FAVOUR, MOORE & WILHELMSEN, P.A.
Post Office Box 1391
Prescott, AZ 86302-1391
928/445-2444
David K. Wilhelmsen, 007112

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF YAVAPAI

JOHN B. CUNDIFF and **BARBARA C. CUNDIFF**, husband and wife; **BECKY NASH**, a married woman dealing with her separate property; **KENNETH PAGE** and **KATHRYN PAGE**, as Trustee of the Kenneth Page and Kathryn Page Trust,

Plaintiffs,

vs.

DONALD COX and **CATHERINE COX**, husband and wife,

Defendants.

Case No. CV 2003-0399

Division 1

PLAINTIFFS' LEGAL MEMORANDUM RE JOINDER UNDER RULE 19 OF ALL COYOTE SPRINGS RANCH PROPERTY OWNERS SUBJECT TO RECORDED COVENANTS, JUNE 13, 1974

Plaintiffs, John and Barbara Cundiff, Becky Nash, and Kenneth and Kathryn Page (hereinafter collectively referred to as "Cundiff"), pursuant to the Court's minute entry dated August 24, 2007, (as modified on September 25, 2007) hereby submits their memorandum for the Court's consideration of Defendants Cox's (hereinafter "Cox"), request that all landowners subject to the restrictive covenants recorded June 13, 1974, be joined as indispensable parties, such that the case must be dismissed if their joinder cannot be had.

Cundiff's take the legally cogent position that this litigation can proceed without the joinder of all area residents, as their interests remain protected whether or not they are made parties to this litigation. Cox's have interposed the issue of joinder as a barely disguised means of effecting a dismissal of the action, in an effort to deprive Cundiff of a full hearing on the issues in this case.

Furthermore, "crowding the court" with all area residents does nothing to assist this Court in entering a just order between the parties presently before it. Indeed, the timing and lack of legal support for Cox's initial motion for joinder of all area residents reveals that their request was interposed for the improper purpose of delay and harassment, rather than to ensure a just resolution of this case.

Therefore, as supported by the following memorandum of points and authorities, Cundiff respectfully requests that this Court **deny** Cox's blatant attempt to derail this litigation by claiming that all area property owners are "indispensable" to this action.

RESPECTFULLY SUBMITTED this 12th day of October, 2007.

FAVOUR MOORE & WILHELMSEN, P.A.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY

Although this Court is undoubtedly well acquainted with this case, the following summary of facts and procedural history is provided in order to provide meaningful context to the legal issue of joinder. Cundiff initiated this action against Cox seeking, in principal part, that Cox's use of their property in connection with their retail and wholesale nursery business constituted a violation of the recorded restrictive covenant against commercial or industrial use of property. *See generally, First Amended Complaint, CV 2003-0399, March 18, 2004.* Cox defended on the grounds that there was no on-site cash transfer for any of the multitude of trees, shrubs, or other nursery items with the public, and even if there were business employees tending to the nursery items that were later transferred to their commercial operations, they were not in technical violation of the restrictive covenant.

On the literal eve of trial, Cox moved for summary judgment claiming that their use of the property was "agricultural" and thus, under a strict construction of the recorded covenants, they were not in violation as "agriculture" was not a listed prohibited use. Cox also moved for joinder of all other 402 property owners on the grounds that they were "indispensable" parties under Cox's rendition of Rule 19, Ariz.R.Civ.Proc.[1] This Court granted Cox's summary judgment on a strict construction that "agricultural use" of property was not expressly prohibited by the restrictive covenant. On the issue of Cox's joinder argument, this Court denied that motion on the grounds that it was untimely. Cundiff appealed the Court's grant of summary judgment, and Cox cross-appealed the Court's decision on joinder.

The Court of Appeals reversed the summary judgment decision, and ruled that joinder of a necessary party could be raised at any time, since Rule 19(a) did not provide any time parameters.[2] *See, Cundiff v Cox, 1 CA-CV 06-0165, Memorandum Decision, May 24, 2007.* On remand, this Court has requested that the parties file legal memorandum on the issue of joinder of all other area property owners. This memorandum sets forth the legal sophistry of Cox's position that in order for this Court to effect a just decision, all 402 Coyote Springs Ranch property owners must be joined to this action.

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[1] Cox repeatedly uses the term "indispensable" when arguing that the other 402 Coyote Springs Ranch property owners must be joined to this action. Arizona has long since dispensed with this antiquated categorization. *Id., see also State Bar Committee Note, 1966 Amendment, Rule 19.*

[2] The Court of Appeals affirmed this Court's dismissal of Cox's affirmative defenses of estaoppel, laches and unclean hands, which had been raised by Cundiff on summary judgment. *Memorandum Decision, 1 CA-CV 06-0165, May 24, 2007 at Conclusion, ¶37, p.21.*

II. LEGAL ARGUMENT

A. COX's ARGUMENTS FAIL TO SATISFY RULE 19(a)

This case involves the propriety of Cox's undeniable use of their land as a nursery growing yard for their off-site commercial business operations in light of the restrictive covenant prohibiting the use of land for a commercial or business purpose. Hence, this Court can enter an order providing complete and just relief between the parties before it, without the necessity of joining all property owners in the entire subdivision.

In their motion for joinder, Cox argued that all property owners in the subdivision subject to the recorded covenants and restrictions were required to be joined because, absent their joinder Cox argued, there could be inconsistent decisions on their affirmative defenses in the event of subsequent litigation by other property owners.[3] Based upon the Court of Appeals decision, there is only one remaining affirmative defense that Cox may advance at this stage of the proceedings; namely, abandonment of the recorded covenants. Distilled to its essence, and stripped of hyperbole, Cox's argument to the Court is that unless all the other property owners are joined to this action, they could face multiple and/or inconsistent subsequent litigation on the same issue. The persuasiveness – if any – that this argument may have is obtained only by Cox ignoring or purposefully failing to appreciate the affect of other equally relevant and important legal doctrines that foreclose their hypothetical scenario of interminable litigation regarding their nursery operations in violation of the residential-use only covenant.

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[3] Cox referred to the other property owners with a predictable self-serving characterization, terming other property owners as "affected owners." Obviously, no other property owner is necessarily "affected," despite Cox's grandiose implied characterization. No other admissible evidence currently exists before the Court that any other property owner is using their land as are the Cox's.

An analysis of Cox's arguments must begin with the language of Rule 19(a). That rule provides:

> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action **if** (1) **in the person's absence complete relief cannot be accorded among those already parties, or** (2) **the person claims an interest relating to the subject of the action** and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede the person's ability to protect that interest (ii) leave any of the persons already parties subject to a **substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest**....

Rule 19(a), Ariz.R.Civ.Proc. (emphasis added). Federal courts discussing Rule 19(a) have failed to be persuaded by litigants advancing the same threat of exposure to "multiple litigation" as advanced by Cox in this litigation. Furthermore, federal court decisions on the rules of civil procedure are highly persuasive to Arizona courts. It has long been a principle of the Arizona Supreme Court to look to federal court interpretation of the federal rules of civil procedure for guidance. "We...subscribe to the principle that uniformity in interpretation of our rules and the federal rules is highly desirable." *Orme School v. Reeves, 166 Ariz. 301, 304, 802 P.2d 1000, 1003 (1990) (internal case citations omitted); see also, Green v. Nygaard, 213 Ariz. 460, 143 P.3d 393 (App. Div.2 2006) (uniformity in interpretation of state and federal rules of civil procedure is highly desirable, and federal cases interpreting federal counterpart of state rule of civil procedure are persuasive).*

First, under Rule 19(a), Cox are required to establish that complete relief cannot be afforded to the parties in the absence of the other property owners. In order to establish this element of their argument, Cox must provide cogent evidence that any judgment rendered by this Court based upon the legal claims at issue would be deficient. Cox has failed to do so. At issue[4] is Cundiff's claim that Cox is utilizing their property for a business or commercial purpose in violation of the recorded

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[4] Cundiff also has raised claims that Cox has violated other provisions of the restrictive covenants; however, these violations, while independent of the commercial use violation, are ancillary to that claim.

covenants. Cox's sole remaining post-appellate defense is that the restrictive covenants have been abandoned. This Court can obviously evaluate the evidence and render a decision in complete relief on Cundiff's claim and Cox's affirmative defense without the necessity of joining all other property owners. The fallacy with Cox's argument is that they fail to understand the legal principle underlying Rule 19's prescribed "complete relief."

> The "complete relief" prescribed in ... Rule [19] only relates to those persons already party to the action; it does not concern any subsequent relief that could be later obtained from the absent party.

General Council of Assemblies of God v. Fraternidid de Iglesia de Asamblea de Dios Autonoma Hispana, Inc., 382 F.2d Supp.2d 315, 320 (D. Puerto Rico 2005) citing Bedel v. Thompson, 103 F.R.D. 78 (D.C Ohio 1984) (which in turn cited Morgan Guaranty Trust Co. of N.Y. v. Martin, 466 F.2d 593 (7th Cir. 1972); other internal citations omitted. Thus, in this case, the complete relief concerns Cox having to disband their commercial enterprise, as a violation of the restrictive covenant, or allowed to continue their business operation because this Court has found that the restrictive covenants have been so thoroughly disregarded as to be considered abandoned. The joinder of other property owners is obviously unnecessary as any order from this Court can be fully satisfied or performed by the parties presently before it. In other words, if the Court rules in Cundiff's favor, Cox will be required to terminate their business operations on the subject property. Alternatively, if the Court rules in Cox's favor on their affirmative defense, Cox will be able to maintain their business operations. Hence, complete relief can be obtained with the parties who are currently before the Court without the joinder of other property owners. As none of these other property owners have even expressed an interest in this litigation, it is difficult to assume – without anything further from Cox – that they must be joined. Their rights are obviously unaffected by the Court's decision. And it is *their rights, not the Cox's* that are to be evaluated by the Court under Rule 19.

It is the issue of hypothetical subsequent litigation that Cox raises as an argument that all other property owners must of necessity be joined or they, Cox, face potentially conflicting judgments. This, however, is where Cox confuses the issue by legal sophistry. Rule 19(a) provides for an evaluation of joinder if any party to the litigation may be "subject to a **substantial** risk of incurring double, multiple, or otherwise inconsistent **obligations** by reason of the claimed interest." *Id. (emphasis added).* Here, Cox's argument rests principally on the hypothetical situation that they might be sued again by another property owner on the same claim raised in this case, and be required to disband their commercial enterprise.

> ...Rule 19 does not speak of inconsistent "results." Rather, it speaks in terms of inconsistent "obligations." As pointed out, defendant's scenario does not result in subjecting the defendant to inconsistent obligations, but instead imposes the consequences of inconsistent results. *See 3A Moore's Federal Practice and Procedure, 1907-1[2-2].*

Bedel, supra, 103 F.R.D. at 81 (treatise citation in original). The same holds true in the present case. Cox's argument is one of fear of potentially inconsistent results, not obligations. Thus, the classic case of an indispensable party is where one party in the case may be required to pay a sum of money to the other party to the suit, but then faces a substantial risk that another non-party may file suit for the same sum and the party may then later be obligated to pay again. Hence, joinder of the non-party removes the very real threat that one party may have to pay the same sum twice. *Compare, Delano v. Ives, 40 F.Supp. 672 (E.D.Pa. 1941) (joinder by plaintiff of unnamed party not required where claim by defendant is joint and several liability with unnamed party) with Lurz v. John J. Thompson & Co., 86 Ga.App. 295, 71 S.E.2d 675 (1952) (adjudication of ownership of property requires joinder of all interested parties).* Clearly, this case does not present the situation that Cox will face inconsistent obligations. If no other property owners are joined, and Cox is later sued, they may face an

inconsistent *result* but not an inconsistent legal *obligation.* Absent such a showing by Cox, the movant for mandatory joinder of 402 subdivision property owners, their Rule 19 argument by necessity fails.

Secondly, assuming they could sustain a showing of a risk of inconsistent legal obligations, Cox have failed to provide any substantiating evidence that they face a "**substantial risk**" of incurring "double, multiple or otherwise inconsistent obligations...." *Rule 19(a)(2)(ii) (emphasis added).*

> [A]s to the risk of multiple and/or inconsistent obligations, "[t]he key is whether the possibility of being subject to multiple obligations is real; an unsubstantiated or speculative risk will not satisfy Rule 19(a) criteria. 7 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d §1604 at 64.*

General Council of Assemblies of God, supra, 382 F.Supp.2d at 320 (treatise citation in original). Likewise, in the instant action, Cox have not provided any evidence that they face any subsequent or multiple litigation on the issue of their commercial use of the property. Absent showing a "realistic risk of multiple or inconsistent obligations[,]" Cox are not entitled to joinder of all other property owners simply on their gross assumption that they could be sued again for the same conduct. *Ibid.*

Finally, Rule 19(a)(2) necessitates joinder of a party only where that party "claims a 'legally protected' interest relating to the subject matter of the action." *Ibid. citing United States v. San Juan Bay Marina, 239 F.3d 400, 406 (1st Cir. 2001).* "Defendants do not even allege what legally protected interest is involved. Thus, we see no need to speculate." *Ibid.* Again, the same analysis holds true for the case presently before the Court. Cox have not advanced any "legally protected interest" claimed by any other property owner not currently a party to this litigation that relates to the subject matter of the litigation. It is not incumbent upon Cundiff to tilt its sword at windmills.

B. RULE 19(b) DOES NOT SUPPORT JOINDER OF ALL AREA PROPERTY OWNERS TO THE CURRENT LITIGATION

Rule 19(b) requires the Court to make a judicial determination in the event a non-litigant cannot be joined under Rule 19(a), "whether in equity and good conscience the action should proceed among

the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." *Id.* Rule 19(b) further provides criteria the Court may use in its determination:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id. (underline added for ease of review). "[T]his rule is designed to avoid an inflexible formula approach by the courts and requires that findings of indispensability must be based on stated pragmatic considerations of the particular consequences of a person's nonjoinder and ways by which those consequences might be ameliorated." *59 Am.Jur.2d Parties §134.* "The decision as to necessary or indispensable parties rests within the sound authority of the trial judge, who should exercise that discretion on a case-by-case basis rather than on arbitrary considerations, and whose decision should not be reversed unless it is clearly erroneous or affects the substantial rights of the parties." *Id.*

The first three factors set forth in the rule are necessarily intertwined and have been addressed by Cundiff in the context of Rule 19(a). In this case, Cox have failed to establish how any of the other approximate 400 property owners would be prejudiced by this Court ruling that Cox's commercial use of the property in any way prejudices the non-party's rights. Hence, this Court would not be required to fashion a judgment that would lessen or avoid any non-existent prejudice to the non-parties. On the other hand, any determination that Cox prevails on their affirmative defense that the recorded covenants have been abandoned again would not operate to prejudice the *non-parties'* rights or interests under the restrictive covenants. It is at this juncture in the argument that Cox moves away from the wording of the rule (as federal cases have made clear) and instead focus on any inconsistent result they may face. As set forth above, an inconsistent result to Cox in the event of subsequent

litigation brought by another party is not the showing required under the Rule. Rather, Cox must establish both a substantial risk of multiple litigation, and inconsistent obligations. Without first meeting that burden, Cox clearly cannot establish that in the event they prevail on their affirmative defense that they would face an inconsistent obligation should another property owner sue. Unlike the situation where there is a certain sum of money at issue, there is no chance of Cox having "inconsistent obligations" in having to risk an adverse judgment from a plaintiff and then face similar adverse rulings to pay the same sum of money to non-parties. *Bedel, supra; Morgan Guaranty Trust Co., supra.* This case presents an analogous situation to the case where a defendant contends that the plaintiff must join other potential joint or severally liable parties. In those cases, the federal courts have held a plaintiff "is under no requirement to join all parties who might be jointly and severally liable." *Bedel, supra, 103 F.R.D. at 81 (cases cited therein).*

As for the third factor set forth in Rule 19(b), the Court can enter a judgment that will afford complete relief among the parties presently before it. Furthermore, no other subdivision property owner's rights would be prejudiced by such a decision, and Cox's purported fears are nothing more than hypotheticals as they have failed to even substantiate any claim that any other property owner has threatened suit against them. It is the fourth factor that warrants the Court's exercise of discretion in finding that the other property owners are not "indispensable" to the adjudication of this action. If this action is dismissed on the grounds of non-joinder, simply put, Cundiff have no other remedy available to them, much less an "adequate remedy" as required under Rule 19(b). Balanced against factually baseless fears of potential multiple litigation, as Cox urges, compared to the complete absence of any form of redress for Cundiff's claims if this matter is dismissed mandates that the Court find that under the circumstances of this case, there is no factually warranted, legally sound basis for ruling in Cox's favor that all subdivision property owners must be joined.

III. CONCLUSION

Cox's contention that joinder of all subdivision property owners is necessary under Rule 19(b), and that if it cannot be accomplished mandates this Court's dismissal of the action, is a hollow argument based upon a misreading of Rules 19(a) and (b) resulting from self-serving interest in avoiding litigation on Cundiff's claim against them. The underlying inescapable and insurmountable fallacy to Cox's argument is that they cannot substantiate a claim for joinder of non-parties based upon a theoretical, or less than probable claim, that they may be subject to multiple litigation on the same issue. As a preliminary matter, Cox cannot establish that any of the non-party subdivision property owners has a right that requires protection through joinder in this litigation. What Cox is really complaining of is that there are other property owners in the subdivision that *they* claim are in violation of the recorded covenants. But that argument does nothing to preclude this Court from entering a judgment that fully adjudicates the parties claims and defenses in this action such that the Court's judgment would be just and equitable as between the parties currently before the Court.

Furthermore, Cox have failed to provide any credible basis upon which this Court could conclude that they stand a "substantial" risk of inconsistent "obligations" in the event a non-party property owner filed suit against Cox at a later date. Indeed, at most Cox has only made a bald assertion that they may be sued again and may face an inconsistent result. However, as federal case law makes quite clear, a party's purported fear of an inconsistent result does not warrant a court requiring joinder of other parties.

As a practical matter, stripped of Cox's rhetoric, Cox's joinder motion is nothing more than a blatant attempt to delay this matter, or otherwise make it prohibitively unwieldy and costly to litigate to conclusion. Cox is obviously employing Rule 19 for a perverse purpose. There is no right possessed by a non-party property owner that would be affected by this litigation that compels a finding that the party be joined or the matter dismissed under Rule 19(b).

Thus, the Court is able to render judgment in this case that would fully adjudicate each party's claim, and Cox would not be subject to multiple inconsistent legal obligations assuming that there was a substantial risk of multiple litigation on the same issue. No other property owner's rights being necessary for this Court's adjudication of the claims in this case between these parties, there is no basis under Rule 19(a) or (b) by which the Court must join any other Coyote Springs Ranch subdivision property owner in order to protect that individual's rights.

Therefore, Cundiff respectfully requests that this Court deny Cox's motion to join all other subdivision property owners as these parties are not necessary to this Court's just and equitable adjudication of the rights and interests of the parties currently before the Court.

DATED this 12th day of October, 2007.

FAVOUR MOORE & WILHELMSEN, P.A.

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

/ / /

Original of the foregoing filed
this 12th of October, 2007, with:

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

A copy of the foregoing
hand-delivered this 12th day
of October, 2007, to:

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

Mark Drutz
Jeffrey Adams
MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
Prescott, Arizona 86302
Attorneys for Defendants Cox

By: _____
David K. Wilhelmsen