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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2009 JUN 12 PM 4: 25

JENNIFER HICKS, CLERK
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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,

14 Plaintiffs,

15 vs.

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

18 Defendants.

CASE NO. CV 2003-0399

**REPLY IN SUPPORT OF
PLAINTIFFS' MOTION FOR
LEAVE TO AMEND FIRST
AMENDED COMPLAINT**

19 Plaintiffs, by and through undersigned counsel, hereby submit their Reply in Support of
20 Plaintiffs' Motion for Leave to Amend First Amended Complaint pursuant to Rule 15 (a),
21 Arizona Rules of Civil Procedure (ARCP) for the purpose of converting this case into a class
22 action.

23 **I. Factual and Procedural Background**

24 Plaintiffs reassert the factual and procedural background set forth in their Motion to
25 Amend First Amended Complaint as if fully set forth herein. In Defendants' response to
Plaintiffs' motion, they do not contest any of the facts or procedural background in this case.
What remains uncontroverted is the fact that this Court discussed the possibility of this case
being more suited to a class action and the fact that this Court stated it would give the Plaintiffs

1 the opportunity to make a determination on that issue. Defendants also do not contest the fact
2 that Plaintiffs compiled information for the purpose of either joinder or class action by
3 submitting the owner occupied properties with parcel numbers, addresses, and mailing labels,
4 along with absentee owners, their parcel numbers, mailing addresses, and mailing labels. These
5 were attached to Plaintiffs' motion and should be reasonably interpreted as an effort to comply
6 with this Court's order of either taking substantial steps to join or the suggestion of class action.

7 **II. Argument**

8 In the current motion, Plaintiffs' seek only to amend their complaint to convert this case
9 into a class action. Plaintiffs are not interposing the motion for reasons of delay. The motion will
10 not result in any prejudice. Defendants have not presented anything to support a finding of delay
11 or prejudice. Court's in Arizona have been liberal about granting leave to replead. *Romo v.*
12 *Reyes*, 26 Ariz. App. 374, 375, 548 P.2d 1186, 1187 (1976) (quoting *Five Right & Miller*,
13 *Federal Practice and Procedure*, § 1394 at 871).

14 Plaintiffs are not required to establish the legal basis for class action certification in a
15 motion to amend the complaint. Because Defendants have not established that Plaintiffs are
16 interposing this motion for reasons of delay or that the motion would result in any prejudice to
17 them, the motion should be granted. Contrary to prejudice, this class action process could
18 benefit Defendants. For example, if this Court decides class action is not superior but that joinder
19 is the superior method of proceeding with this case, the taxable costs will be substantial. If
20 Plaintiffs are the prevailing party, Defendants would be responsible for those costs (or double the
21 taxable costs if rule 68 applies). This is not prejudicial to Defendants, it is preventative.

22 Much of Defendants' legal argument in their response is devoted to quoting Rule 23
23 *verbatim*. As can be gleaned from a review of Plaintiffs' Motion to Amend and proposed
24 Second Amended Complaint in Class Action, Plaintiffs have asserted that they would be
25 complying with Rule 23 Defendants have cited the case of *Lennon v. First National Bank of*

1 *Arizona*, 21 Ariz.App. 306, 518 P.2d 1230 (App. 1974) as support for their challenge to
2 Plaintiffs' motion to amend their complaint in this case. The challenge is premature. Rule
3 23(c)(1) states, in part, "[As] soon as practicable after the commencement of an action brought as
4 a class action, the court shall determine by order whether it is to be so maintained". This case
5 can not commence as a class action until this Court allows Plaintiffs to amend the complaint.
6 Recognizing that Defendants are debating this issue, however, Plaintiffs will address their
7 concerns.

8 In the *Lennon* case, above, the Court discussed the elements of Rule 23 (a) and
9 determined that each one of those elements had been satisfied. Regarding Rule 23 (a), the Court
10 stated that the Appellant had satisfied that element because it was clear that the class was so
11 numerous that joinder of all the members was impractical. In the present case, this Court stated
12 in its Ruling on August 22, 2008, page 2, (middle of second paragraph), that Plaintiffs' argument
13 regarding the expense of service "is best made towards the 'impracticable' requirement of that
14 rule." That is the argument Plaintiffs are asserting and which should satisfy the requirement of
15 Rule 23 (a)(1).

16 The *Lennon* court also discussed Rule 23 (a)(2) and stated that the Rule requires "simply
17 that there exist questions of law or fact common to the class." This element is met because the
18 question at issue in this lawsuit currently, is whether the Declaration of Restrictions (hereinafter
19 "Restrictions") for Coyote Springs Ranch has been abandoned. This is an issue common to
20 every property owner, whether they reside on site or elsewhere. This element should not be an
21 onerous burden to shoulder once the Second Amended Complaint has been filed.

22 The next element is contained in Rule 23 (a)(3), which requires that the claims or
23 defenses of the representative parties be typical of the class members' claims or defenses. The
24 court in *Lennon* stated in its analysis of this element that "some courts have held that the
25 typicality requirement is satisfied when common questions of law or fact exist, 21 Ariz. App.

1 306 at 309, 518 P.2d 1230 at 1233 (citations omitted). The court when on to state, “others have
2 held a representative’s claim typical if the interests of the representative are not antagonistic to
3 those of the absent class members.” *Id.* The court continued, “still others require the
4 representative to demonstrate the absent class members have suffered the same grievances of
5 which he complains.” *Id.* The *Lennon* court found that under each of the various approaches, the
6 appellants’ claim was typical of the remainder of the asserted class. “There are common
7 questions, her position is clearly not antagonistic to those of the class, and her alleged grievance
8 is identical to that of the class.” *Id.*

9 Although Defendants do not refer to the fourth element of Rule 23, Plaintiffs will discuss
10 it so as to be thorough. The fourth element of Rule 23 is that the representative parties will fairly
11 and adequately protect the interests of the class. The court in *Lennon* discussed this element as
12 follows:

13 An essential concomitant of adequate representation is that the parties’ attorney
14 be qualified, experienced and generally able to conduct the proposed litigation.
15 Additionally, it is necessary to eliminate so far as possible the likelihood that the
litigants are involved in a collusive suit or that plaintiff has interests antagonistic
to those of the remainder of the class.

16 *Id.* (quoting, *In Eisen v. Carlisle and Jacquelin*, 391 F.2d 555, 562-563 (2nd Circuit
17 1968)).

18 The *Lennon* court determined that it had not found anything indicating that there
19 was a lack of adequate representation in the trial court and that the appellant should be an
20 excellent representative since she was presumably one who had more at stake than most
21 class members. The court finished by stating that there were not any doubts that had
22 been raised by the parties as to the qualifications of her attorneys. 21 Ariz. App. At 309-
23 310, 518 P.2d 1233-1234.
24

25 Defendants have stated that the “Plaintiffs fail to meet, satisfy or even address the
typicality requirement.” For the reasons stated above, Plaintiffs are seeking to amend their

1 complaint. The merits of the complaint itself should not be challenged in the course of a motion
2 to amend. Out of an abundance of caution, however, Plaintiffs will address Defendants'
3 concerns. As the *Lennon* court stated, typicality can be satisfied by merely establishing that
4 there are common questions of law or fact which exist. 21 Ariz. App.at 309, 518 P.2d at 1233.
5 There cannot be any legitimate dispute that there are common questions of law and fact which
6 exist in this case. If this Court takes the position that the typicality requirement is satisfied by
7 establishing this, then Defendants' argument evaporates.

8 If this Court seeks to utilize the antagonistic approach to Rule 23 (a)(3), it is certainly
9 premature in a motion to amend the complaint to establish whether or not the interests of the
10 representative are not antagonistic to those of the absent class members. This can only be
11 determined in the process of the class action itself.

12 If this Court analyzes the requirements of Rule 23 (a)(3) on the basis of a demonstration
13 that the absent class members have suffered the same grievances of which the Plaintiffs
14 complain, common sense dictates that, with property owners totaling over three hundred, absent
15 class members who agree that the Restrictions have not been abandoned are in the same boat as
16 Plaintiffs in this case.

17 In sum, this Court could align itself with the decision in the *Lennon* court, above, by
18 stating that there are common questions, that Plaintiffs' position is not antagonistic to those of
19 the class, and that the Plaintiffs' grievances are identical to those of the class in this case. This
20 Court could also align itself with any of the interpretations of the other courts cited in the *Lennon*
21 case.

22 Defendants' next assertion is that Plaintiffs must comply with Rule 23 (b). In their
23 motion to amend their complaint Plaintiffs state in the last two sentences of the Factual and
24 Procedural Background, "In the event this Court allows this action to proceed as a class action,
25 Plaintiffs are prepared to comply with all the requirements of Rule 23. This will of course

1 include mailing notices to all property owners for the purposes stated in Rule 23". Plaintiffs
2 understand their obligations under Rule 23, including complying with Rule 23 (b). Although
3 Plaintiffs believe that having to assert their position in the context of a motion to amend the
4 complaint is premature, they will address Defendants' arguments nevertheless.

5 Defendants' argument seems to center on their assertion that Plaintiffs have taken
6 inconsistent positions in this case. Defendants describe some of Plaintiffs' arguments as ones that
7 have been made "*ad nauseum*" in some motions concerning joinder. Defendants seek the
8 Court's assistance in making Plaintiffs "suffer the consequences therefore." Regardless of the
9 positions taken in this case, this Court has made certain findings. Those findings dictate the
10 course of action in this case. In its August 22, 2008 ruling, this Court stated on page 3 of its
11 decision that it found that both Plaintiffs and Defendants may be subject to multiple litigation if
12 the other property owners are not joined. This Court stated, "Although unlikely, even if the
13 plaintiffs prevail in avoiding a finding of abandonment, a property owner who agrees with the
14 defendants' position regarding abandonment of the declaration of restrictions could file another
15 declaratory action and name plaintiffs as parties in the lawsuit . . . More likely, if Defendants
16 prevail, any other property owner who is not a party to this suit could file the same action against
17 the defendants as is currently pending."

18 Defendants have stated that Plaintiffs should not be allowed to assert inconsistent
19 positions. This argument does not make sense. If Defendants mean that a position taken by a
20 party during a pleading in the case becomes the law of the case, Plaintiffs will certainly entertain
21 any authority for that position. This Court has stated that other property owners not being
22 involved in this case will result in prejudice to their property rights. The class action that
23 Plaintiffs are proposing provides a superior vehicle for involving all property owners. No
24 property owners will be prejudiced. Plaintiffs will establish the prerequisites of Rule 23 (b). It
25

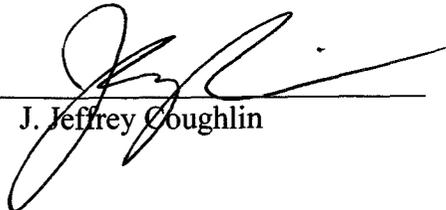
1 should be noted that Rule 23 (b) is phrased in the disjunctive, so any of the elements in Rule 23
2 (b)(1) through (3) can be satisfied to comply with the rule.

3 **III. Conclusion**

4 Plaintiffs seek to amend their complaint to convert this case into a class action. Any
5 challenge to the elements necessary for a class action are not appropriate at this time. Plaintiffs,
6 nevertheless, have addressed the issues raised by Defendants in the opposition to Plaintiffs'
7 motion to amend and request that this Court grant the motion and allow this matter to proceed.

8 RESPECTFULLY SUBMITTED this 2nd day of June, 2009

9 **J. JEFFREY COUGHLIN PLLC**

10
11 By: 
12 J. Jeffrey Coughlin

13 COPY of the foregoing
14 mailed this 2nd day of
15 June, 2009 to:

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