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1 Jeffrey R. Adams, #018959
2 **ADAMS & MULL, PLLC**
3 211 East Sheldon Street
4 Prescott, Arizona 86301
5 (928) 445-0003

6 Attorneys for Defendants

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

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

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

15 Plaintiffs,)

16 v.)

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

19 Defendants.)
20)

CASE NO. CV 2003-0399

DIVISION 1

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO AMEND**

(Oral Argument Requested)

(Assigned to the Hon. David L. Mackey)

21 Defendants Donald and Catherine Cox, by and through undersigned counsel, hereby respond
22 to Plaintiffs' request to Amend the Complaint for purposes of bringing this matter as a class action.
23 Contrary to Plaintiffs' assertion otherwise, their actions clearly demonstrate that they wish to (i) delay
24 this matter further and (ii) ignore the Court's Order re: Joinder making it perfectly clear that they have
25 no intention to join the absent owners. This Response is supported by the accompanying
26
27

Memorandum of Points and Authorities and the record on file, which shall be incorporated by reference.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Legal Argument.

In general, the factual considerations inherent in the decision to grant or deny class certification are left to the trial judge's discretion. See *London v. Green Acres Trust*, 159 Ariz. 136, 140, 765 P.2d 538, 542 (App.1988). To maintain a class action, the Plaintiffs must prove: (1) the class is so numerous that joinder of all members is impractical, (2) questions of law or fact common to the class exist, (3) the class representative's claim or defense is typical of the claims or defenses of the class, and (4) the class representative is able to adequately and fairly protect the interests of the class. See Rule 23(a), Ariz. R. Civ. P. The foregoing is routinely considered the "typicality" requirement and in assessing whether the typicality requirement is satisfied, Arizona courts examine whether: (1) common issues of law and/or fact are presented; (2) the interests of the proposed class representatives are not antagonistic to those members of the putative class; and (3) absent class members have suffered the same type of injury as the class representative. *Lennon v. First Nat'l Bank of Ariz.*, 21 Ariz.App. 306, 309, 518 P.2d 1230, 1233 (1974) (approving typicality of a bank customer seeking to maintain a class action counterclaim for allegedly illegal service charges). In other words, the claim is typical "if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory." *Weinberger v. Thornton*, 114 F.R.D. 599, 603 (S.D.Cal.1986) (citation omitted); accord *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir.1992) (noting that although some beauty school students were satisfied with their education, it did not mean that their claims were atypical, but rather that they suffered less injury).

In their Motion, Plaintiffs fail to meet, satisfy or even address the typicality requirement.

1 Specifically, Plaintiffs provide no evidence of any kind reflecting that make no showing that their
2 interests (they being the proposed class representatives) are not antagonistic to the absent owners of
3 property that this Court has ordered to be joined. Nor have Plaintiffs shown that the absent owners
4 have suffered the same type of injury as the Plaintiffs. To the contrary, as this Court is well aware and
5 as the Court records in Yavapai County indicate (of which we ask that the Court take judicial notice),
6 nobody including Plaintiffs has ever filed any action seeking to enforce the subject Declaration of
7 Restrictions against Defendants herein or any other absent owner. Accordingly, the Motion should
8 be denied.
9
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11 Class certification also requires compliance with Rule 23(b), Ariz. R. Civ. P. Therein, it states:

12 An action may be maintained as a class action if the prerequisites of
13 subdivision (a) are satisfied, and in addition:

- 14 (1) the prosecution of separate actions by or against individual members of the
15 class would create a risk of (A) inconsistent or varying adjudications with
16 respect to individual members of the class which would establish incompatible
17 standards of conduct for the party opposing the class, or (B) adjudications with
18 respect to individual members of the class which would as a practical matter
19 be dispositive of the interests of the other members not parties to the
20 adjudications or substantially impair or impede their ability to protect their
21 interests; or
- 22 (2) the party opposing the class has acted or refused to act on grounds generally
23 applicable to the class, thereby making appropriate final injunctive relief or
24 corresponding declaratory relief with respect to the class as a whole; or
- 25 (3) the court finds that the questions of law or fact common to the members of the
26 class predominate over any questions affecting only individual members, and
27 that a class action is superior to other available methods for the fair and
efficient adjudication of the controversy. The matters pertinent to the findings
include: (A) the interest of members of the class in individually controlling the
prosecution or defense of separate actions; (B) the extent and nature of any
litigation concerning the controversy already commenced by or against
members of the class; (C) the desirability or undesirability of concentrating the

litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

1 In their Motion, Plaintiffs have failed to satisfy the mandates of Rule 23(b), Ariz. R. Civ. P.
2 Accordingly, the Motion should be denied and Plaintiffs be ordered to complete joinder of the absent
3 owners.
4

5 As this Court well aware, during their lengthy opposition to the joinder of the absent owners,
6 Plaintiffs have asserted on multiple occasions that in this case there is no “risk of inconsistent or
7 varying adjudications” with respect to the Defendants or any of the absent owners. In this regard, we
8 refer the Court to their May 14, 2008, Plan for Joinder of Property Owners Subject to Restrictions, a
9 copy of which is attached hereto as Exhibit “1”. Therein, Plaintiffs stated:
10

11 Yet, Cox have conveniently failed to provide any cogent factual basis by which
12 this Court could conclude that the Cox’s face a real, potential (as opposed to
13 hypothetical threat contrived for purposes of argument only) of a subsequent lawsuit
14 from any other property owner. Cox have never provided this Court with any
15 affirmative evidence to support their proposition that they face an actual threat of
16 additional litigation from other property owners as to their use of the land.

16 Moreover, Cox have failed to establish that they would be subject to
17 inconsistent obligations, as opposed to inconsistent adjudications....

18 Under Cox’s hypothetical, contrary judicial adjudications of whether the
19 restrictive covenants have been abandoned do not result in Cox having inconsistent
20 legal obligations to others.

20 See Exhibit “1” at 5-6. Plaintiffs made the very same arguments *ad nauseum* in their subsequent
21 Motions on the issue of joinder of which we ask that the Court take judicial notice. Plaintiffs should
22 not be permitted to assert an argument on this point of law for purposes of opposing joinder and than
23 utilize the exact opposite argument for purposes of seeking class certification. Rather, Plaintiffs
24 should be held accountable for taking their legal position and made to suffer the consequences
25 therefore.
26
27

1 Furthermore, Plaintiffs have made no showing that the defenses asserted by the Defendants
2 herein are the same or similar to those that may be asserted by the absent owners. While we recognize
3 that Defendants have asserted at least one defense that may very well apply to all of the absent owners
4 that have used or may be using their property in violation of the restrictive covenants, Plaintiffs have
5 failed to show that Defendants would be in a position to assert any of the other defenses that any other
6 absent owner may possess. Further, while we acknowledge that the volume of absent owners is high,
7 that in and of itself is not justification for class certification. Inasmuch as Plaintiffs have already
8 identified all of the absent owners of which joinder is required, their joinder and the litigation of this
9 case, while involving many people, will be relatively simple. We know who they are, where they are
10 located and the manner of service that must be employed given their ownership of property subject
11 to the restrictive covenants. Accordingly, the Motion should be denied.

12
13 **II. Conclusion.**

14 For the foregoing reasons, the Motion in which Plaintiffs seek class certification of this case
15 should be denied. Plaintiffs have failed to meet their obligations due under Rule 23, Ariz. R. Civ. P.
16 Accordingly, we ask that the Court reject Plaintiffs' proposal and order that Plaintiffs comply with the
17 Court's Order to join the Absent Owners by completing joinder within the time period allowed.

18
19 DATED this 4 day of June, 2009.

20 ADAMS & MULL, PLLC

21 By _____

22 Jeffrey R. Adams, Esq.

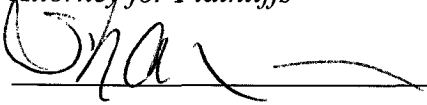
23 *Attorneys for Defendants*

24 A copy of the foregoing was
25 hand-delivered this 3 day of
26 April, 2009 to:

27 The Honorable David L. Mackey
Yavapai County Superior Court
Division 1
Yavapai County Courthouse
Prescott, Arizona

J. Jeffrey Coughlin, Esq.
J. Jeffrey Coughlin PLLC
114 South Pleasant Street
Prescott, Arizona 86303

Attorney for Plaintiffs



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1 FAVOUR MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
2 Prescott, AZ 86302-1391
Ph: 928/445-2444
3 Fax: 928-771-0450
David K. Wilhelmsen, 007112
4 Marguerite Kirk, 018054

5 Attorneys for Plaintiffs

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

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

12 vs.

13 DONALD COX and CATHERINE COX,)
14 husband and wife,)

15 Defendants.
16

No. CV 2003-0399

Division 1

**PLAINTIFFS' PLAN FOR
JOINER OF PROPERTY
OWNERS SUBJECT TO
RESTRICTIVE COVENANTS**

(Oral Argument Requested)

17 Plaintiffs, by and through undersigned counsel, in accordance with this Court's minute entry,
18 dated March 10, 2008, hereby submit their "plan for joinder" and for the Court's evaluation of whether
19 complete relief can be afforded in this action without joinder of each owner of property in Coyote
20 Springs Ranch subdivision subject to the restrictive covenants recorded June 13, 1974. Pursuant to
21 the Court's minute entry, Plaintiffs' plan herein provides a list of all property owners not currently a
22 party to this litigation, a map, a proposal for the procedural mechanism for joinder of these
23 individuals, and an analysis of this Court's ability to proceed without the necessity of joining any
24 additional property owner.


25 The present determination culminates from the Court of Appeals decision that Cox's motion
26 for joinder of non-party property owners was not "untimely," and it was incumbent upon this Court

1 on remand to render a determination whether this action should proceed if the absentees could not be
2 joined.¹ This Court's minute entry dated March 10, 2008, has requested that Plaintiffs provide the
3 Court with a "proposed plan" for joinder. It is assumed that this Court has not yet rendered its
4 determination that the absentees must be joined or the action dismissed, as the Court has not set forth
5 its findings on the indispensability of non-party property owners and the Court of Appeals never
6 entered a ruling to that effect. Plaintiffs' proposed plan will thus necessarily discuss the factors set
7 forth in Rule 19(b), and "whether in equity and good conscience the action should proceed among the
8 parties already before it, or should be dismissed." *Comments, Rule 19(b), Fed.R.Civ.Proc.*

9 RESPECTFULLY SUBMITTED this 14th day of May, 2008.

10 FAVOUR MOORE & WILHELMSSEN, P.A.

11 By


12 David K. Wilhelmsen
Marguerite Kirk
13 Post Office Box 1391
Prescott, Arizona 86302-1391
14 Attorneys for Plaintiffs

15 **PLAN FOR JOINDER**

16 **A. IDENTIFICATION OF PROPERTY OWNERS**

17 **AND AERIAL PHOTOGRAPHIC MAP OF SUBDIVISION**

18 A list of property owners not currently parties to this litigation, who own property subject to
19 the restrictive covenants at issue in this case, identifying the name(s) of the individual property owner,
20 _____

21 ¹ Cox's originally raised the issue of the necessity of joinder of all non-party property owners
22 on the eve of trial in this matter, arguing that joinder was necessary as Cox could be subject to
23 subsequent litigation from other property owners. This Court dismissed that request as untimely. The
24 appellate court reversed, stating that the rule itself did not set forth a time-frame by which a request
25 for joinder could be made. Comments to the federal counterpart of Arizona's joinder rule pointedly
26 uphold this Court's original determination: "However, when the moving party is seeking dismissal
in order to protect himself against a later suit by the absent person (subdivision (a)(2)(ii)), and is not
seeking vicariously to protect the absent person against a prejudicial judgment (subdivision (a)(2)(i)),
his undue delay in making the motion can properly be counted against him as a reason for denying the
motion." *Comments, Rule 19(b), Fed.R.Civ.Proc.*

1 their current address on file with Yavapai County Assessor's Office, and assessor's parcel number for
2 each property is attached hereto as Exhibit 1. An aerial photographic map² of the subdivision to which
3 the June 13, 1974 recorded covenants and restrictions apply is attached hereto as Exhibit 2. The map,
4 certified as accurate by Yavapai County Management Information Systems GIS Department, identifies
5 the parcel numbers for each property (as available on July 18, 2005), as well as identification of local
6 streets, roads and ways.

7 **B. NECESSITY OF COURT'S DETERMINATION FOR FINDING OF ABSENTEES AS**
8 **"INDISPENSABLE" AND PROPOSED PROCEDURE FOR JOINDER OF NON-PARTY**
9 **PROPERTY OWNERS**

10 As set forth in the attached list of non-party property owners, there are currently 273³ non-party
11 property owners proposed for joinder to this action. These property owners are spread over 12 states
12 (including Arizona) from California to New York.

13 As a practical matter, Plaintiffs propose that only in the event this Court renders findings and
14 enters a ruling that these non-parties be deemed indispensable⁴, that joinder be accomplished by means
15 of amendment to the current complaint to include these individuals as plaintiffs to the instant action.

16 Rule 19(b), Ariz.R.Civ.Proc., provides:

17 If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the
18 court shall determine whether in equity and good conscience the action should proceed
19

20 ² As demonstrated by the map, the sheer amount of vacant, undeveloped land in the
21 subdivision undermines any cogent legal argument of abandonment Cox intend on advancing at time
22 of trial.

23 ³ Only one property owner was included in calculating the final number where more than one
24 individual owned a particular lot.

25 ⁴ Should the Court hold that these non-party property owners are indispensable, Plaintiffs
26 reserve the right to address the issue of the propriety of a class action at that time, as making any such
argument at this juncture is premature and may inadvertently lead the Court to conclude that Plaintiffs
waive any argument on the issue of indispensability.

1 among the parties before it, or should be dismissed, the absent person being thus
2 regarded as indispensable. The factors to be considered by the court include: first, to
3 what extent a judgment rendered in the person's absence might be prejudicial to the
4 person or those already parties; second, the extent to which, by protective provisions
5 in the judgment, by the shaping of relief, or other measure, the prejudice can be
6 lessened or avoided; third, whether a judgment rendered in the person's absence will
7 be adequate; fourth, whether the plaintiff will have an adequate remedy if the action
8 is dismissed for nonjoinder.

9 *Id.* State Bar Committee Notes to the rule state: "The official comment of the federal advisory
10 committee on civil rules on the change in Federal Rule 19 is comprehensive and should be consulted."

11 *Id.* The Arizona Supreme Court has previously commented that it "subscribe[s] to the principle that
12 uniformity in interpretation of our rules and the federal rules is highly desirable." *Orme School v.*
13 *Reeves*, 166 Ariz. 301, 304, 802 P.2d 1000, 1003 (1990), citing *Ritchie v. Grand Canyon Scenic Rides*,
14 165 Ariz. 460, 463-64, 799 P.2d 801, 804-05 (1990), (other internal case citations omitted).

15 Federal Rule 19(b) sets forth the same criteria as that contained in its Arizona counterpart for
16 a court's determination of whether a party is "indispensable" as was previously used to describe those
17 necessary and proper parties who, if not joined, would lead to dismissal of the action. Comments to
18 the federal rule note that "[t]he factors are to a certain extent overlapping, and they are not intended
19 to exclude other considerations which may be applicable in particular situations." *Comments to 1966*
20 *Amendment to Federal Rule of Civil Procedure, Rule 19, subdivision (b) (hereinafter cited as*
21 *"Comments, Rule 19(b), Fed.R.Civ.Proc."*). In light of the extensive federal court precedent dealing
22 with determinations as to a party's indispensability, and Arizona Supreme Court's and Rule
23 Committee comments seeking to keep the federal and state rules uniform, the remainder of this
24 memorandum will refer in large measure to federal law.

25 The first factor brings in a consideration of what a judgment in the
26 action would mean to the absentee. Would the absentee be adversely

1 affected in a practical sense, and if so, would the prejudice be
2 immediate and serious, or remote and minor? The possible collateral
3 consequences of the judgment upon the parties already joined are also
4 to be appraised. Would any party be exposed to a fresh action by the
5 absentee, *and if so, how serious is the threat?*

6 *Comments, Rule 19(b), Fed.R.Civ.Proc. (emphasis added, internal citations omitted).* In this case, no
7 absentee would be prejudiced by non-joinder. As this Court is well aware, the recorded covenants at
8 issue expressly provide that each property owner has an independent right to assert a claim against any
9 other property owner in the subdivision who may be violating the covenants. Hence, no absentee
10 would be prejudiced by failure to join and the action could proceed. It is the contrary upon which
11 Cox's have premised their entire argument that the action cannot proceed *unless* all property owners
12 are joined. Yet, Cox have conveniently failed to provide any cogent factual basis by which this Court
13 could conclude that the Cox's face a real, potential (as opposed to hypothetical threat contrived for
14 purposes of argument only) of a subsequent lawsuit from any other property owner. Cox have never
15 provided this Court with any affirmative evidence to support their proposition that they face an actual
16 threat of additional litigation from other property owners as to their use of the land.

17 Moreover, Cox have failed to establish that they would be subject to inconsistent obligations,
18 as opposed to inconsistent adjudications. The U.S. District Court, District of New Jersey, has aptly
19 stated:

20 It should be noted that Rule 19 protects only against inconsistent obligations, not
21 inconsistent adjudications. *See RPR & Assoc. v. O'Brien/Atkins Assoc., P.A., 921*
22 *F.Supp. 1457, 1464 (M.D.N.C. 1995).* The Third Circuit agrees **that Rule 19 is not**
23 **triggered merely by inconsistent adjudications.** *See Field v. Volkswagenwerk AG,*
24 *626 F.2d 293, 301-02 (3d Cir. 1980).* (*The mere risk that a defendant who has*
25 *successfully defended against a party may be found liable to another plaintiff in a*
26 *subsequent action does not necessitate joinder of all of the parties in one action.*)

1 *Saudi Basic Industries Corp. v. Exxonmobil Corp.*, 194 F.Supp.2d 378, 397 (D.N.J. 2002) (*emphasis*
2 *added*). In this case, Cox's argument in support of joinder (and consequent dismissal if joinder cannot
3 be had) is that should they prevail in this case, they run the risk of subsequent litigation that will find
4 that their business does violate the restrictive covenants. But what Cox have never appreciated about
5 the application of Rule 19 is, as the U.S. District Court has so succinctly set forth, joinder is not
6 intended to protect a party against inconsistent adjudications. Under Cox's hypothetical, contrary
7 judicial adjudications of whether the restrictive covenants have been abandoned do not result in Cox
8 having inconsistent legal obligations to others. Thus, the classic case for demonstrating
9 indispensability centers on a party who owes a sum certain between two or more competing entities,
10 one or more of whom are not parties to the action.

11 The second factor "calls attention to the measures by which prejudice may be averted or
12 lessened. The 'shaping of relief' is a familiar expedient to this end." *Comments, Rule 19(b)*,
13 *Fed.R.Civ.Proc.* The cases cited by the Comments to this portion of federal rule 19(b) speak in terms
14 of prejudice to the absentee, not to the parties before the Court. Here, the restrictive covenants
15 preclude any prejudice to an absentee should that party not be joined. Alternatively, to the extent that
16 a party to the action may claim prejudice for non-joinder, the Comments to the federal rule provide:
17 "Sometimes, the party is *himself able to take measures to avoid prejudice*. Thus a defendant faced
18 with a prospect of a second suit by an absentee may be in a position to bring the latter into the action
19 by defensive interpleader....So also the absentee may sometimes be able to avert prejudice to himself
20 by voluntarily appearing in the action or intervening on an ancillary basis." *Comments, Rule 19(b)*,
21 *Fed.R.Civ.Proc.* (*emphasis added; internal case citations omitted*).

22 It is the ability of this Court to fashion relief between the parties, and for Cox themselves to
23 take "measures to avoid prejudice" that militate against this Court's finding that any absentee is an
24 indispensable party. In "equity and good conscience," this Court can proceed with this action as
25 between the parties against it, without joinder of any non-party property owner. *Comments, Rule 19(b)*,
26 *Fed.R.Civ.Proc.* ("the court is to determine whether in equity and good conscience the action should

1 *proceed among the parties already before it, or should be dismissed. That this decision is to be made*
2 *in the light of pragmatic considerations has often been acknowledged by the courts.” (emphasis*
3 *added)).* To the extent that Cox are concerned about any hypothetical subsequent suit from another
4 absentee, equity dictates that Cox bear the burden of interpleading those non-parties whom they
5 consider to pose a threat of actual subsequent litigation. That Comments to the federal rules so
6 provide for such a result, and that it is an available remedy to Cox, mandates this Court’s finding that
7 this case, as between the parties currently before it, proceed without necessity of joining any other
8 party, or dismissal for failure to join.

9 “The third factor – whether an “adequate” judgment can be rendered in the absence of a given
10 person – calls attention to the extent of the relief that can be accorded among the parties joined. It
11 meshes with the other factors, especially the ‘shaping of relief’ mentioned under the second factor.”
12 *Comments, Rule 19(b), Fed.R.Civ.Proc.* Clearly, this Court can enter an adequate judgment on the
13 claims raised between the parties to the instant litigation. That judgment would not in and of itself
14 expose Cox to subsequent contrary judgments as would be the case if this Court were asked to
15 determine the rights and liabilities of parties to a sum certain when an absentee with rights to that sum
16 is not joined (the classic case of indispensability). It is the failure of the Court in that instance to
17 fashion relief as between the parties to it that dictates a finding that a non-party with rights to the
18 subject of litigation be joined or the action dismissed. Clearly, that is not the case before this Court.

19 “The fourth factor, looking to the practical effects of a dismissal, indicates that the court should
20 consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another
21 forum where better joinder would be possible.” *Comments, Rule 19(b), Fed.R.Civ.Proc. (internal case*
22 *citations omitted).* There is no alternate, more effective forum for Plaintiffs in this action to file suit.

23 As a final consideration, Plaintiffs request that the Court look to the practical effects of joinder
24 and alignment of all non-party property owners who are scattered across 12 states. Cox have asserted
25 the affirmative defense of abandonment, upon which their joinder argument is entirely premised.
26 Insofar as the Court may rule that these parties are necessary for the just adjudication of this case, such

1 that without their participation this action must be dismissed, Plaintiffs request that the Court also
2 enter a ruling as to the alignment of the non-parties in this action. The principle consideration in
3 alignment of non-parties gleaned from federal cases dealing with the topic in the context of diversity
4 actions, “courts must focus on the points of substantial antagonisms, not agreement.” *Wolf v. Kennelly*,
5 *2008 WL 410640 (N.D.Ill. E.Div. 2008)*; *Langone v. Flint Ink North America Corp.*, *231 F.R.D. 114*
6 *(D. Mass. 2005)* (in determining alignment of parties, courts have a duty to align according to their
7 sides of dispute).

8 **C. NON-PARTY PROPERTY OWNERS ARE NOT INDISPENSABLE**
9 **TO THIS COURT’S JUST ADJUDICATION OF THIS CASE**

10 In this case, there are 273 non-party property owners that reside in Yavapai County, in Arizona
11 but outside the county, and several who live in 11 other states (Arkansas, California, Illinois, Kansas,
12 Michigan, Montana, Nevada, New York, Tennessee, Virginia and Wyoming). Obtaining service on
13 these individuals in accordance with Rule 4 would be cost-prohibitive and would operate as an undue
14 financial hardship⁵ on Plaintiffs who simply reside in Coyote Springs Ranch, unlike Cox who are
15 using their property to generate a substantial business income. It would be unjust and inequitable for
16 the Court to ignore the substantial hardship joinder of approximately 400 additional individuals that
17 Cox demand Plaintiffs bear when (a) Cox moved for joinder, and (b) Cox are operating a business on
18 the subject property generating an income. Additionally, it is Cox who have argued that joinder is
19 appropriate so that they may be shielded from additional litigation on their commercial use of the
20 property in violation of the restrictive covenants. Equitable considerations would compel a conclusion
21 that Cox bear the expense of any guarantee against future litigation as to their commercial use of the
22 property.

23
24
25 ⁵ Rule 19(b) provides the Court with factors to consider in determining indispensability of
26 a party. The Rule does not characterize those factors as exclusive, and comments to the federal
counterpart expressly provide that the factors are non-exclusive.

1 This case does not present the situation where courts typically find indispensability; namely,
2 where a party is subject to inconsistent obligations, as opposed to adjudications (as Cox argue). To
3 the contrary, this case presents a situation where Cox seek to ignore and then undermine restrictive
4 covenants for which they had notice based simply upon their argument that they *may* be subject to
5 future litigation that *may* result in a contrary decision. That being the case, Cox's own conduct for
6 which they seek to use this litigation as assurance against any potential litigation is no different than
7 a tortfeasor seeking a ruling that his omission or misconduct in one instance operates as a bar against
8 a similar claim by another individual in all instances.

9 D. CONCLUSION


10 Plaintiffs propose that the Court find that joinder of 273 non-party property owners be deemed
11 impractical, infeasible and prohibitively expensive without promoting justice or equity in the
12 determination of Cox affirmative defense of abandonment. In equity and good conscience this Court
13 can readily fashion relief between the parties without any prejudice to any absentee. Moreover, and
14 more importantly, Cox's entire premise that joinder is necessary based upon the threat of multiple
15 subsequent litigation is a red herring. As Comments to federal Rule 19(b) makes clear, a party may
16 not seek to derail litigation on the mere speculation of subsequent litigation that may expose it to
17 adverse decisions. As Cox have always known of the existence of these other property owners, have
18 always had a procedural remedy available to join these non-party property owners, but failed to do so,
19 and were the movants for joinder, Cox must establish with greater particularity that any threat of
20 potential future litigation is real and not contrived for purposes of argument to increase the cost of
21 litigation, and stretch the seams of the Court's resources. That Cox have failed to do so, "equity and
22 good conscience" dictate that this Court proceed without the necessity of joining any other property
23 owner not otherwise already a party to this action. To the extent Cox are aggrieved by such a decision,
24 it is incumbent upon Cox to file a third-party claim against any property owner that they feel poses
25 an actual threat of future litigation on the same issues set forth in this litigation.

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DATED this 14th day of May, 2008.

FAVOUR MOORE & WILHELMSSEN, P.A.

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

Original of the foregoing filed
this 14th of May, 2008, with:

Clerk, Superior Court of Arizona
Yavapai County
120 S. Cortez Street
Prescott, Arizona 86302

A copy of the foregoing
hand-delivered this 14th day
of May, 2008, to:

Honorable David L. Mackey
Division One
Superior Court of Arizona
Yavapai County
120 S. Cortez Street
Prescott, Arizona 86302

A copy of the foregoing
mailed this 14th day of May,
2008, to:

Jeffrey Adams
Adams & Mull
P. O. Box 1031
Prescott, Arizona 86302
Attorneys for Defendants Cox

By: 
David K. Wilhelmsen
Marguerite Kirk