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

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

22 JOHN B. CUNDIFF and BARBARA C.
23 CUNDIFF, husband and wife; ELIZABETH
24 NASH, a married woman dealing with her
25 separate property; KENNETH PAGE and
26 KATHRYN PAGE, as Trustee of the Kenneth
27 Page and Catherine Page Trust,

28 Plaintiffs,

v.

DONALD COX and CATHERINE COX,
husband and wife, et al., et ux.,

Defendants.

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Case No. P1300CV20030399

Division No. 6

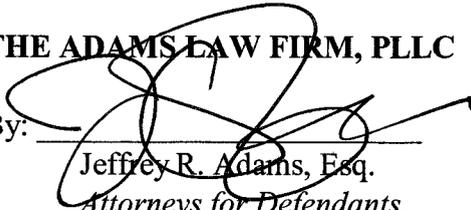
**RESPONSE AND OBJECTION TO
PLAINTIFFS' PROPOSED FINAL
JUDGMENT**

(Assigned to the Hon. Kenton Jones)

(Oral argument requested)

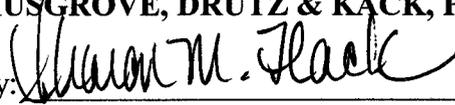
1 Defendants Cox, as well as those joined property owners upon whose behalf undersigned
2 counsel have entered an appearance and filed an Answer to Plaintiffs' First Amended Complaint
3 (collectively herein, "**Defendants**"), pursuant to Ariz. R. Civ. P. 1, 54, 58, the Court of Appeals
4 Memorandum Decision filed May 24, 2007 (also "**Memo Dec.**"), and any other applicable rule or
5 law, submit their objection to Plaintiffs' Cundiff, Nash, and Page ("**Cundiff plaintiffs**"), and James
6 Varilek's proposed form of Final Judgment, for the reasons set forth below in the accompanying
7 Memorandum of Points and Authorities.
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9

10 **THE ADAMS LAW FIRM, PLLC**

11 By: 

12 Jeffrey R. Adams, Esq.
13 *Attorneys for Defendants*

MUSGROVE, DRUTZ & KACK, P.C.

14 By: 

15 Mark W. Drutz, Esq.
16 Sharon M. Flack, Esq.
17 *Attorneys for Defendants Cox*

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 **I. Procedural History of This Case.**

20 For the sake of brevity, Defendants incorporate herein by reference the Procedural History
21 discussed in Defendants' Response and Objection to Plaintiffs' Requests for Award of Attorneys'
22 Fees, filed August 9, 2013 ("**Defendants' Response re: Attorneys Fees**"). A very brief discussion
23 of the procedural history of the case that requires highlighting beyond incorporating what we stated
24 in Defendants' Response re: Attorneys' Fees is provided below.

25 On May 16, 2003, Plaintiffs, through attorney Robert J. Lauanders, filed their Complaint for
26 Injunctive Relief ("**Original Complaint**"). Plaintiffs' Original Complaint asserted that Defendants
27 were in breach of paragraphs 2, 7(e), and 15 of the Declaration of Restrictions recorded on June 13,
28 2004 at Book 916, Page 680, Official Records of Yavapai County ("**Declaration**" or "**CC&Rs**").

1 See Original Complaint. Plaintiffs sought injunctive relief. Paragraphs 2, 7(e) and 15 of the
2 Declaration provide as follows:

3
4 2. No trade, business, profession or any other type of commercial or industrial activity
shall be initiated or maintained within said property or any portion thereof.

5 ***

6 7(e). No structure whatsoever other than one single family dwelling or mobile home, as
7 herein provided, together with a private garage for not more than three (3) cars, a
8 guest house, service quarters and necessary out building shall be erected, placed or
permitted to remain on any portion of said property.

8 ***

9 15. No outside toilet or other sanitary conveniences or facilities shall be erected or
10 maintained on the premises.

11 See Declaration, recorded at Book 916, Page 680, Official Records of Yavapai County, Arizona.

12 On March 18, 2004, Plaintiffs filed their First Amended Complaint ("**Amended**
13 **Complaint**"). The Amended Complaint sought relief, declaring: (i) that the recorded Declaration
14 is valid and enforceable, (ii) the rights and other legal relations of the Plaintiffs and Defendants
15 arising from the recorded Declaration, (iii) that Defendants were in breach of the recorded
16 Declaration, permanent injunction, and (iv) removal of "any and all conditions or activities" on the
17 Cox-Property that violates any restriction or covenant. Amended Complaint, p. 6. On May 21,
18 2004, Defendants Cox Answered and denied Plaintiffs' claims and asserted various affirmative
19 defenses including abandonment and waiver. On March 25, 2011, Mr. Veres Answered Plaintiffs'
20 Amended Complaint, and asserted that all of the claims for breach of contract, declaratory- and
21 injunctive relief, were directed to Defendants Cox. Other Defendants subsequently filed their
22 Answers.
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26 After more than nine years of litigation, and on the deadline to file dispositive motions,
27 Plaintiffs filed a Motion for Summary Judgment on the issue of abandonment. The trial Court
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1 granted summary judgment notwithstanding the fact that Defendants in their view had provided the
2 Court with an abundance of evidence establishing, at minimum, a question of fact existed concerning
3 abandonment of the Declaration. Our conclusion in this regard is supported by the fact that Judge
4 Mackey ruled, more than eight years ago, that “there is a **material factual issue** regarding whether
5 the restrictions in this case have been so thoroughly disregarded as to result in a change in the area
6 . . . and amounts to abandonment of the entire Declaration *** **The issue of abandonment will**
7 **have to be litigated** before the Court will be in a position to decide the enforceability of any term
8 of the restrictive covenants.” Judge Mackey rendered the foregoing ruling after having reviewed (i)
9 one of the two Affidavits of Sheila Cahill of Palmer Investigative Services detailing her investigative
10 findings detailing a plethora of violations of the Declaration of Restrictions, (ii) the affidavit of
11 Curtis Kinchelow in which he detailed his operation of Coyote Curt’s Auto Repair in the subject
12 subdivision detailing as well as a lengthy listing of other Coyote Springs Ranch property owners who
13 patronize his business including the Plaintiffs herein, (iii) a number of Lonesome Valley Newsletters
14 and telephone book and other publications in which a multitude of Coyote Springs property owners
15 advertise their businesses that are operated in the subject subdivision and (iv) several hundred
16 photographs depicting rather open and obvious violations of virtually every single provision of the
17 Declaration of Restrictions as they pertain to the use of the properties. *See Under Advisement*
18 Ruling filed May 4, 2005, Page Two, ¶¶ 1, 3 and 7.

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24 Finally, the docket in this case reflects that the focal point of ten years of litigation has been
25 (i) paragraph 2 of the Declaration and Plaintiffs’ allegation that Defendants have violated that
26 provision and (ii) Defendants’ abandonment defense. Virtually no litigation has concerned
27 Plaintiffs’ allegations that Defendants have violated paragraphs 7e (pertaining to the number of
28

1 residential structures allowed) and 15 (pertaining to outdoor sanitary facilities) of the Declaration.
2 And Defendants' affirmative defenses of abandonment and waiver notwithstanding, Defendants do
3 now, as they have since filing their Answer in this case, adamantly deny those allegations. Thus,
4 while Plaintiffs moved for and obtained summary judgment on Defendants' affirmative defenses of
5 abandonment and waiver, the Court still has not entered a final ruling on the Breach of Contract
6 claims alleging violations of paragraphs 7e and 15. That is the case because no Motion has been
7 filed by Plaintiffs on those two Counts of their First Amended Complaint and no trial has been
8 conducted on those Counts of the First Amended Complaint. As such, those two Counts of
9 Plaintiffs' First Amended Complaint still require resolution be it on Motion or through a trial on the
10 merits.
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13 14 **II. LEGAL ARGUMENT.**

15 **A. Defendants' April 25, 2013, Motion to Dismiss Remains at Issue Precluding** 16 **Entry of Final Judgment.**

17 Defendants' April 25, 2013, Motion to Dismiss for Failure of Plaintiffs to Join Indispensable
18 Parties ("**Motion to Dismiss**"), premised upon Rule 19, remains pending, and was filed after
19 receiving Plaintiff Varilek's Motion to Require Defendants Cox to Serve the Indispensable Parties
20 with Documents that Comport with Due Process ("**Varilek Motion to Require**") in which Mr.
21 Varilek takes the position that all of the Absent Owners still have yet to be properly joined.
22

23 The Court of Appeals found that:

24
25 Because none of the absent property owners is a party to this action, the doctrines of
26 res judicata and collateral estoppel could not be employed to limit their claims or
27 defenses in a subsequent case.
28

1 Memorandum Decision, 1 CA-CV 06-0165, filed 05-24-07, ¶ 32. *See also* ¶ 31. On remand from
2 the appellate court the trial Court ordered joinder of all of the Absent Owners as indispensable
3 parties. *See* Court's Under Advisement Rulings dated May 6, 2010 (filed May 7, 2010), and August
4 22, 2008 (filed August 25, 2008). Instructive on this issue is the Court's May 6, 2010 Under
5 Advisement Ruling (filed May 7, 2010), wherein the Court determined that the matter was not
6 subject to class-action certification and ordered the Cundiff plaintiffs to take substantial steps to join
7 all necessary and indispensable parties within 120 days. The Court articulated concerns that Rule
8 23 would permit an Absent Owner to 'opt-out', thereby defeating the appellate court's ruling that
9 joinder is necessary, as follows:

12 [T]he Court finds that if a class action were maintainable pursuant to Rule 23(b)(1)
13 or (2) . . . members of the class could not request exclusion from the class pursuant
14 to Rule 23(c)(2) Under such circumstances, landowners who do not agree with
15 the Plaintiffs' position could not seek exclusion from the class. ON the other hand,
16 if the Court finds that a class action was maintainable pursuant to Rule 23(b)(3) . .
17 . members of the class could request exclusion from the class pursuant to Rule
18 23(c)(2) . . . **The first option will not permit landowners to align themselves on
19 the side they may choose. The second option would allow landowners to remove
20 themselves from this case and not be bound by the decision of the Court. That
21 would defeat the very purpose of the Court of Appeals ruling that joinder is
22 necessary. Neither option is appropriate.**

23 **IT IS ORDERED** that in the event the Plaintiffs do not take substantial steps to join
24 all necessary and indispensable parties within the next one hundred twenty (120)
25 days, this matter will be dismissed.

26 Despite an abundance of time and leeway given them, Plaintiffs failed to comply with the Court's
27 Order to join all Absent Owners by October, 12, 2010. Instead, on December 7, 2010, Plaintiffs
28 requested additional time to complete joinder in their Motion for Permission to Serve Remaining
Property Owners by Publication to which Defendants Cox objected on December 14, 2010, and
in which objection Absent Owner Robert Veres joined on December 21, 2010. Notwithstanding

1 Defendants' and Mr. Veres' objections, on January 26, 2011, the Court granted Plaintiffs an
2 additional 90 days to complete joinder of and service upon all of the Absent Owners, and to file
3 proof of the same with the Court. Thus, Plaintiffs had until April 26, 2011, to complete their
4 joinder of the Absent Owners and to provide the Court with proof of the same. See January 26,
5 2011, Ruling (filed February 1, 2011). On April 13, 2011, Plaintiffs filed their Affidavit of
6 Publication presumably in an attempt to convince the Court that they had timely and properly
7 completed joinder when in fact they had not.
8

9
10 On May 29, 2012, the Court held a status conference to address multiple matters including
11 a trial schedule. During that status conference, the issue of service and joinder was addressed
12 again during which undersigned raised the issue of Plaintiffs' filing and recording a Notice of *Lis*
13 *Pendens*, suggesting that this should have been done and was appropriate to provide constructive
14 notice of the pendency of litigation in the event of ownership transfers. See A.R.S. § 33-411.
15 Undersigned counsel (Adams) requested that the Court enter such an Order. However, as
16 reflected in the May 29, 2012, Nature of Proceedings, no such Order was entered.
17

18
19 Plaintiffs' haphazard approach to join the Absent Owners is evident in their counsels'
20 billing entries, as discussed in greater detail in Defendants' Response re: Attorneys Fees. That is,
21 as opposed to obtaining a litigation guarantee, condition of title, or similar report from a title agency
22 in order to effectuate service upon Absent Owners, coupled with recording a Notice of *Lis Pendens*¹,
23

24
25 ¹ See *Tucson Estates, Inc. v. Superior Court In and For the County of Pima*, 151 Ariz. 600, 605, 729
26 P.2d 954, 959 (App. 1986) (*lis pendens* statute construed broadly to permit filing of notice of *lis pendens* in
27 any action involving an adjudication of rights incident to title to real property; such notice was properly filed
28 as to count seeking a declaration of an implied restrictive covenant that golf course be maintained for
exclusive use of residents of mobile home community and an injunction enjoining developer from granting
or purporting to grant right to use golf course to non-residents); *Santa Fe Ridge HOA v. Bartschi*, 219 Ariz.
391, 396-97, ¶ 17, 199 P.3d 646, 652-53 (App. 2009) (discussing *Tucson Estates*).

1 Plaintiffs' counsels' office spent dozens of hours researching County parcel records and preparing
2 and filing multiple iterations of a parcel-owner matrix, together with hundreds of hours opposing
3 joinder of indispensable parties. *See* Plaintiffs' Notice of Filing Property Owners List filed 09-21-
4 10, Plaintiffs' Notice of Filing Revised Property Owners List filed 09-29-10, Plaintiffs' Notice of
5 Filing Third Revision of Property Owners List filed 03-07-11. However, while Plaintiffs
6 successfully expanded and delayed these proceedings thereby dramatically increases the cost to all
7 parties, they failed to successfully achieve the one thing that the Court required prior to entering any
8 final rulings in this case – namely joinder of all owners of property governed by the Declaration.
9 This fact has been highlighted by (i) Varilek's Motion to Require, (ii) the multitude of problems with
10 this case identified by the Court in its March 6, 2013, Notice/Order and (iii) the Court's dialogue
11 with Jerry Carver, who not only is a local attorney but, more importantly, one of the Coyote Springs
12 property owners whose property is subject to the Declaration of Restrictions and has advised the
13 Court that he does not believe that he has been joined.
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18 Importantly, as of this date, the Court has not rendered a ruling or final determination that
19 all of the owners of property subject to the Declaration of Restrictions have been lawfully and
20 properly joined. To the contrary, as recently as March 6, 2013, in its Notice/Order, the Court stated
21 that it still was in need of the identification of “new property owners that have not been served
22 following their purchase of property within the subdivision following the initiation of these
23 proceedings and the initial service upon the prior owner.” The Court further stated:
24

25 **As the Court of Appeals has made clear, each property owner within the**
26 **subdivision needs [to] be addressed in the court of this action in order for there**
27 **to be a binding Judgment entered at the culmination of these proceedings.**

28 March 6, 2013, Notice/Order, Page One [emphasis added].

1 Candidly, it is astounding, in our view, that Plaintiffs still have yet to join all owners whose
2 properties are subject to the Declaration of Restrictions in light of the years that have gone by.
3
4 Regardless, we do not believe that this Court can sign a final judgment on the enforceability of the
5 Declaration of Restrictions absent complete joinder. That is so because joinder was a condition
6 precedent to the Court's entry of a final judgment in this case. In other words, a final judgment in
7 this case on the enforceability of the Declaration of Restrictions and the issues of abandonment and
8 waiver is an all or none proposition. Either the declaration is enforceable against all property owners
9 or it is not. That is precisely the reason the Court of Appeals required joinder and the reason that
10 following remand Judge Mackey determined all of the owners subject to the Declaration of
11 Restriction were indispensable and required their joinder.
12
13

14 As the Court is aware, a judgment against a defendant not served with process is absolutely
15 void, and failure to set it aside is an abuse of discretion. *Lore v. Citizens Bank of Winslow*, 51 Ariz.
16 191, 194, 75 P.2d 371, -- (1938); *Corbet v. Superior Court*, 165 Ariz. 245, 798 P.2d 383 (App.
17 1990); Ariz.R.Civ.P. 60(c)(4). Notice and an opportunity to be heard are essential elements of due
18 process; without the same a court lacks jurisdiction and a judgment based thereon is void and subject
19 to attack at any time. *Phoenix Metals Corp. v. Roth*, 79 Ariz. 106, 108-09, 284 P.2d 645, 647 (1955)
20 (citing *Pemberton v. Duryea*, 5 Ariz. 8, 43 P. 220 (1896)). See also *Lincoln-Mercury-Phoenix v.*
21 *Base*, 84 Ariz. 9, 322 P.2d 891 (1958). Due process and jurisdiction are the cornerstones of obtaining
22 a valid judgment.
23
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25 In *Spudnuts, Inc., v. Lane*, 139 Ariz. 34, 676 P.2d 669 (App. 1984), a breach of contract
26 action, the Court held that because no attempt was ever made to serve the wife, the judgment was
27 not binding against her or against the community. That is, her rights were never adjudicated. *Id.* See
28

1 also Varilek's Motion to Require, p. 6:1-11 (discussing Plaintiffs' failure to serve both husband and
2 wife and multiple owners of property).

3
4 Importantly, Mr. Varilek made arguments similar to those above in his April 8, 21013,
5 Motion to Require in which he acknowledge and admitted that all of the owners subject to the
6 Declaration of Restrictions had not been joined. And while we disagreed with the relief he
7 requested, the fact that Mr. Varilek, one of Plaintiffs allies and one who himself was seeking
8 enforcement of the Declaration of Restrictions albeit initially only against Mr. Veres, he nonetheless
9 made a rather candid admission – namely that the Plaintiffs and those aligned with them had not
10 complied with the Court of Appeals and Judge Mackey's mandate that all those burdened by the
11 Declaration had to be joined before this Court could render any dispositive rulings.
12
13

14 Based upon the foregoing, we believe that the Court may not, at this juncture, sign a final
15 judgment on any issue, claim or defense in this case until there is a determination concerning
16 whether all Absent Owners have been properly joined. Without joinder of all Absent Owners, such
17 judgment may be void and unenforceable. Accordingly, the Court should not enter a Rule 54(b)
18 judgment on the issue of Abandonment.
19

20 **B. The Proposed Final Judgment Is Erroneous and Contains Superfluous**
21 **Recitation of Procedural History.**

22 In the event the Court is inclined to consider entering final Judgment, Defendants object to
23 the form of Judgment submitted by the Cundiff Plaintiffs and Mr. Varilek, as discussed below. The
24 proposed final Judgment fails in all respects to follow the Court's June 14, 2013, Under Advisement
25 Ruling. Instead, the proposed Final Judgment is replete with filler in the form of procedural history,
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1 including paragraphs 5, citing paragraphs 7(e) and 15 of the Declaration²; and paragraphs 6, 7, 8, 9,
2 10, and 11.

3
4 Further, there are several glaring errors contained in the proposed Final Judgment
5 ("**Proposed Judgment**"), as discussed below:

6 1. Plaintiffs' description on Page 3, Paragraph 5 of the proposed findings stating the
7 allegations of the First Amended Complaint is inaccurate. The First Amended Complaint alleged
8 that use by Defendants Cox of their property as a tree farm violated paragraph 2 of the Declaration
9 of Restrictions. They alleged separately that (i) Defendants Cox had more than one residence on
10 their property in violation of paragraph 7e of the Declaration of Restrictions and (ii) the Coxes'
11 temporary use of an outdoor j-john violated paragraph of 15 of the Declaration of Restrictions.
12 Those two Counts of the Complaint were denied in addition to being the subject of Defendants'
13 affirmative defenses of abandonment and waiver and those two Counts of the First Amended
14 Complaint the allegations for which have been denied have never been the subject of any Motion
15 with the exception of the affirmative defenses of abandonment and waiver and therefore are
16 unresolved by the Court.
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20 2. While on Page 3, Paragraph 6, of Plaintiffs' proposed findings states part of the
21 Court's ruling on their Motion for Summary Judgment, they fail to articulate the entirety of the
22 Court's ruling including its determination that a question of fact existed on the affirmative defenses
23 of abandonment and waiver.
24

25
26 ² Paragraphs 7(e) and 15 are not properly before the Court at this time. Counts II and III,
27 regarding outdoor sanitary facility and more than one single family residence remain at issue and still
28 must be litigated. Thus, any entry of judgment is not a "full" final judgment. Rather, it is a partial
final judgment.

1 3. Proposed Judgment, Page 4, Paragraph 9, Line 19/20: The Court of Appeals did *not*
2 “publish” its Memorandum Decision. A memorandum decision “is a written disposition of a matter
3 not intended for publication.” Ariz. R. Supreme Ct., 111(a)(2). *See also* Memo Dec. Caption (“Not
4 for Publication - Rule 28, Arizona Rules of Appellate Procedure). Any reference to ‘publication’
5 would be wholly inappropriate and must be stricken.
6

7 4. Proposed Judgment, Page 4, Paragraph 9, Lines 24-26: The Court of Appeals did *not*
8 hold that “the business enterprise conducted by Defendants Cox did violate section 2 of said
9 Declaration of Restrictions as a matter of law.” Rather, the appellate court considered whether
10 nursery inventory maintained on the Coxes' property, which was sold at retail and wholesale off-site
11 locations, violated the Declaration. The Court of Appeals found that the Coxes grow and store
12 inventory for their retail and wholesale nursery business. Memorandum Decision, ¶ 15. The Court
13 of Appeals held that the Coxes’ tree farm is an agricultural business. *Id.* at ¶ 17. The Court of
14 Appeals disregarded Robert Conlin’s Affidavit to the “extent that Conlin’s affidavit attempt to
15 express a legal opinion” Considering the ‘intent’ expressed by the Conlin Affidavit and *Powell*
16 *v. Washburn*, 211 Ariz. 553, 555, ¶ 8, 125 P.3d 373, 375 (2006), the appellate court held that the
17 Coxes’ agricultural business use of the property violates section two of the Declaration.
18 Memorandum Decision, ¶¶ 19 and 20. Thus, the Court of Appeals did not rule “as a matter of law”
19 and such a reference must be stricken.
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24 5. Proposed Judgment, Page 5, Paragraphs 10-11: As discussed above, several
25 Defendants through their Counsel Jeffrey Adams, and the trial Court, have expressed concern
26 regarding whether all Coyote Springs property owners have been properly joined. This is the subject
27 of Defendants' April 25, 2013, Motion to Dismiss for Failure of Plaintiffs to Join Indispensable
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1 Parties filed by counsel for the Coxes. As such, to the extent that Plaintiffs imply that complete
2 joinder has been effectuated and approved by the trial Court through the mere act of filing their
3 *Notice of Compliance with June 17, 2010 Notice Re: Service of Property Owners*, Defendants
4 vehemently object. In fact, Mr. Varilek whom is specifically referenced in this Paragraph filed his
5 own Motion on April 8, 2013, challenging the joinder of the Absent Owners establishing that they
6 have not all been joined. The issue that is critical to the case at bar is whether all of the property
7 owners have been properly joined (e.g., served with process). Without joinder of all property
8 owners, any final Judgment is open to later challenge by a property owner. And it is a fact that the
9 Court has not yet ruled that all of the Absent Owners have been properly and lawfully joined.
10 Further, Defendants have filed a Motion to Dismiss for Failure of Plaintiffs to Join Indispensable
11 Parties, which is currently pending before the Court. Thus, the issue of whether Plaintiffs have
12 “served” the indispensable parties remains at issue. Therefore, any statement or implication in the
13 final Judgment that all of the Absent Owners have been joined would be wholly improper.

14 6. Proposed Judgment, Page 5, Paragraph 11, line 13; Paragraph 12, line 16, Paragraph
15 14, line 6; and Page 7, Paragraph (B) all make reference to “aligned” property owner. Defendants
16 object to the use of the term ‘aligned’ property owner as vague, ambiguous, and irrelevant and
17 should be stricken.

18 7. Proposed Judgment, Page 5, Paragraph 12: Plaintiffs’ Motion for Summary Judgment
19 filed on December 28, 2012, failed to address “all remaining issues in the case”. See Page 5,
20 Paragraph 12, line 16/17. Plaintiffs’ Motion for Summary Judgment sought only to have the Court
21 determine whether the Declaration had been abandoned. As noted above, *infra*, the Court held that
22 they were not abandoned. Other issues that have not been adjudicated include: (i) whether the Coxes
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1 are in breach of Paragraph 7(e) of the Declaration and (ii) whether the Coxes are in breach of
2 Paragraph 15 of the Declaration. See First Amended Complaint, ¶ 8; 12, 13, and Counts II and III.

3
4 8. Proposed Judgment, Page 5, Paragraph 13: Like Paragraphs 7(e) and 15 of the
5 Declaration, discussed above, the Coxes' purported property transfer to High C's, LLC or Prescott
6 Valley Growers LLC (the "LLC's") is not properly before the Court. This issue is not the subject
7 of Plaintiffs' pleadings, claims, or motions and is not properly a part of the Final Judgment. The
8 Cundiff plaintiffs have not pled injunctive relief against the Coxes' successors-in-title, assigns, or
9 heirs and their First Amended Complaint did not include as defendants any fictitious persons, parties
10 or entities. Also, Plaintiffs have not sought leave to amend their pleadings, or to add or join the
11 transferee entities of Defendants Cox, which they would have discovered had they obtained a title
12 report or litigation guarantee; nor have Plaintiffs sought any form of relief against the transferees of
13 Defendants Cox.

14
15
16 More importantly, since Plaintiffs were Ordered to join the Absent Owners, they have never
17 even attempted to serve the Plaintiffs' successor entities with a Summons, the Court-Ordered Notice
18 or the First Amended Complaint. See Notice filed June 17, 2010 (ordering Cundiff plaintiffs to
19 serve the Notice approved by the Court, Alias Summons and First Amended Complaint). We
20 believe that the foregoing highlights the problem created in this case as a result of Plaintiffs' failure
21 to (i) properly join all of the Absent Owners and (ii) record a Notice of *Lis Pendens*. See A.R.S. §
22 33-411(A) ("No instrument affecting real property gives notice of its contents to subsequent
23 purchasers or encumbrance holders for valuable consideration without notice, unless recorded as
24 provided by law in the office of the county recorder of the county in which the property is located").
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1 Based upon the foregoing, we believe that the proposed final Judgment should be stricken as to any
2 of the successors of Defendants Cox.

3
4 9. Proposed Judgment, Page 6, Paragraph 14: Defendants have objected to Plaintiffs'
5 request for attorneys' fees, taxable costs, and non-taxable costs, and incorporate herein by reference
6 their Response re: Attorneys Fees. Defendants' position is that Plaintiffs are not entitled to an award
7 of attorneys' fees, including 'aligned' plaintiff property owner Varilek.

8
9 10. Proposed Judgment, Page 6, Paragraph (A)(1): Although the Court has determined
10 based upon the record before it that the Declaration has not been abandoned, the Court lacks
11 prescience to enter a final judgment that surrounding conditions will remain static and that the
12 Declaration will remain enforceable in perpetuity and not-abandoned. As such, this portion of the
13 Judgment, at minimum, should include language that clarifies that the Court is entering Judgment
14 based upon the record on file herein, as follows: "Based upon the record on file herein, the
15 Declaration of Restrictions of Coyote Springs Ranch, as recorded at Book 916, Page 680, Official
16 Records of Yavapai County, Arizona, has not been abandoned and is valid and enforceable against
17 the real property legally described in paragraph 2 above. The Judgment rendered herein shall not
18 serve to establish that the referenced Declaration of Restrictions may, at some point in time in the
19 future, become abandoned."
20
21
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23 11. Proposed Judgment, Page 6, Paragraph (A)(2): As discussed above, the Court of
24 Appeals found that the Coxes' tree farm is an agricultural business. Memo Dec., at ¶ 17. As such,
25 this portion of the Judgment should be revised to comport with the Court of Appeals' finding. We
26 would suggest language as follows:
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1 The Court of Appeals has held: "In this case the Declaration does not define the
2 terms "business" or "commercial" used in section two of the restrictions. However,
3 '[w]ords in a restrictive covenant must be given their ordinary meaning, and the use
4 of the words within a restrictive covenant gives strong evidence of the intended
5 meaning.' *Burke v. Voicestream Wireless Corp. II*, 207 Ariz. 393, 396, 87 P.3d 81,
6 84 (App. 2004); *see also Chandler Med. Bldg. Partners v. Chandler Dental Group*,
7 175 Ariz. 273, 277, 855 P.2d 787, 791 (App. 1993) ("The controlling rule of contract
8 interpretation requires that the ordinary meaning of language be given to words
9 where circumstances do not show a different meaning is applicable."). Nothing in
10 the record suggests a specialized meaning for the words 'business' and 'commercial'
11 in the Declaration, and the ordinary meaning of these terms will be utilized in
12 characterizing the activity that is undisputedly occurring on the subject property....
13 [N]othing in the Declaration suggests that any one type of business was intended to
14 be excluded from section two of the restrictions. On the contrary, the wording used
15 in the restriction is broad, prohibiting any 'trade, business, profession or any other
16 type of commercial or industrial activity.'" Memo Dec., ¶¶ 14, 15 and 17. Based
17 upon the Court of Appeals' decision including its interpretation of the Affidavit of
18 Robert Conlin concerning evidence of his intent as the original declarant of the
19 Declaration of Restrictions, the Coxes' agricultural business use of the property
20 violates section two of the Declaration." *See* Memo Dec., ¶ 20 ("the Coxes
21 agricultural business use of the property violates section two of the declaration").

12. Proposed Judgment, Page 6, Paragraph (A)(3), line 28: There has been no
16 adjudication that the Coxes are in violation of Paragraphs 7(e) or 15 of the Declaration. These issues
17 are not properly a part of the Final Judgment because they have yet to be litigated. Any reference
18 in the Final Judgment to Paragraphs 7(e) and/or 15 must be stricken. Moreover, the caption should
19 be styled "**Partial Final Judgment**," not "Final Judgment".

13. Proposed Judgment, Pages 6-7, Paragraph (A)(3): At best, Plaintiffs are entitled to
22 a judgment enjoining the Coxes from conducting activities on their property that constitute an
23 agricultural business use in violation of section two of the Declaration. Stated another way, there
24 is no provision in the Declaration that prohibits any property owner, including the Coxes, from
25 maintaining flowers, plants, shrubs, and trees on their property, so long as such greenery is not
26 employed for an agricultural business use. This is in keeping with the rural, residential environment
27
28

1 of Coyote Springs as Robert Conlin attested in his Affidavit. *See* Memo Dec., ¶¶ 19, 20. *See also*
2 Court's Under Advisement Ruling filed June 14, 2013, Page 4 (citing definition of "rural" as "...Of,
3 relating to, or characteristic of the country... Of or relating to people who live in the country. Of,
4 or relating to farming, agricultural . . ."). Any other finding would be tantamount to *selective*
5 *enforcement without due process of law*. The Coxes cannot be compelled under any provision of
6 the Declaration to eliminate greenery from the property that is not used for commercial purposes.
7 Additionally, the Coxes intend to appeal the final Judgment. The final Judgment should include
8 language that permits the Coxes to continue their business operations until the exhaustion of their
9 appellate remedies.

12 Finally, Defendants Cox must be given a reasonable amount of time within which to comply
13 with the final Judgment prior to Plaintiffs being allowed to execute on the same. Presently,
14 Defendants Cox have located on their property 10,600 items of inventory that range in size from
15 seven-gallon plants to 24-inch and 20-gallon box trees with an estimated value of \$500,000.00.
16 Assuming the importation of no new inventory following entry of a final Judgment and given
17 Defendants knowledge of inventory turnover, Defendants Cox anticipate that it will take 18 to 24
18 months within which to completely remove their existing inventory from their property. That
19 amount of time is necessary as Defendants Cox do not have an alternate location that could
20 accommodate what is on their property and we ask that the Court allow Defendants Cox that amount
21 of time to comply with a final Judgment with respect to paragraph 2 of the Declaration of
22 Restrictions.

26 In considering the foregoing, we believe that A.R.S. § 12-1258 is relevant as it pertains to
27 legal actions to recover real property. That statute provides as follows:
28

1 12-1258. Allegation of growing crops; stay of execution; bond and conditions.

2 If defendant alleges that he has a crop sowed, planted or growing on the premises, the
3 judge or jury, finding for plaintiff, and also finding that fact, shall further find the
4 value of the premises from the date of the trial until February 1 next succeeding. No
5 execution for possession shall be issued until that time if the defendant executes, with
6 surety to be approved by the clerk of the court, a bond in double such amount to
7 plaintiff, conditioned to pay at such date the sum so assessed, and if not paid at
8 maturity the court shall enter judgment upon the bond.

9 In this instance, while Plaintiffs may not be seeking possession of real property, they nonetheless are
10 seeking relief that will be tantamount to stripping Defendants Cox of the possessory right to continue
11 to grow their crops, i.e. trees, shrubs and bushes, on their property. Accordingly, we believe that the
12 Court should consider instituting a mechanism similar to that required by A.R.S. § 12-1258 with
13 respect to Plaintiffs' right to enforce their Judgment.

14 Based upon the foregoing, the language of the final Judgment must be revised to (i) eliminate
15 any references to paragraphs 7(e) and 15, and (ii) to comport with the Court of Appeals
16 Memorandum Decision, as follows: "Within ____ days of entry of this partial final Judgment
17 Defendants Donald Cox and Catherine Cox shall cease agricultural business use on the Subject
18 Property." with the number of days equal to a reasonable amount of time to comply, which we
19 believe to be 18 to 24 months.

20
21 14. Proposed Judgment, Page 7, Paragraph B: Defendants object to an award of attorneys'
22 fees, taxable costs, and non-taxable costs in favor of Plaintiff and Varilek. Defendants incorporate
23 herein by reference their Response re: Attorneys Fees.

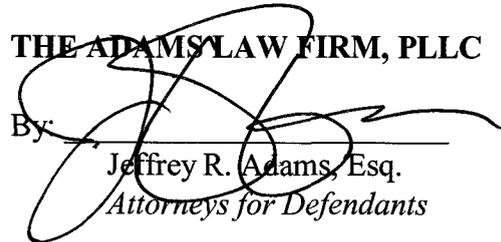
24
25 **III. Conclusion.**

26 Based upon the foregoing, we believe that the Court cannot sign a final Judgment at this
27 juncture whether it be partial or resolves this case in its entirety as not all Absent Owners have been
28

1 joined and not all Counts of the First Amended Complaint have been resolved. However, in the
2 event the Court disagrees with our belief in this regard, we believe that the Court should reject
3 Plaintiffs' form of Judgment and Order Plaintiffs to lodge a form of Judgment that comports with
4 the Court's Under Advisement Ruling and that adequately addresses the objections noted above.
5

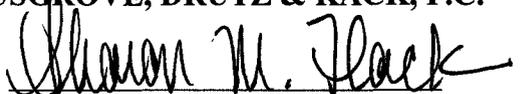
6 Respectfully submitted this ___ day of August, 2013.

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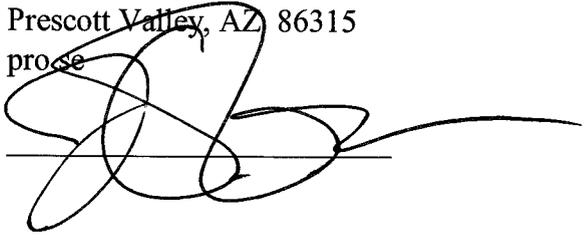
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