Jeffrey R. Adams, #018959
THE ADAMS LAW FIRM, PLLC
125 Grove Avenue
Post Office Box 2522
Prescott, Arizona 86302
Phone: (928) 445-0003
Fax: (928) 443-9240
law_office@jradamslaw.com
Co-Counsel for Defendants Cox; Counsel for Joined Party Defendants

Mark W. Drutz, #006772
Sharon M. Flack, #021590
MUSGROVE, DRUTZ & KACK, P.C.
1135 W. Iron Springs Road
P.O. Box 2720
Prescott, Arizona 86302-2720
Phone: (928) 445-5935
Fax: (928) 445-5980
Firm Email: mdkpc@cableone.net
Counsel for Defendant Veres; Co-Counsel for Defendants Robert and Catherine Cox

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; ELIZABETH NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust, Plaintiffs, v. DONALD COX and CATHERINE COX, husband and wife, et al., et ux., Defendants.	Case No. P1300CV20030399 **DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR NEW TRIAL RE: GRANT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** (Oral argument requested)

Defendants Cox, Veres as well as those joined property owners upon whose behalf undersigned counsel have entered an appearance and filed an Answer to Plaintiffs' First Amended Complaint (collectively herein, "**Defendants**") hereby file their combined Reply to Plaintiffs' and James Varilek's

Responses to Defendants' Motion for New Trial Re: Grant of Plaintiffs' Motion for Summary Judgment ("**MNT**") and again move the Court to grant a new trial or reversal of the grant of Plaintiffs' Motion for Summary Judgment. This Reply is premised upon Rules 56 and 59(a), Ariz. R. Civ. P., as well as the Court's June 14, 2013, Under Advisement Ruling ("**June 14, 2013 UAR**") erroneously entering summary judgment in favor of Plaintiffs. The Court failed to follow the Court of Appeals' interpretation of paragraph 2 of the Declaration of Restrictions (also, "**CC&Rs**"), improperly relied upon the Affidavit of Robert Conlin, failed to apply well-established Arizona law governing motions for summary judgment, and improperly granted summary judgment prior to ensuring that all owners of property in Coyote Springs Ranch were properly joined. These errors are premised upon Rule 59(a)(1), (6) and (8), Ariz. R. Civ. P.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Both Judge Jones' And Plaintiffs' "Analysis" And "Focus" Were Erroneous.

Throughout their Responses to Defendants' MNT, Plaintiffs contend that the "focus" should be that Coyote Springs was intended to be merely a rural, residential community and that was the end of the inquiry concerning the issue of abandonment. Plaintiffs assert that, in evaluating the "hundreds of violations" identified by Defendants, Judge Jones "recognized ... that [violations such as] [unshielded] above-ground propane tanks, old couches [littering the properties], trashed mobile homes and similar trivialities are virtually irrelevant to whether CSR remains a rural, residential subdivision. Indeed, it might be said that most of them are typical of a rural, residential subdivision." Varilek's Response to MNT, p. 6:4-9. Plaintiffs' argument exposes the flawed "focus" of both Plaintiffs and Judge Jones.

Assuming, *arguendo*, that the developers of Coyote Springs intended merely to create a rural residential community, there would not have been any need for the creation of the subject CC&Rs. Rather, the Yavapai County Zoning Ordinance and the zoning classification for the properties in

Coyote Springs already provide for rural land uses, of which the Court may take judicial notice. *Roseland v. City of Phoenix*, 14 Ariz.App. 117, 122, 481 P.2d 288, -- (App. 1971).

It is crystal clear that the developers of Coyote Springs sought to create ***much more*** than merely a rural, residential community. To use Plaintiffs' language, the "fundamental character" of Coyote Springs was intended to be a residential development where the owners of the properties are significantly restricted with respect to how they may develop, maintain and use their properties.[1] And those restrictions are anything but "trivial" or "irrelevant". Rather, they are a "fundamental" part of the development scheme established by the developers of Coyote Springs as set forth in the CC&Rs. Importantly, nowhere in the CC&Rs did the developers of Coyote Springs state that any one provision should be favored over another provision. Thus, the only inference to be drawn from the express language CC&Rs is that ***all*** of the provisions therein carry equal importance and, taken together, they establish the "fundamental character" of Coyote Springs.

Candidly, if the developers of Coyote Springs were unconcerned with the types and sizes of the homes and materials used to build them, screening above-ground storage tanks, junk littering the properties, limits on the time motor homes may be kept, the number and size of out-buildings and stand-alone garages allowed, etc., they would not have included provisions in the CC&Rs that address each of the foregoing as well as many others in establishing the "fundamental character" of Coyote Springs as something more than simply rural, residential. Thus, Plaintiffs' and Judge Jones' focus solely on the rural, residential aspect of Coyote Springs and nothing more was a "fundamental error" in and of itself. And, because Defendants have identified literally hundreds of violations of those restrictive covenants (which Plaintiffs did not controvert), each of which go to the heart of the

[1] Significantly, 11 of the provisions in the CC&Rs begin by using the prohibitive word "**No**".

"fundamental character" of Coyote Springs, a material question of fact exists regarding whether the CC&Rs have been abandoned. Accordingly, either the grant of summary judgment on Plaintiffs' Third Motion for Summary Judgment should be reversed or a new trial granted.

II. The MNT Comports With Arizona Procedure.

In their Responses, Plaintiffs argue that the MNT (i) was filed either too early or too late, and (ii) fails to comply with Rule 59, Ariz. R. Civ. P. However neither argument is valid.

As an initial matter, Rule 59(a), Ariz. R. Civ. P., provides in pertinent part as follows:

> A verdict, decision or judgment may be vacated and a new trial granted on motion of the aggrieved party for any of the following causes materially affecting that party's rights:
>
> 1. Irregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial....
>
> 6. Error in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions requested, or other errors of law occurring at the trial or during the progress of the action....
>
> 8. That the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law.

See Rule 59(a), Ariz. R. Civ. P. (emphasis added).

Regarding the timing of the filing of a Rule 59 motion, Rule 59(c), Ariz. R. Civ. P., requires merely that it must be filed "not later" than 15 days following entry of a "judgment." Thus, it is relatively clear that a Rule 59 motion can be filed at any time after a judicial "decision" has been made and prior to 15 days after entry of a "judgment." The foregoing is consistent with decisions from the Arizona Supreme Court, which has held that "[a] motion for new trial required to be filed 'not later than' 15 days after entry of judgment, ... may be effectively filed prior to the entry of judgment." *Farmers Ins. Co. of Arizona v. Vagnozzi*, 132 Ariz. 219, 644 P.2d 1305 (1982), *citing Dunahay v.*

Struzik, 96 Ariz. 246, 393 P.2d 930 (1964) and *Sadler v. Arizona Flour Mills Co.*, 58 Ariz. 486, 121 P.2d 412 (1942). Accordingly, Plaintiffs' argument regarding the timing of the MNT must be dismissed.

Regarding Plaintiffs' argument that Defendants did not comply with Rule 59(a), Ariz. R. Civ. P., we have the following comments. A motion filed pursuant to Rule 59 "must both refer to rule 59 as authority for the motion and set forth as grounds for the motion those grounds found in rule 59." *James v. State*, 158 P.3d 905, 215 Ariz. 182 (Ct. App. 2007). The "grounds" articulated in Rule 59(a) as articulated above include, *inter alia*, (i) "[i]rregularity in the proceedings of the court, referee, jury or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial", (ii) "[e]rror in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions requested, or other errors of law occurring at the trial or during the progress of the action", and (iii) "[t]hat the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law." *See* Ariz. R. Civ. P. 59(a)(1), (6) and (8).

Defendants' MNT complied with the mandates of Rule 59. In their MNT, Defendants specifically referenced Rule 59 as the rule upon which the Motion was premised, set forth their arguments under that Rule as the basis upon which they are entitled to a new trial including the Court's failure to: (i) properly apply and follow the law of the case doctrine, (ii) properly apply the law governing Rule 56, Ariz. R. Civ. P., and motions for summary judgment, (iii) properly apply and follow the law governing the interpretation of the CC&Rs, (iv) consider the uncontroverted evidence of several hundred violations of the CC&Rs and (v) rule on Defendants' Motion to Dismiss *prior* to ruling on Plaintiffs' Third Motion For Summary Judgment, without first ensuring that all Coyote Springs property owners had been properly joined. Each of the foregoing fall within the scope of Rules 59(a)(1), (6) and (8). Accordingly, Plaintiffs' argument that the MNT was procedurally

defective must be dismissed. Alternatively, and in accordance with due process, the Court may permit Defendants an opportunity to amend their Motion for New Trial.

III. Arizona Follows The "Frequency-Of-Violation" Test on the Issue of Abandonment.

In opposing Defendants' argument that a "frequency-of-violations" test must be utilized in analyzing whether a question of fact exists regarding the abandonment of the CC&Rs, Plaintiffs attempt to murky the waters by arguing that Defendants have confused waiver with abandonment. Plaintiffs also argue that a "frequency-of-violations" test does not exist with respect to determining whether restrictive covenants have been abandoned and propose that abandonment requires 100 percent violation of each and every provision of a set of restrictive covenants by each and every property owner, and on, at or in each property. However, Plaintiffs' arguments are erroneous.

Defendants have not confused waiver with abandonment. Defendants understand that *College Book Ctrs. v. Carefree Foothills*, 225 Ariz. 533, 241 P.3d 897 (Ct. App. 2010), established that when restrictive covenants contain a non-waiver provision[2], for such a provision to be deemed unenforceable, there must be an abandonment of the restrictive covenants. *Id.* at *College Book Centers*, 225 Ariz. at 539, 241 P.3d 897. However, *College Book Centers* also held that when the frequency of violations of restrictive covenants reaches that point at which it is apparent that the restrictive covenants have been "so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed",

[2] As the Court is aware, ambiguities in a contract are to be construed against the drafter. With respect to the case at bar, there is a potential conflict between paragraphs 18 and 19. Paragraph 18 allows, without limitation, for severance (blue-penciling) of the "Invalidation" of any portion of the CC&Rs, while Paragraph 19 contains the 'non-waiver' provision. Specifically, Paragraph 18 does not articulate any specific basis that results in the "Invalidation" of a provision of the CC&Rs (such as discrimination based upon race or religion). Thus, "Invalidation" could include abandonment of a certain provision based upon frequency of violations.

the restrictive covenants will be deemed abandoned. *Id.* (quoting *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954)). In this regard, *College Book Centers* stated:

> On appeal, we recognized at the outset that absent a non-waiver provision, deed restrictions may be considered abandoned or waived "if ***frequent violations*** of those restrictions have been permitted." *Id.* at 398, ¶ 21, 87 P.3d at 86. But when CC&Rs contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as ***the violations*** did not constitute a "complete abandonment" of the CC&Rs. *Id.* at 399, ¶ 26, 87 P.3d at 87. Complete abandonment of deed restrictions occurs when "the restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed[.]" *Id.* (quoting *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954)).

College Book Centers, 225 Ariz. at 539, 241 P.3d 897. Interestingly, a frequency-of-violations test was acknowledged by Arizona courts prior to the *College Book Centers* opinion, which incorporated such a test. As an example, in *O'Malley v. Central Methodist Church*, 67 Ariz. 245, 194 P.2d 444 (1948), Arizona's Supreme Court held as follows: "Where ... ***frequent violations of the restrictions have been permitted, then the neighborhood scheme will be considered abandoned***. *O'Malley*, 67 Ariz. at 257, 194 P.2d at 453 (emphasis added). Thus, "[w]hen there is no benefit there should be no burden. ***If the benefit be destroyed, the burden should end.***" *O'Malley*, 67 Ariz. at 257, 194 P.2d at 452 (emphasis added).

Put another way, the frequency of violations of restrictive covenants in a neighborhood is tied directly to whether there has been a complete abandonment of those covenants. And, the frequency of violations is necessarily, inherently and logically a subjective and factual inquiry that should be made on a case-by-case basis by the finder of fact, especially when the party opposing enforcement and a corresponding motion for summary judgment produces substantial evidence reflecting wholesale ignorance of the restrictions as Defendants did in this case and which evidence went uncontroverted by Plaintiffs or Varilek, which was precisely the ruling from the Texas Court of Appeals on two

separate occasions. *See New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d 666 (Tex. Civ. App. 1980), and *Traeger v. Lorenz*,, 749 S.W.2d 249, 250 (Tex. Civ. App. 1988). On this point, the Court in *Traeger* stated: "As long as there was ***some evidence*** to ***support*** the issue of ***abandonment*** and waiver, it ***should have been submitted to the jury***." *Traeger,* 749 S.W.2d 249, 250.

In opposing the foregoing, Plaintiffs and Varilek argue that the Court should not apply a frequency of violation test and instead adopt the proposition that there must be 100 percent violation of the CC&Rs by 100 percent of the property owners of 100 percent of the properties in Coyote Springs. In other words, they argue that in order for the CC&Rs to be deemed abandoned, there cannot be even a single instance of compliance with the CC&Rs by any Coyote Springs property owner. However, that is not the test adopted by either the Arizona courts nor any other court in any other jurisdiction that we could find. The body of common-law, including Arizona, does not articulate any bright-line, specified threshold for violations that would be necessary to rise to the level of abandonment, which clearly leads to the conclusion that determination of abandonment of restrictive covenants is a subjective and factual inquiry that should not be decided summarily. Accordingly, this Court should have applied the frequency-of-violations test, recognized and accepted as an uncontroverted fact that there are literally hundreds of violations in Coyote Springs and concluded that a material question of fact existed, justifying denial of Plaintiffs' Third Motion for Summary Judgment. However, because it did not, Defendants are entitled to a new trial.

IV. Defendants Are Entitled To The Application Of (I) The Law of the Case Doctrine As It Applies To the Entirety Of The Court Of Appeals Decision Including Paragraph 2 And (II) The General Prohibition Of Plaintiffs' Horizontal Appeal.

Plaintiffs and Varilek argue in their Responses that Judge Jones properly (i) ignored the Court of Appeals' determination that no business, regardless of nature, scope or extent, whether operated

within a home or outside on the property, whether initiated within or on the property or commenced outside and brought in, are allowed in Coyote Springs, and (ii) reconsidered and overruled Judge Mackey's two prior decisions that a material question of fact existed regarding whether the CC&Rs had been abandoned. However, the former violates the law of the case doctrine and the latter is against the general prohibition against horizontal appeals.

In their Responses, Plaintiffs and Varilek rely upon *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 860 P.2d 1328 (Ariz. App. Div. 1, 1993). Yet, *Powell* actually supports Defendants' position in the case at bar. In addressing the law of the case doctrine and horizontal appeals and distinguishing between them, *Powell* held:

> The doctrine referred to as "law of the case" describes the judicial policy of refusing to reopen questions previously decided in the same case by the same court or a higher appellate court. *A & A Concrete, Inc. v. White Mountain Apache Tribe*, 781 F.2d 1411, 1418 (9th Cir.), *cert. denied*, 476 U.S. 1117, 106 S.Ct. 2008, 90 L.Ed.2d 659 (1986); *Dancing Sunshines Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986). As one commentator has noted, however, courts commonly use the single label "law of the case" to describe a doctrine applied to distinct sets of problems. In some instances, courts use the label to refer to the fundamental obligation of every court to follow the rulings of a higher court. In others, courts use the label in connection with the desire of a single court to adhere to its own prior rulings. 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4478 (1981) [hereinafter FEDERAL PRACTICE AND PROCEDURE]; see also 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE p 0.404 (2d ed. 1993) [hereinafter MOORE'S]. Unfortunately, our decisions do not always adequately distinguish between the two situations or take into account the differing considerations raised by these distinctive applications of the doctrine.
>
> When, as in this case, we apply the doctrine to decisions of the same court, we treat law of the case as a procedural doctrine rather than as a substantive limitation on the court's power. *See North Star Dev. Corp. v. Wolfswinkel*, 146 Ariz. 406, 410, 706 P.2d 732, 736 (App.1985); *Love v. Farmers Ins. Group*, 121 Ariz. 71, 73, 588 P.2d 364, 366 (App.1978). In this setting, the doctrine promotes an orderly process leading to an end to litigation. *State v. Maxwell*, 19 Ariz.App. 431, 435, 508 P.2d 96, 100 (1973).
>
> The policy against horizontal appeals, which TCR asserts Judge Campbell violated, forms part of the general concept of law of the case as applied to decisions of

the same court. *See* MOORE'S, supra, at p 0.4.4[4.-2]. A party seeks a "horizontal appeal" when it requests a second trial judge to reconsider the decision of the first trial judge in the same matter, ***even though no new circumstances have arisen in the interim*** and ***no other reason justifies reconsideration***. *Hibbs v. Calcot, Ltd.*, 166 Ariz. 210, 214, 801 P.2d 445, 449 (App.1990). ***We criticize horizontal appeals because they waste judicial resources by asking two judges to consider identical motions and because they encourage "judge shopping."*** *Id.; see Chanay v. Chittenden*, 115 Ariz. 32, 34, 563 P.2d 287, 289 (1977); *Mozes v. Daru*, 4 Ariz.App. 385, 389, 420 P.2d 957, 961 (1967).

Prior decisions have established, however, that courts must not afford this procedural doctrine undue emphasis. Because of the potentially harsh nature of the doctrine, we will not apply it if doing so would result in a "manifestly unjust decision." *Sibley v. Jeffreys*, 81 Ariz. 272, 276, 305 P.2d 427, 429 (1956) (citation omitted). Similarly, reliance upon law of the case does not justify a court's refusal to reconsider a ruling when ***an error in the first decision renders it manifestly erroneous or unjust or when a substantial change occurs in essential facts or issues, in evidence, or in the applicable law***. *Dancing Sunshines Lounge*, 149 Ariz. at 483, 720 P.2d at 84. Additionally, we will not apply law of the case ***if the prior decision did not actually decide the issue in question, if the prior decision is ambiguous, or if the prior decision does not address the merits. Id. If these or comparable circumstances appear, sufficient reason exists for reconsideration, and a second judge does not abuse his discretion by agreeing to reconsider an earlier decision***. *Union Rock & Materials Corp. v. Scottsdale Conference Ctr.*, 139 Ariz. 268, 273, 678 P.2d 453, 458 (App.1983); *Union Constr. Co. v. Beneficial Standard Mortgage Investors*, 125 Ariz. 433, 434, 610 P.2d 67, 68 (App.1980).

Powell, 176 Ariz. at 278-79, 860 P.2d at 1331-32 (emphasis added).

Based upon *Powell* and the law of the case doctrine, Judge Jones was required to (i) follow the Court of Appeals ruling that paragraph 2 of the CC&Rs prohibits ***any*** type of business, commercial or industrial activity of any kind in Coyote Springs whether it be large or small, operated inside of a building and home-based or out in the open on the property, (ii) apply that ruling in this case to the uncontroverted evidence presented by Defendants rather than dismiss it and (iii) draw the reasonable inferences from that evidence in Defendants' favor. Judge Jones did not properly apply the law of the case doctrine. Consequently, a new trial is warranted.

Likewise, Plaintiffs did ***not*** present with their Third Motion for Summary Judgment any new admissible evidence to controvert Defendants' evidence of hundreds of CC&Rs violations. Judge Mackey ***did*** rule that a material question of fact existed regarding the abandonment of the CC&Rs, and because Plaintiffs did not assert, allege or establish that Judge Mackey's two prior decisions were ambiguous, their horizontal appeal of Judge Mackey's two prior rulings should have been denied. Accordingly, the Court should grant Defendants a new trial.

V. Preponderance Of The Evidence Is The Appropriate Standard.

In their Responses, Plaintiffs and Varilek argue that Judge Jones' application of the clear and convincing evidence standard to Defendants' abandonment defense in evaluating their Response to Plaintiffs' Third Motion for Summary Judgment was the applicable burden of proof. However, Plaintiffs have not provided any legal authority supporting that proposition. Varilek admits this at page 3 of his Joinder in Plaintiffs' Motion for Summary Judgment dated January 7, 2013 ("there are no reported Arizona decisions specifically addressing the evidence required to prove an abandonment or waiver . . . .") Rather, in support of their argument, Plaintiffs offer two Arizona cases, one involving quiet title to a mining claim and another involving a contract dispute over the sale of stock. Neither of those cases involve the validity or enforceability of restrictive covenants much less their abandonment.

In the mining claim case, the court stated ***in dicta*** that the parties were in agreement on the elements and burden of proof of abandonment of a mining claim. *Velasco v. Mallory*, 5 Ariz.App. 406, 412, 427 P.2d 540, -- (App. 1967) (*citing* to 58 C.J.S. Mines and Minerals, §§ 78, 79, and 82 and 2 American Law of Mining §§ 8.4 and 7.22). Thus, the court itself did not announce the burden of proof standard.

Turning to the latter case, the appellate court held that *oral* statements relied upon to set aside a written contract must be demonstrated by clear and convincing evidence. *Webber v. Smith* 129 Ariz. 495, 498, 632 P.2d 998, -- (App. 1981). Unlike the rule announced in *Webber*, the Defendants do not rely upon oral statements concerning the CC&R's and their abandonment; rather, they are offering the testimony of witnesses concerning those witnesses' direct *observations* of violations within Coyote Springs.

In the absence of Arizona law on the standard of proof for abandonment of CC&R's, *American Pepper Supply Co. v. Fed. Ins. Co.*, 208 Ariz. 307, 93 P.3d 507 (2004) and *Godwin v. Farmers Ins. Co. Of America*, 129 Ariz. 416, 631 P.2d 571 (App. 1981) offer clear guidance. "In Arizona, the burden of proof in civil cases is satisfied by the preponderance of evidence. " *Godwin*, 129 Ariz. at 418, 631 P.2d at – (citation omitted). And, *American Pepper* provided:

> [i]n a non-civil fraud case, however, an erroneous verdict for either party is no less unjust for one party than it would be if it were rendered for the opposing party. [citation omitted]. For that reason, civil claims generally need be established only by a preponderance of the evidence.

American Pepper Supply, 208 Ariz. at 311, 93 P.3d at -- (and, *citing Couch on Insurance*, noting that, in insurance litigation, generally all affirmative defenses use a preponderance of the evidence burden of proof; holding that the proper burden of proof applicable to a policy defense of concealment or misrepresentation is by a preponderance of evidence).

This case is a civil case. No reported Arizona decision has announced that in a restrictive covenant case dealing with a defense of abandonment the applicable burden of proof is by clear and convincing evidence. Accordingly, this Court is required to abide by the general rule that civil claims and defenses be proved merely by a preponderance of evidence. Because Judge Jones applied an erroneous legal standard to Defendants' abandonment defense, Plaintiffs are entitled to a new trial.

VI. The Court Was Required To Ensure The Joinder Of The Absent Owners Prior To Rendering A Dispositive Decision.

In responding to Defendants' argument that the grant of summary judgment was premature because not all necessary and indispensable Coyote Springs property owners had yet been joined ("**Absent Owners**"), Plaintiffs argue that the Court's grant of their Third Motion for Summary Judgment rendered the joinder of all of the Absent Owners moot "because such a decision would have no subdivision-wide ramifications."[3] Varilek Response to MNT, p. 10:24-28. However, that notion was already decided, and debunked, by Judge Mackey nearly six years ago and is the law of the case.

In his August 22, 2008, Ruling, Judge Mackey found that all of the Absent Owners were required parties regardless of the ultimate decision in this case. In other words, Judge Mackey determined that a decision in Plaintiffs' favor could have subdivision-wide ramifications and would not be binding on any property owner not made a party herein just as a decision in Defendants' favor could have subdivision-wide ramifications. In this regard, Judge Mackey stated:

> The second part of that first factor requires the Court to consider the prejudice to the parties. The Court finds that both the Plaintiffs and the Defendants may be subject to multiple litigation if the other property owners are not joined. As the Plaintiffs have noted, there are other property owners who are not yet parties that may align with either side in this lawsuit. Although unlikely, even if Plaintiffs prevail in avoiding a finding of abandonment, a property owner who agrees with the Defendants' position regarding abandonment of the Declaration of Restrictions could file another declaratory action and name the Plaintiffs as parties in the lawsuit. Without their joinder, the Plaintiffs could not claim the ruling in this case is binding upon such a property owner. More likely, if Defendants prevail, any other property owner who is not a party to this suit could file the same action against the Defendants as is currently pending. The Defendants will not be able to claim their victory in this case is binding

[3]In the introductory portion of his Response on this issue, Varilek asserts that the Court of Appeals determined the Absent Owners to be indispensable. That is not true. Rather, that Court found that all owners in Coyote Springs are "necessary parties" given the abandonment issue to be decided in this case and it thus Ordered on remand that this Court determine whether those parties were also indispensable. *See* May 24, 2007, Memorandum Decision at ¶ 36.

> upon other property owners unless they are joined. The Court finds that facing multiple litigation on the same issue is prejudicial to all the parties.
>
> * * *
>
> Next, the Court considers "whether a judgment rendered in the person's absence will be adequate." Although the Plaintiffs argue that a judgment from this court would be adequate as between the parties, the Court does not agree. Certainly, if the Plaintiffs prevail they will consider an order from this Court prohibiting the Defendants from growing trees on their property to be adequate. However, the word adequate means more. If this were the case in which only a monetary judgment was sought, the Court might agree that a resolution of the matter between only these parties would be adequate even if the other parties could claim monetary damages against either party for similar conduct. However, as noted by the Court of Appeals, the resolution of this case impacts the property rights of everyone covered by the Declaration of [Restrictions]. Under those circumstances, "adequate" takes on a broader meaning. The resolution of this case will not resolve the broader question of whether the Declaration of [Restrictions] continues to apply to all property owners whose property is covered by them or whether a term or terms have been abandoned by the other property uses in the area covered. The Court finds that a judgment in the absence of all property owners subject to the Declaration of [Restrictions] would not be adequate.

See August 22, 2008, Ruling at pp. 3-4. As a result, Judge Mackey found the Absent Owners indispensable and Ordered their joinder before anything else could occur in the case. Notwithstanding the foregoing and the passage of nearly six years, proper joinder of the Absent Owners remains squarely at issue and should have been decided before ruling on Plaintiffs' Third Motion for Summary Judgment. Thus, the Court erred in considering and ruling upon Plaintiffs' Third Motion for Summary Judgment. Accordingly, Defendants are entitled, at minimum, to a new trial if not the dismissal of this case.

At best from their perspective, Plaintiffs' Responses overlooked the problems associated with Plaintiffs' efforts to join the Absent Owners, which were addressed in Defendants' MNT. Thus, rather than restate Defendants' argument and request for dismissal herein, Defendants incorporate herein by reference those arguments detailed in the MNT.

As Judge Mackey's prior Rulings make clear, Plaintiffs' failure to properly join all Absent Owners is fatal to Plaintiffs' case. The by-product of this is that Judge Jones' failure to consider the issue of the proper joinder and Defendants' Motion to Dismiss *prior* to considering and ruling upon Plaintiffs' Third Motion for Summary Judgment was a significant error. Simply put, Judge Jones skipped a crucial step. Thus, Defendants are entitled to new trial, if not complete dismissal of this case. Plaintiffs were provided ample opportunity to join the Absent Owners and they were fairly warned about the implications of a failure to timely and effectively accomplish joinder – namely, dismissal of their First Amended Complaint. Plaintiffs filed the instant lawsuit seeking declaratory relief concerning the enforceability of the entirety of the Declaration of Restrictions. Plaintiffs were Ordered to join the Absent Owners in a timely manner. And, Plaintiffs have failed to comply with the Court's Order as to the timely joinder of the Absent Owners. All of the foregoing was a prerequisite to any final judicial determinations in this case. Consequently, justice, equity and fairness support the dismissal of this case or, at the very least, the grant of a new trial. Finally, Defendants request their reasonable attorneys' fees in connection with the instant Motion, pursuant to A.R.S. § 12-341.01, 12-1838, and any other applicable rule or law.

RESPECTFULLY SUBMITTED this 10 day of February, 2014.

THE ADAMS LAW FIRM, PLLC

By: _____
Jeffrey R. Adams, Esq.
Attorneys for Defendants

MUSGROVE, DRUTZ & KACK, P.C.

By: _____ For & with permission
Mark W. Drutz, Esq.
Sharon M. Flack, Esq.
Attorneys for Defendants

COPY of the foregoing mailed
this 10 day of February, 2014, to:

J. Jeffrey Coughlin, Esq.
J. Jeffrey Coughlin PLLC
1570 Plaza West Drive
Prescott, AZ 86303
Attorneys for Plaintiffs

David K. Wilhelmsen, Esq.
Favour, Moore & Wilhelmsen, P.A.
P.O. Box 1391
Prescott, AZ 86302-1391
Attorneys for Property Owner James Varilek

Noel J. Hebets, Esq.
Noel J. Hebets, PLC
2515 N. 48th St., #3
Phoenix, AZ 85008
Attorney for William M. Grace

Robert E. Schmitt, Esq.
Murphy, Schmitt, Hathaway & Wilson, PLLC
P.O. Box 591
Prescott, AZ 86302
Attorneys for Robert H. Taylor and Terri A. Thomson-Taylor

William H. "Bill" Jensen
14556 Howard Mesa Loop
Mesa, AZ 86046-7593
pro se

Gary & Sabra Feddema
9601 East Far Away Place
Prescott Valley, AZ 86315
pro se

William R. and Judith K. Stegeman Trust
9200 East Far Away Place
Prescott Valley, AZ 86315
pro se

Karen L. and Michael P. Wargo
9200 East Spurr Lane
Prescott Valley, AZ 86315
pro se

Linda J. Hahn
10367 W. Mohawk Lane
Peoria, AZ 85382
pro se

Sergio Martinez and Susana Navarro
10150 N. Lawrence Lane
Prescott Valley, AZ 86315
pro se

Lloyd E. and Melva J. Self
9250 E. Slash Arrow Drive
Prescott Valley, AZ 86315
pro se

Rynda and Jimmy Hoffman
9650 E. Spurr Lane
Prescott Valley, AZ 86315
pro se

William and Shaunla Heckethorn
9715 E. Far Away Place
Prescott Valley, AZ 86315
pro se

Leo M. and Marilyn Murphy
9366 E. Turtlerock Road
Prescott Valley, AZ 86315
pro se

James C. and Leslie M. Richie
9800 E. Plum Creek Way
Prescott Valley, AZ 86315
pro se

Rhonda L. Folsom
9305 N. Coyote Springs Road
Prescott Valley, AZ 86315-4517
pro se

Kenneth Paloutzian
8200 Long Mesa Drive
Prescott Valley, AZ 86315
pro se

Bonnie Rosson
8950 E. Plum Creek Way
Prescott Valley, AZ 86315
pro se

John and Rebecca Feddema
9550 E. Spurr Lane
Prescott Valley, AZ 86315
pro se

John D. and Dusti L. Audsley
966 N. Stirrup High Drive West
Dewey, AZ 86327-5906
pro se

Richard and Beverly Strissel
9350 E. Slash Arrow Drive
Prescott Valley, AZ 86314
pro se

Nicholas Corea
4 Denia
Laguna Nigel, CA 92677
pro se

Eric Cleveland
9605 E. Disway
Prescott Valley, AZ 86315
pro se

Richard and Patricia Pinney
10980 N. Coyote Road
Prescott Valley, AZ 86315
pro se

Robert Lee Stack and Patti Ann Stack
Trustees of the Robert Lee and Patti
Ann Trust utd March 13, 2007
10375 Lawrence Lane
Prescott Valley, AZ 86315
pro se

Dane E. and Sherrilyn G. Tapp
8595 E. Easy Street
Prescott Valley, AZ 86315
pro se

Jesus Manjarres
105 Paseo Sarta #C
Green Valley, AZ 85614
pro se

Jack and Dolores Richardson
505 Oppenheimer Drive, #4
Los Alamos, NM 87544
pro se

Robert and Patricia Janis
7685 N. Coyote Springs Road
Prescott Valley, AZ 86315
pro se

Mike and Julia Davis
9147 E. Morning Star Road
Prescott Valley, AZ 86315
pro se