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BY: V. Morse

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6 **IN THE SUPERIOR COURT OF ARIZONA**
7 **COUNTY OF YAVAPAI**
8

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

13 Plaintiffs,)

13 vs.)

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

16 Defendants.)

Case No. CV 2003-0399

Division 1

RESPONSE TO DEFENDANTS'
MOTION FOR LIFT OF STAY
AND
REQUEST FOR ORDER RE:
JOINDER

17 Plaintiffs, by and through undersigned counsel, hereby respond to Defendants' motion for lift
18 of stay and request for order regarding joinder of all other approximate 400 subdivision property
19 owners to this case.

20 This response is supported by the following memorandum of points and authorities together
21 with this Court's minute entry dated August 22, 2008, and relevant portions of the file since remand
22 from the Court of Appeals on direct appeal.

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1 RESPECTFULLY SUBMITTED this 13th day of April, 2009.

2 FAVOUR MOORE & WILHELMSSEN, P.A.

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5 By: 
6 David K. Wilhelmsen
7 Marguerite Kirk
8 P.O. Box 1391
9 Prescott, Arizona 86302-1391
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11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. RESPONSE TO MOTION FOR LIFT OF STAY**

13 Plaintiffs have no objection to Defendants request for lift of stay, or Defendants calculation
14 of the number of days remaining (55) from the original days – ninety (90) – ordered by the Court to
15 “take substantial steps to join all necessary and indispensable parties....” *See, Minute Entry, dated*
16 *August 22, 2008, (filed with Clerk of Court, August 25, 2008), at p.4.* In fairness and to avoid any later
17 confusion, Plaintiffs’ would request that the 55 days commence from the date of this Court’s ruling
18 on Plaintiffs’ motion to amend the caption and complaint.

19 **II. RESPONSE AND OBJECTION TO DEFENDANTS’ REQUEST**
20 **FOR ORDER RE: JOINDER**

21 In a characteristic sleight of hand, or a purposefully self-serving misreading of the Court’s
22 prior order regarding joinder, Defendants assert that this Court enter an order that by expiration of the
23 55 days that joinder be “complete.” *See, Defendants’ Motion for Lift of Stay, at p.3, lines 11-15.* This
24 is not consistent with this Court’s ruling on the issue. This Court previously ruled that Plaintiffs were
25 to “**take substantial steps to join all necessary and indispensable parties**” within 90 days or suffer
26 dismissal of their action. *See, Minute Entry dated August 22, 2008, at p.4 (emphasis added).*
Plaintiffs would request that any order from this Court be in conformity with its earlier ruling.

Toward this end, Plaintiffs will be taking the following substantial steps to join all remaining

1 property owners to this action. First, Plaintiffs will be filing a motion to amend the caption and
2 complaint in this matter to include a third-party declaratory judgment action as to enforceability of the
3 subject restrictive covenants as this is the only legally viable means of including these other non-
4 parties to the action. Plaintiffs would name the current non-party property owners as third-party
5 defendants. At such time as these individuals and entities enter an appearance, Plaintiffs would
6 request that this Court re-align those parties consistent with the interests of those currently before
7 the Court. Further, Plaintiffs would request that once all other current non-parties have been served
8 and have made an appearance or otherwise defaulted, that this Court evaluate the propriety of the
9 matter proceeding as a class action. Plaintiffs would anticipate that Defendants would have no
10 objection or will otherwise stipulate to the amendment of the complaint and caption.

11 Plaintiffs are currently obtaining an updated list of property owners in the pertinent subdivision
12 as Defendants had previously objected to the list obtained and filed with this Court. Plaintiffs will
13 attempt service on all property owners in accordance with Rules 4.1 and 4.2, Ariz.R.Civ.Proc.
14 Specifically, Plaintiffs intend on effecting service for in-state subdivision property owners by first
15 resorting to waiver of service as provided under Rule 4.2(d) prior to attempting personal service under
16 Rule 4.2(e). Again, as the cost of service may later be shifted to Defendants in the event they do not
17 prevail in this action, and in order to ensure that costs do not unnecessarily spiral out of control, it is
18 anticipated that Defendants will have no objection to this method and manner of effecting service on
19 in-state subdivision property owners.

20 II. CONCLUSION

21 Plaintiffs are ready and willing to proceed with undertaking the enormous and undeniably
22 costly task of joining all other subdivision property owners to this case so that Defendants may
23 proceed with their affirmative defense of joinder in accordance with this Court's prior order. As such,
24 Plaintiffs have no quibble with Defendants' calculation in determining that 55 days remain of the
25 initial 90 days provided by this Court by which Plaintiffs can take substantial steps toward obtaining
26 a motion to amend caption and complaint, and serving approximately 400 other property owners with

1 summons and the amended complaint. Consequently, as it is theoretically possible that all the time
2 could be consumed by argument over a motion to amend the caption and complaint, and in light of
3 the fact that this Court would want to hear the matter on its merits rather than be forced to dismiss the
4 matter based upon Defendants' seizure of a technical mis-step by Plaintiffs¹, Plaintiffs request that this
5 Court enter an order clearly providing that service under Rules 4.1 and 4.2 be undertaken after this
6 Court has entered its ruling on Plaintiffs' motion to amend complaint and caption.

7 Finally, again in an effort to efficiently dispose of this issue, Plaintiffs request that this Court
8 deny Defendants' request for oral argument as it is obviously interposed only to increase the cost of
9 litigation to Plaintiffs' detriment.

10 DATED this 13th day of April, 2009.

11 FAVOUR MOORE & WILHELMSSEN, P.A.

12
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14 By:


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18 Original of the foregoing
19 filed this 13th day of April,
20 2009, with:

21 Clerk, Superior Court of Arizona
22 Yavapai County
23 120 S. Cortez Street
24 Prescott, Arizona
86302

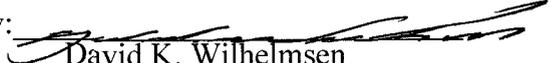
25 _____
26 ¹ That Defendants would seize such an opportunity is obvious in light of their purposeful mis-
reading of this Court's prior ruling and present argument to the Court that Plaintiffs have only 55 days
within which to obtain service on all other sub-division property owners.

1 A copy hand-delivered this 13th day
2 of April, 2009, to:

3 Honorable David L. Mackey
4 Division One, Yavapai County
5 Superior Court of Arizona
6 120 S. Cortez St.
7 Prescott, Arizona 86302

8 and, a copy mailed this
9 13th day of April, 2009, to:

10 Jeffrey Adams
11 ADAMS & MULL, PLLC
12 211 E. Sheldon Street
13 Prescott, Arizona 86302
14 Attorneys for Defendants Cox

15 By: 
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17 Marguerite Kirk

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