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2011 APR 26 PM 3: 24  
CLERK  
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BY: \_\_\_\_\_

7 Attorneys for Defendant Robert D. Veres

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

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

11 JOHN B. CUNDIFF and BARBARA C.  
12 CUNDIFF, husband and wife; ELIZABETH  
13 NASH, a married woman dealing with her  
14 separate property; KENNETH PAGE and  
15 KATHRYN PAGE, as Trustee of the Kenneth  
16 Page and Catherine Page Trust,  
  
17 Plaintiffs,  
  
18 v.  
  
19 DONALD COX and CATHERINE COX,  
20 husband and wife, et al.,  
  
21 Defendants.

Case No. P1300CV20030399

**JOINDER IN DEFENDANTS' COX, ET UX., ET AL., RESPONSE AND OBJECTION TO REQUEST FOR JUDICIAL RE-ASSIGNMENT and PARTIAL JOINDER IN PLAINTIFFS' OBJECTION TO REQUEST FOR JUDICIAL REASSIGNMENT**

(Oral Argument Requested)

22 Defendant Robert D. Veres (hereinafter, "**Defendant**" or "**Veres**"), through his undersigned  
23 attorneys MUSGROVE, DRUTZ & KACK, P.C., and pursuant to Ariz.R.Civ.P. 1, 7.1, 42, and any  
24 other applicable rule or law, hereby submits his Joinder and Response in the above-captioned matter.

25 Mr. Veres joins in all respects Defendants Cox, et ux. et al., Response and Objection to  
26 Request for Judicial Reassignment dated April 14, 2011, and Plaintiffs Cundiff, et al., Objection to  
27 Request for Judicial Reassignment, with the exception that Defendant does not join in Plaintiffs'  
28 Request to Vacate the Consolidation Order and suspend Mr. Varilek's case until the lower numbered  
case is fully adjudicated. See Plaintiffs' Objection dated April 13, 2011, p. 2:23-24. If the Court is

1 inclined to consider vacating the Consolidation Order and/or suspend the Varilek v. Veres case until  
2 the lower numbered case is fully adjudicated, then Defendant Veres respectfully requests an  
3 opportunity to respond to this issue pursuant to Rule 7.1(e) of the Arizona Rules of Civil Procedure,  
4 which provides in relevant part as follows:  
5

6 **Motions for Reconsideration.** A party seeking reconsideration of a ruling of the Court  
7 may file a Motion for Reconsideration. All Motions for Reconsideration, however  
8 denominated, shall be submitted without oral argument and without response or reply,  
9 unless the Court otherwise directs. No Motion for Reconsideration shall be granted,  
10 however, without the Court providing an opportunity for a response....

11 The Court has already ruled upon the issue of consolidation. Therefore, any requests to vacate the  
12 consolidation should be treated as a Motion for Reconsideration under Ariz.R.Civ.P. 7.1(e). See  
13 Lerette v Adams, 186 Ariz. 628, 925 P.2d 10709 (App. 1996) (although the Superior Court has  
14 nominally separate divisions or sections sitting in each of Arizona's 15 counties, it remains a single  
15 unitary court).

16 Further, Defendant brings to the Court's attention that he served a copy of his December 10,  
17 2009 Motion to Consolidate Case Nos. P1300CV20030399 and P1300CV20090822 upon the  
18 Honorable David L. Mackey. Cf. Plaintiffs' Objection to Request for Judicial Reassignment, pp.  
19 1:25 - 2:2. Judge Mackey in his Notice filed on July 30, 2010 in P1300CV20090822 stated as  
20 follows:  
21

22 Copies of various motions have been sent to this Division suggesting that this  
23 Court should rule upon a pending Motion to Consolidate. This Division is assigned  
24 P1300CV20030399 which is the lower case number. However, this Division has been  
25 noticed in P1300CV20090822. While the local rules provide that this Division should  
26 decide the Motion to Consolidate, the notice of change of judge that was filed takes  
27 precedent over the local rules and precludes this Division from entering rulings in  
28 P1300CV20090822. Therefore, this Division declines to take any action regarding the  
pending Motion To Consolidate.

Should both parties wish to have this Division rule upon the pending Motion To Consolidate, they may stipulate to withdraw the notice of change of judge for the

1 purpose of allowing this Division to rule upon the pending Motion To Consolidate or  
2 Plaintiff may withdraw the notice of change of judge for all purposes so that the case can  
3 be transferred back to this Division.

4 Counsel for Plaintiff Varilek did not withdraw his Notice of Change of Judge and consequently  
5 Judge Jones ruled upon and granted Defendant's Motion to Consolidate.

6 Next, not only does Rule 42(a) provide the Court with discretion to order that all actions be  
7 consolidated involving a common question of law or fact pending before the Court, importantly, it  
8 also authorizes the Court to:

9  
10 Make such orders concerning proceedings therein as may tend to avoid unnecessary  
11 costs or delay.

12 Ariz.R.Civ.P.42(a). In this case, as both Plaintiffs' and Defendants' counsel have discussed in their  
13 objections, the Court and Judge Mackey have presided over the case at the bar for the past eight  
14 years. This not only constitutes a waiver, but a change of judge at this juncture would unnecessarily  
15 deplete party and judicial resources and cause unnecessary delay of these already lengthy  
16 proceedings.

17 Pursuant to Ariz.R.Civ.P. 42(f)(1)(D), the waiver provisions of the Rule are intended to  
18 prohibit a party from peremptorily challenging a judge after discovering the judge's viewpoint on  
19 any significant aspect of the case. Williams v Superior Court in and for County of Maricopa, 190  
20 Ariz. 80, 945 P.2d 391 (App. 1997). In our case, this matter has been pending for eight years and  
21 the presiding judge has made numerous significant rulings in this case. Thus Plaintiff Varilek,  
22 whose counsel filed a Notice of Appearance in this matter on October 27, 2010, has waived his right  
23 to judicial reassignment. See Switzer v Superior Court in and for County of Maricopa, 176 Ariz.  
24 285, 860 P.2d 1338 (App. 1993). In his Notice of Appearance, Plaintiff expressly states that he  
25 "requests alignment with parties-Plaintiff on the issues remaining for adjudication pursuant to the  
26  
27  
28

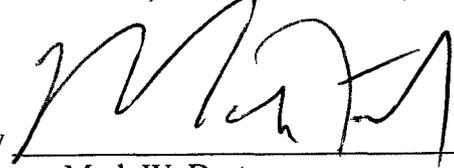
1 decision rendered in this case by the Arizona Court of Appeals. . . .” And, see Ruling Re: Notice  
2 filed September 22, 2008 (denying Plaintiff’s Notice of Change of Judge because Court has issued  
3 Rulings on contested issues since the remand from the from the Court of Appeals). Plaintiff Varilek  
4 may argue that he was brought into this case after the numerous, significant Rulings occurred,  
5 thereby depriving him of a peremptory right that may otherwise have been available. Id. However,  
6 the apparent harshness of this aspect of the Rules operations is ameliorated by the fact that, if the  
7 newcomer’s interests are inconsistent with those of other parties on the same side, or if the judge is  
8 biased against the newcomer, the newcomer may still secure relief under other provisions of 42(f).  
9  
10 Id.  
11

12 In conclusion, any judicial reassignment sought by Plaintiff Varilek pursuant to the first and  
13 second sentences of Rule 42(f)(1)(A) has long been waived by Plaintiff. Plaintiff Varilek still has  
14 an option to exercise a change of judge based upon either (i) Rule 43(f)(1)(A), sentence number 3  
15 (hostile interests of parties on same side justifies an additional notice of change of judge) or (ii)  
16 42(f)(2)(A) (change of judge for cause). But, at this time, Varilek has not demonstrated such  
17 grounds. See Plaintiff Varilek’s Notice of Appearance, excerpted herein supra.  
18

19 WHEREFORE, Mr. Veres requests that the Court deny Plaintiff Varilek’s Request for Judicial  
20 Reassignment.  
21

22 RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of April, 2011.

23 MUSGROVE, DRUTZ & KACK, P.C.

24  
25  
26 By 

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1 COPY of the foregoing mailed  
2 this 26<sup>th</sup> day of April, 2011, to:

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- 20 Ann Trust utd March 13, 2007
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