Affected Owners considering the factors set forth in Rule 19(b), Ariz. R. Civ.

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23  
24 <sup>2</sup>On the issue of who holds the burden as it applies to the argument of joinder of the Affected  
25 Owners, Plaintiffs actively have sought, in their memorandum, to shift that burden to Defendants.  
26 In Plaintiffs' Memorandum, Plaintiffs stated not less than 14 times that Defendants have failed to  
27 meet their burden in establishing why the Affected Owners should be joined. This was despite the  
28 fact that this Court determined that it is Plaintiffs' burden and obligation to demonstrate why, given  
the factors set forth in Rule 19(b), the Affected Owners should not be joined. This is important  
because much to the chagrin of Plaintiffs, the Court of Appeals already has established that the  
Affected Owners are necessary parties to this case and that they should be joined if they can be.

1 P. In response to that Order, Plaintiffs have not met their burden. While Plaintiffs have argued that  
2 the Affected Owners are unnecessary, the Court of Appeals has already settled that issue. Plaintiffs  
3 did not address the issue of the feasibility of joinder of the Affected Owners. Consequently, we are  
4 left to assume that they concede that joinder is feasible. Plaintiffs also have failed to appeal, dispute  
5 or rebut the Court of Appeals' conclusion that without the joinder of the Affected Owners, a ruling  
6 in this case in Defendants' favor will unequivocally and dramatically affect the legal and real  
7 property rights of each and every Affected Owner in an irreparable way regardless of the manner in  
8 which this Court were to fashion Defendants' relief. Consequently, this Court must either (i) order  
9 joinder of the Affected Owners as they are necessary parties or (ii) dismiss this case.  
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12 RESPECTFULLY SUBMITTED this 2 day of November, 2007.

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14 MUSGROVE, DRUTZ & KACK, P.C.

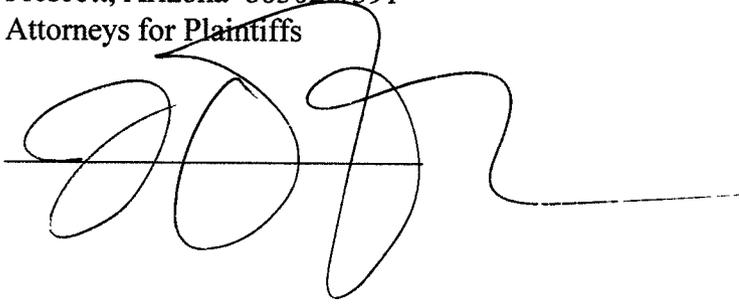
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17 By 

18 Mark W. Drutz  
19 Jeffrey R. Adams  
20 Sharon Sargent-Flack  
21 Attorneys for Defendants

22 COPY of the foregoing hand-delivered  
23 this 2 day of November, 2007, to:

24 Honorable David L. Mackey  
25 Yavapai County Superior Court  
26 Division 1  
27 Yavapai County Courthouse  
28 Prescott, Arizona 86301

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