

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

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JULIA E. HONE, CLERK

BY: J. Seguin

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7 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

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

9 JOHN B. CUNDIFF and BARBARA C.)
10 CUNDIFF, husband and wife; ELIZABETH)
11 NASH, a married woman dealing with her)
12 separate property; KENNETH PAGE and)
13 KATHRYN PAGE, as Trustee of the Kenneth)
14 Page and Catherine Page Trust,)

15 Plaintiffs,)

16 v.)

17 DONALD COX and CATHERINE COX,)
18 husband and wife,)

19 Defendants.)

CASE NO. CV 2003-0399
DIVISION 1

**DEFENDANTS' MOTION FOR ORDER
DENYING CLASS ACTION
CLASSIFICATION AND
CERTIFICATION**

AND

**MOTION FOR ORDER RE:
COMPLIANCE WITH ORDER RE:
JOINDER**

(Oral Argument Requested)

(Assigned to the Hon. David L. Mackey)

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21 Defendants Donald and Catherine Cox, by and through undersigned counsel and pursuant to
22 Rule 23(c)(2), Ariz. R. Civ. P., hereby move the Court for an Order denying Plaintiffs' request for
23 class-action classification and certification. Defendants further request that the Court Order Plaintiffs
24 to comply with the Court's April 24, 2009, and August 22, 2008, Orders regarding joinder of all
25 owners of property governed by the subject Declaration of Restrictions who are not now parties
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1 (“Absent Owners”). This Motion is supported by the accompanying Memorandum of Points and
2 Authorities and the record on file, which shall be incorporated by reference.

3 Respectfully submitted this 17 day of September, 2009.

4 ADAMS & MULL, PLLC

5 By 

6 Jeffrey R. Adams, Esq.
7 Attorneys for Defendants

8 **MEMORANDUM OF POINTS AND AUTHORITIES**

9 **I. Legal Argument.**

10 This Court is well-aware that on the issue of joinder of the Absent Owners, the Court of
11 Appeals held specifically that (i) the Defendants’ Motion to Join Indispensable Parties Pursuant to
12 Rule 19(a), Ariz. R. Civ. P., or, in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(7), Ariz.
13 R. Civ. P., (“**Defendants’ Joinder Motion**”) was well founded and supported by Rule 19(a), Ariz.
14 R. Civ. P., (ii) that the Declaration of Restrictions at issue constitute property rights which run with
15 title to the land owned by the Absent Owners, (iii) that a ruling in this case in Defendants’ favor on
16 the issue of abandonment would affect the real property rights of the Absent Owners and (iv) that the
17 Absent Owners are necessary parties to this case as long as (a) they are subject to service of process
18 and (b) their joinder will not deprive the trial court of jurisdiction. See Memorandum Decision at ¶¶
19 29, 32, 35 and 36. Specifically, the Court of Appeals ruled that the outcome of this case could
20 significantly affect each of the Absent Owners and each of their respective real property rights by
21 potentially creating a patchwork of restrictive covenants. In this regard, the Court stated:
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25 Restrictions as to the use of land are mutual, reciprocal, equitable easements in the
26 nature of servitudes in favor of owners of other lots within the restricted area, and
27 constitute property rights which run with the land.” *La Esperanza Townhome Ass’n,
Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 238, 689 P.2d 178, 181 (App. 1984)

1 (quoting *Montoya v. Barreras*, 473 P.2d 363, 365 (N.M. 1970). **A ruling in this case**
2 **that the restrictions have been abandoned and are no longer enforceable against the**
3 **Coxes' property would affect the property rights of all other owners subject to the**
4 **Declaration.**

5 Memorandum Decision at ¶ 32 (emphasis added).

6 [E]ven if a ruling in favor of the Coxes on their affirmative defense of abandonment
7 were to apply **only** to the Coxes' property, **all property owners rights would still be**
8 **affected** by the Coxes' continued use of their property, or by any future use adverse to
9 the restrictions. We have previously found that amendments to covenants must apply
10 to all property subject to them or not at all. See *La Esperanza Townhomes*, 142 Ariz.
11 at 238, 689 P.2d at 181; *Riley v. Boyle*, 6 Ariz.App. 523, 434 P.2d 525, 528 (1967).
12 **Similarly, ruling in favor of the Coxes in this case could cause the same unintended**
13 **"patchwork" of restrictions those cases sought to avoid.**

14 Memorandum Decision at ¶¶ 35 (emphasis added). Thus, Court of Appeals unequivocally determined
15 that the Absent Owners (all of them) **are** necessary parties to this case and ordered this Court to
16 determine, on remand, whether the Absent Owners are also indispensable under Rule 19(b), Ariz. R.
17 Civ. P., and if so, they must be joined. *Id.* at ¶ 36.

18 On remand, on August 22, 2008, this Court entered its Order requiring the Plaintiffs to join
19 the Absent Owners. See Exhibit "1" attached hereto. Therein, this Court, in following the Court of
20 Appeals' reasoning, found the Absent Owners to be indispensable to this action. *Id.* This Court also
21 held that "the failure to join the other property owners would prejudice their property rights." In
22 reaching this conclusion, the Court ruled as follows:

23 The Court finds that both the Plaintiffs and Defendants may be subject
24 to multiple litigation if the other property owners are not joined. As the
25 Plaintiffs have noted, there are other property owners who are not yet
26 parties that may align with either side in this lawsuit. Although
27 unlikely, even if the 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

1 party to this suit could file the same action against the Defendants as
2 is currently pending. **The Defendants will not be able to claim their
3 victory in this case is binding upon other property owners unless they
4 are joined.** The Court finds that facing multiple litigation on the same
5 issue is prejudicial to all the parties.

6 *Id.*

7 In their effort to obtain class classification and certification, Plaintiffs claim that if this case
8 proceeds as a class action, it will resolve the dilemma foreseen both by the Court of Appeals and by
9 this Court should the Absent Owners not be joined. However, that is not true.

10 According to Rule 23(c)(2), Ariz. R. Civ. P., “A judgment in a class action is binding upon all
11 persons whom the court finds to be members of the class.” *A.J. Bayless Markets, Inc. v. Superior
12 Court of Pima County*, 145 Ariz. 285, 700 P.2d 1385 (Ct.App. 1985). However, that premise would
13 not hold true with respect to all of the Absent Owners. This is the case because, pursuant to Rule
14 23(c)(2), Ariz. R. Civ. P., any putative member of a designated class may “opt out” of the class and,
15 thereafter, that member **will not** be bound by any judgment that may be entered. In this regard, the
16 Rule states:

17 In any class action maintained under subdivision (b)(3), the court shall
18 direct to the members of the class the best notice practicable under the
19 circumstances, including individual notice to all members who can be
20 identified through reasonable effort. The notice shall advise each
21 member that (A) the court will exclude the member from the class if
22 the member so requests by a specified date; (B) **the judgment, whether
23 favorable or not, will include all members who do not request
24 exclusion;** and (C) any member who does not request exclusion may,
25 if the member desires, enter an appearance through counsel.

26 *See* Rule 23(c)(2), Ariz. R. Civ. P. (emphasis added).

27 Thus, if this Court were to certify this case as a class action and designate the Absent Owners
as class members, any or all of the Absent Owners could elect to “opt out” and thereafter they would
not be bound by any Judgment entered this Court be it in favor of Plaintiffs on a finding that the

1 Declaration of Restrictions are either partially or fully enforceable or be it on any of the defenses that
2 have been asserted by the Defendants including the defense of abandonment. Further, those Absent
3 Owners who choose to “opt out” could bring their own separate actions in which they separately could
4 seek either a judicial determination that the Declaration of Restrictions are enforceable or that they
5 have been abandoned. Even worse, this Court could, upon entering a Judgment finding that the
6 Declaration of Restrictions have been abandoned, create the very the very patchwork of restrictions
7 that the Court of Appeals determined was unacceptable and which rendered the Absent Owners
8 necessary and indispensable parties to this action. Accordingly, certifying this case as a class action
9 would deny Defendants the very result that this Court sought to avoid in Ordering joinder.
10

11 Based on the foregoing, it is clear that this case ***should not*** proceed as a class action. Because
12 this case involves restrictive covenants that Plaintiffs allege burden and encumber the Defendant’s and
13 the Absent Owners’ real property and their real property rights, this Court is obligated to ensure that
14 all of the Absent Owners, not just those who choose not to “opt out”, are made parties. Such a result
15 was precisely what this Court already determined was necessary in it’s August 22, 2008 and April 9,
16 2009 rulings on the issue of Joinder. Accordingly, this Court should deny Plaintiffs’ request for class
17 certification. In addition, we ask that the Court Order the Plaintiffs to comply with the previous Orders
18 of this Court regarding joinder.
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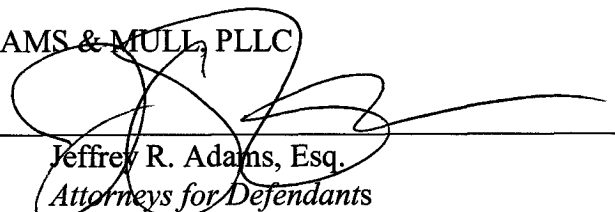
21 **II. Conclusion.**

22 Based on the foregoing, class action certification is clearly inappropriate in this case.
23 Accordingly, the Court should deny Plaintiffs’ request for class certification of the Absent Owners and
24 Order Plaintiffs to comply with the Court’s previous Orders regarding joinder and if they fail to do so
25 in a timely manner this case should be dismissed with prejudice and the Court should award
26 Defendants their attorneys’ fees, costs and expenses accordingly.
27

Respectfully submitted this 17 day of September, 2009.

ADAMS & MULL, PLLC

By

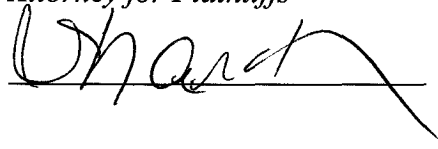

Jeffrey R. Adams, Esq.
Attorneys for Defendants

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A copy of the foregoing was hand-delivered this 17 day of September, 2009 to:

The Honorable David L. Mackey
Yavapai County Superior Court
Division 1
Yavapai County Courthouse
Prescott, Arizona

J. Jeffrey Coughlin, Esq.
J. Jeffrey Coughlin PLLC
114 South Pleasant Street
Prescott, Arizona 86303
Attorney for Plaintiffs



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

<p>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 Catherine Page Trust,</p> <p align="right">Plaintiff,</p> <p align="center">-vs-</p> <p>DONALD COX and CATHERINE COX, husband and wife,</p> <p align="right">Defendant.</p>	<p>Case No. CV2003-0399</p> <p>RULING</p>	<p align="center">FILED AUG 25 2008</p> <p>DATE: _____ 12 O'Clock _____ P.M.</p> <p align="center">JEANNE HICKS, CLERK</p> <p>BY: <u>SHEETAL PATEL</u> Deputy</p>
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<p>HONORABLE DAVID L. MACKEY</p> <p>DIVISION 1</p>	<p>BY: Cheryl Wagster Judicial Assistant</p> <p>DATE: August 22, 2008</p>
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After reviewing the Mandate and Memorandum Decision from the Court of Appeals, this Court Ordered that the Plaintiffs shall "file a legal memorandum setting forth their position that joinder is not feasible and that the Court should proceed with this action based upon the factors set forth in Rule 19(b), *Ariz.R.Civ.P.*" After briefing was completed, the Court held oral argument on March 10, 2008. After hearing argument, the Court Ordered that "the Plaintiff[s] shall join all landowners subject to the Declaration of Restrictions dated June 12, 1974." The Court Ordered that Plaintiffs file a notice with the Court including "a map of the properties subject to the Declaration of Restrictions as well as a list designating the parcel numbers as well as names and address of each property owner." The Court also Ordered that "the Plaintiff[s] shall also file a plan for joinder of all the property owners subject to the Declaration of Restrictions." The Court told the parties that it was keeping open whether the matter should proceed as a class action or whether the additional parties should be joined as Plaintiffs or Defendants.

The Plaintiffs complied with the Court Order to file a notice. In Plaintiffs' Plan For Joinder of Property Owners Subject To Restrictive Covenants, the Plaintiffs included a list of the property owners, their addresses and their parcel numbers as well as a map of the property subject to the Declaration of Restrictions. While the Defendants complain that not every owner for every parcel was listed, the Court finds that deficiency meaningless in light of the position taken by the Plaintiffs.

The Court notes that oral argument was requested by the Plaintiffs and Defendants. The Court pursuant to Rule 7.1(c)(2), *Ariz.R.Civ.P.* has determined that oral argument will not assist the Court in the determination of this motion.

AUG 22 2008

AFTER 2 P.M.

Although the Court had Ordered that Plaintiffs were responsible for the joinder of necessary parties, the plan they submitted for joinder was not a plan at all. The Plaintiffs continue to suggest that joinder is not feasible and argue over whether they should be responsible for joinder. Without saying it specifically, the Plaintiffs suggest that they are NOT going to join all the property owners but that the case should not be dismissed because of the factors set forth in Rule 19(b), *Ariz.R.Civ.P.* The Plaintiffs argue that "there are currently 273 non-party property owners . . . spread over 12 states (including Arizona) from California to New York." Nothing in the information presented to the Court regarding the property owners causes the Court to even respectfully question the Court of Appeals ruling that they are all necessary parties pursuant to Rule 19(a), *Ariz.R.Civ.P.* Furthermore, there is nothing in the information provided to suggest that the other property owners cannot be joined other than the suggestion that the expense is prohibitive.

The Court finds that assertion unpersuasive. Out of State owners could be served by mail pursuant to Rule 4.2(c), *Ariz.R.Civ.P.* Service on in State owners could be attempted by mailing a waiver of service pursuant to Rule 4.1(c), *Ariz.R.Civ.P.* In addition, the Plaintiffs could request an order for alternative service by mail pursuant to Rule 4.1(m), *Ariz.R.Civ.P.* Their argument regarding the expense of service is best made towards the "impracticable" requirement of that rule. The Court finds that Plaintiffs have not established that the other property owners "cannot be made a party" as that phrase is used in Rule 19(b), *Ariz.R.Civ.P.* The Plaintiffs continued assertion that they should not be required to join the other property owners does not support a finding that the necessary parties cannot be joined.

While the Court believes that such a finding should resolve the matter and lead to the dismissal of the action due to Plaintiffs' refusal to even attempt to join necessary parties over a year after being directed to do so by this Court, the Court of Appeals directed this Court to consider whether the property owners are indispensable pursuant to Rule 19(b), *Ariz.R.Civ.P.* so this Court will do so.

Rule 19(b), *Ariz.R.Civ.P.* provides:

"If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine 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. 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."

The Court first considers “to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties.” The Court of Appeals Memorandum Decision already addresses the first part of that question. At ¶ 32, the Court of Appeals stated:

“A ruling in this case that the restrictions have been abandoned and are no longer enforceable against the Coxes’ property would affect the property rights of all other owners subject to the Declaration.”

The Court finds that the failure to join the other property owners would prejudice their property rights.

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 the 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 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.

There is certainly a reason most modern declarations of restrictions name an association as the appropriate party to bring an enforcement action on behalf of all property owners. While the failure of the Declaration of Conditions to designate one entity to bring an action on behalf of all property owners is not the fault of either side in this case, neither side should be prejudiced by facing multiple litigation due to the terms of the Declaration.

Next, the Court considers “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.” The Plaintiffs argue that the Court should require the Defendants to join other property owners to lessen or avoid the prejudice. Other than that, the Plaintiffs offer no other suggestions for the Court to lessen or avoid the prejudice. The Plaintiffs’ argument ignores the fact that this Court has previously ruled that it is Plaintiffs who brought this action and if costs are to be incurred to get to a final resolution, it is Plaintiffs who will incur those costs initially. The Plaintiffs are reminded that, if they prevail, they can request a judgment

Cundiff v. Cox
CV2003-0399
Page Four
August 22, 2008

against the Defendants for those costs at the conclusion of the case. Absent any other suggestion, the Court can think of no protective provision, terms of relief or other measures to lessen or avoid the prejudice when the issue sought to be resolved is the complete abandonment of the Declaration of Conditions.

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 than that. If this were a 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 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 Conditions. 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 Conditions 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 rendered in the absence of all property owners subject to the Declaration of Conditions would not be adequate.

Next, the Court considers "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." Although the Plaintiffs may not like the result, the fact is that upon a dismissal of this case for nonjoinder, the Plaintiffs will have the same remedy they have at this time. They can file an action that joins all property owners subject to the Declaration of Conditions and seek to enforce the terms against the Defendants. A dismissal of this case at this time due to the failure to join indispensable parties will not deprive the Plaintiffs of their right to seek relief in the appropriate way.

The Court finds based upon the factors set forth above that "in equity and good conscience the action . . . should be dismissed" since all property owners subject to the Declaration of Conditions are necessary and indispensable parties. The Plaintiffs have delayed this matter long enough. However, the Court will give the Plaintiffs one final chance to comply with the Court's orders for joinder.

IT IS ORDERED that in the event the Plaintiffs do not take substantial steps to join all necessary and indispensable parties within the next **ninety (90) days**, this matter will be dismissed.

cc: David K. Wilhelmsen/Marguerite Kirk – Favour Moore & Wilhelmsen, P.O. Box 1391,
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Jeffrey Adams – Adams & Mull, P.O. Box 1031, Prescott, AZ 86302