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BY: _____

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

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

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

21 ^{P1300}
22 CASE NO. CV 2003-0399
23 DIVISION 1

24 **DEFENDANTS' REPLY TO**
25 **PLAINTIFFS' OBJECTION TO**
26 **DEFENDANTS' MOTION FOR ORDER**
27 **DENYING CLASS ACTION**
CLASSIFICATION AND CERTI-
FICATION AND RESPONSE TO CROSS-
MOTION FOR DETERMINATION THAT
ACTION MAY PROCEED AS CLASS
ACTION

(Oral Argument Requested)

(Assigned to the Hon. David L. Mackey)

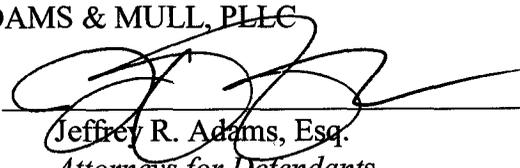
28 Defendants Donald and Catherine Cox, by and through undersigned counsel and pursuant to
29 Rule 23(c)(2), Ariz. R. Civ. P., hereby submit their Reply to Plaintiffs' Objection to Motion for Order
30 Denying Class Action Certification and Response to Motion for Determination that Action May
31 Proceed as Class Action. In reviewing the Plaintiffs' Motions, it is clear that they finally have
32 acknowledged and accepted the fact that (i) the outcome of this case will affect all owners of property
33 in the subject subdivision who are not now parties ("**Absent Owners**") and (ii) the Absent Owners

are necessary and indispensable parties to this action. However, in responding to Defendants' Motions, Plaintiffs have completely ignored Rule 23(c)(2), Ariz. R. Civ. P., and the very real possibility that if this case were to proceed as a class action, it may do so without all of the necessary and indispensable Absent Owners thereby defeating the purpose to be accomplished through joinder. Accordingly, we ask that Defendants' Motions be granted, that Plaintiffs' request for class certification be denied and that Plaintiffs be ordered to join all of the property owners in the subject subdivision in accordance with the prior rulings of this Court.

This Reply and Response is supported by the accompanying Memorandum of Points and Authorities and the record on file, which shall be incorporated by reference.

Respectfully submitted this ___ day of October, 2009.

ADAMS & MULL, PLLC

By 

Jeffrey R. Adams, Esq.

Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. This Case Cannot Proceed As a Class Action.

A. Legal Authority.

In defining this Court's authority in certifying cases as class actions, Rule 23(c)(2) employs mandatory as opposed to discretionary language. In this regard, Rule 23(c)(2) specifically mandates that putative class members will have the right to be excluded from the class if the member so requests, i.e., an "opt-out" procedure. More importantly, the Rule provides that a judgment rendered in the class action will be binding only on those parties who do not elect to be excluded from the class.

1 It is important to note that Arizona's Rule 23(c)(2), Ariz. R. Civ. P., differs considerably from
2 its Federal counterpart. Unlike Arizona's Rule 23(c)(2), Federal Rule 23(c)(2) does not allow
3 putative class members to opt out if the action is one brought under Rules 23(b)(1) or (2), Fed. R. Civ.
4 P., which involve (i) actions brought to avoid the risk of inconsistent or varying adjudications with
5 respect to individual class members that would establish incompatible standards of conduct for the
6 party opposing the class; or (ii) adjudications with respect to individual class members that, as a
7 practical matter, would be dispositive of the interests of the other members not parties to the
8 individual adjudications or would substantially impair or impede their ability to protect their interests.
9 Arizona's Rule 23(c)(2), on the other hand, allows any putative class member to opt out regardless
10 of the category of class action the case falls into whether it be Rule 23(b)(1), (2) or (3), Ariz. R. Civ.
11 P.
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13 As is clear from their Response and their Motion, Plaintiffs only want to focus on Rule 23(b),
14 Ariz. R. Civ. P. However, Rule 23(c)(2), Ariz. R. Civ. P., imposes heightened requirements for class
15 actions maintained pursuant to Rule 23(b), Ariz. R. Civ. P., including the unequivocal right to opt out.
16 When a class action is maintained pursuant to Rule 23(b), Rule 23(c)(2) contemplates that there very
17 well may be putative class members that will elect to take advantage of their opportunity to opt out
18 and, accordingly, not be bound by any judgment to be entered or settlement reached. Such a result
19 will, most certainly, prevent this Court from its ultimate goal – namely to have the issues and disputes
20 affecting the subject subdivision and the owners of property therein resolved within a single lawsuit.
21

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23 **B. Legal Argument.**
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25 In reading this Court's August 22, 2008, Minute Entry, it is rather clear that this Court fears
26 the prospect of creating a patchwork of restrictive covenants in the subject subdivision. As recognized
27 by this Court and the Arizona Court of Appeals, "[r]estrictions as to the use of land are mutual,

reciprocal, equitable easements in the nature of servitudes in favor of owners of other lots within the
1 restricted area, and constitute property rights which run with the land.” *La Esperanza Townhome*
2 *Ass’n, Inc. v. Title Sec. Agency of Ariz.*, 142 Ariz. 235, 238, 689 P.2d 178, 181 (App. 1984) (quoting
3 *Montoya v. Barreras*, 473 P.2d 363, 365 (N.M. 1970). Accordingly, “[a] ruling in this case that the
4 restrictions have been abandoned and are no longer enforceable against the Coxes’ property would
5 affect the property rights of all other owners subject to the Declaration.” Memorandum Decision at
6 ¶ 32 (emphasis added). More importantly, if a ruling in favor of the Coxes on their affirmative
7 defense of abandonment were to apply only to the Coxes’ property and those putative class members
8 made up of only those Absent Owners that do not elect to opt out, all property owners rights would
9 still be affected by the Coxes’ continued use of their property, or by any future use adverse to the
10 restrictions. The result would inevitably be the creation of unintended “patchwork” of restrictions
11 sought to be avoided by those cases establishing that restrictive covenants must apply to all property
12 subject to them or not at all. See e.g., *La Esperanza Townhomes*, 142 Ariz. at 238, 689 P.2d at 181;
13 *Riley v. Boyle*, 6 Ariz.App. 523, 434 P.2d 525, 528 (1967).

17 As stated in Defendants’ Motion, on August 22, 2008, and on remand this Court entered its
18 Order requiring the Plaintiffs to join the Absent Owners. Therein, this Court, in following the Court
19 of Appeals’ reasoning, found the Absent Owners to be indispensable to this action. *Id.* This Court
20 also held that “the failure to join the other property owners would prejudice their property rights.” In
21 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 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.

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6 *Id.*

7 Based on the foregoing coupled with the decisions in *La Esperanza* and *Riley* and the Court
8 of Appeals decision in this case, we must assume that the ultimate objective in making decisions
9 regarding the enforceability of restrictive covenants encumbering real property is that of finality. If
10 this case proceeds as a class action and putative class members opt out, Plaintiffs and Defendants
11 would face the possibility, even if it is a remote one, that they very well may find themselves in Court
12 again on the very same or similar issues. In other words, there is no guarantee or assurance that
13 finality will be achieved if this matter proceeds as a class action. Rather, finality can only be achieved
14 through joinder of all of the Absent Owners. While we recognize that the Plaintiffs' joinder of all of
15 the Absent Owners may be inconvenient or some sort of financial hardship, there is no satisfactory
16 alternative, especially when compared to the prejudice that could result should a single Absent Owner
17 not being made a party to this case and the impact on any Absent Owner's real property rights that
18 could result.
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22 Plaintiffs' failure to address the problems created by Rule 23(c)(2), Ariz. R. Civ. P., speaks
23 volumes. In failing to address Rule 23(c)(2), Ariz. R. Civ. P., in seeking class certification, Plaintiffs
24 tacitly admit that any Absent Owner's election to opt out pursuant to Rule 23(c)(2), Ariz. R. Civ. P.,
25 could result in the very outcome sought to be avoided by this Court – namely that any opting out
26 Absent Owner (i) will not be a party and as a result they and their property would not be bound by any
27 judgment rendered in this case and (ii) could bring their own separate action in which they could seek

their own judicial determination that the Declaration of Restrictions are enforceable or unenforceable.

1 Such a result would be unacceptable and contrary to the Court of Appeals' ruling that the Absent
2 Owners are necessary parties to this case and this Court's ruling that the Absent Owners are also
3 indispensable.

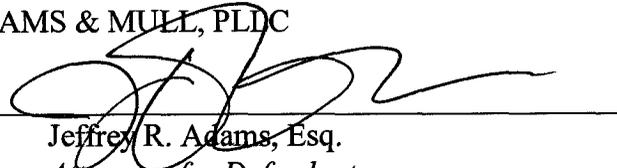
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5 Based on the foregoing, it is clear that this case should not proceed as a class action. Because
6 this case involves restrictive covenants that Plaintiffs allege burden and encumber the Defendant's and
7 the Absent Owners' real property, this Court is obligated to ensure that all of the Absent Owners, not
8 just those who choose not to "opt out", are made parties. Accordingly, Defendants' Motions should
9 be granted and Plaintiffs' Objection and Motion, respectively, should be overruled and denied.

10
11 **II. Conclusion.**

12 Based on the foregoing, class action certification in this case is clearly inappropriate.
13 Accordingly, the Court should deny Plaintiffs' request for class certification and Order Plaintiffs to
14 comply with the Court's previous Orders regarding joinder and if they fail to do so in a timely manner
15 this case should be dismissed with prejudice and the Court should award Defendants their attorneys'
16 fees, costs and expenses accordingly.

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18 Respectfully submitted this 10 day of October, 2009.

19
20 ADAMS & MULL, PLLC

21 By 

22 Jeffrey R. Adams, Esq.

23 *Attorneys for Defendants*

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A copy of the foregoing was
hand-delivered this 16 day of
October, 2009 to:

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2 The Honorable David L. Mackey
3 Yavapai County Superior Court
4 Division 1
5 Yavapai County Courthouse
6 Prescott, Arizona

5

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