

1 Mark W. Drutz, #006772
2 Sharon M. Flack, #021590
3 **MUSGROVE, DRUTZ & KACK, P.C.**
4 1135 W. Iron Springs Road
5 P.O. Box 2720
6 Prescott, Arizona 86302-2720
7 Phone: (928) 445-5935
8 Fax: (928) 445-5980
9 Firm Email: mdkpc@cableone.net

10 Counsel for Defendants Robert and Catherine Cox

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

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

13 JOHN B. CUNDIFF and BARBARA C.
14 CUNDIFF, husband and wife; ELIZABETH
15 NASH, a married woman dealing with her
16 separate property; KENNETH PAGE and
17 KATHRYN PAGE, as Trustee of the Kenneth
18 Page and Catherine Page Trust,

19 Plaintiffs,

20 v.

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

23 Defendants.

Case No. P1300CV20030399

**COXES' RESPONSE TO JAMES
VARILEK'S MOTION TO STRIKE
EXHIBITS 5-12 TO MOTION FOR
RECONSIDERATION RE: AUGUST 25,
2015 RULING RE: ATTORNEYS' FEES
AWARD IN FAVOR OF VARILEK**

24 Donald and Catherine Cox, by and through counsel undersigned, pursuant to Ariz. R. Civ.
25 P. 1, 7.1(e), 54, and any other applicable rule or law, submit this Response in the above-captioned
26 matter.

27 Contrary to Varilek's contention, offering affidavits in support of a Motion for
28 Reconsideration is not sanctionable. Moreover, Exhibits "5"- "12" should not be stricken.

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2014 DEC 15 PM 3:46

DONNA McQUALITY, CLERK ✓

BY: S. MURPHY

1 First, Ariz. R. Civ. P. 7.1(e) does not preclude the use of exhibits in support thereof. Ariz.
2 R. Civ. P. 7.1(a), *Civil motion practice*, governs the use of exhibits: “[A]ffidavits supporting the
3 motion shall be filed and served together with the motion.” Exhibits “5” - “12” attached to the
4 Coxes’ Motion for Reconsideration are the unsworn Declarations under penalty of perjury of various
5 Coyote Springs Property Owners, attesting to ongoing violations of the Declaration of Restrictions
6 at Coyote Springs Ranch¹. See Ariz. R. Civ. P. 80(i).
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9 Next, an award of attorneys’ fees under A.R.S. § 12-341.01(A) is discretionary with the
10 Court. It is well-settled that, one of the factors that the Court should consider in determining whether
11 an award of fees is warranted is the merits of the defense presented by the unsuccessful party.
12 *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570, 694 P.2d 1181 (1985) en banc. Several
13 Coyote Springs property owners have attested to the myriad of Declaration of Restrictions violations
14 (“**Declaration Violations**”) that have been ongoing in Coyote Springs Ranch over the years. The
15 Property Owners’ Declarations support the Coxes’ position that their defense of abandonment had
16 merit, and supports, *inter alia*, Investigator Sheila Cahill’s findings concerning the Declaration
17 Violations, as well as Judge Mackey’s April 4, 2005 UA Ruling (“the issue of abandonment will
18 have to be litigated before the Court will be in a position to decide the enforceability of any term of
19 the restrictive covenants. Plaintiffs are not entitled to such a summary determination”). As part of
20 their Motion for Reconsideration, the Coxes point out that their defense of abandonment was
21 meritorious. Consequently, it is the Coxes’ position that the Court should have considered the
22 Coxes’ meritorious defense and precluded an award of fees or, at minimum, adjusted an award of
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28 ¹ The applicable Declaration of Restrictions was recorded June 13, 1974 at Book 916, Page 680,
Official Records of Yavapai County.

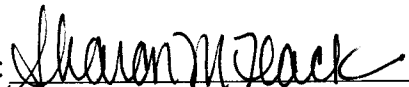
1 attorneys' fees *downward*, because (i) the Coxes relied upon Judge Mackey's UA Ruling that there
2 was a question of fact in dispute on the issue of abandonment of the Declaration, and (ii) the Cundiff
3 Plaintiffs' lack of disclosure of any refuting evidence since the April 4, 2005, UA Ruling warrants
4 the Court's reconsideration of awarding Varilek (a self-described non-party) every penny of his fees.
5 Varilek's Notice of Alignment (appearance) was filed in October 2010, five (5) years after Judge
6 Mackey's UA Ruling. Since Varilek's appearance in October of 2010, Varilek himself had served
7 no disclosure or discovery for the Coxes to consider or otherwise cause them to re-evaluate their
8 position and/or Judge Mackey's April 4, 2005 UA Ruling.

11 The Property Owners' Declarations serve to fortify the Coxes' meritorious defense, and
12 constitutes one of several reasons that the Court is urged to reconsider its August 25, 2014, Ruling.

14 Based upon the foregoing, the Court should deny Varilek's Motion to Strike and his request
15 for attorneys' fees/sanctions.

16 RESPECTFULLY SUBMITTED this 15 day of December, 2014.

18 MUSGROVE DRUTZ KACK & FLACK, PC

19 By: 
20 Mark W. Drutz
21 Sharon M. Flack
22 Attorneys for Defendants Robert and
Catherine Cox

23 COPY of the foregoing mailed
24 this 15th day of December, 2014, to:

25 J. Jeffrey Coughlin, Esq.
26 J. Jeffrey Coughlin PLLC
27 1570 Plaza West Drive
28 Prescott, AZ 86303
Attorneys for Plaintiffs

- 1 Jeffrey R. Adams, Esq.
- 2 The Adams Law Firm, PLLC
- 3 125 Grove Avenue
- 4 P.O. Box 2522
- 5 Prescott, AZ 86302
- 6 Attorneys for Defendants

- 7 David K. Wilhelmsen, Esq.
- 8 Favour & Wilhelmsen, P.A.
- 9 P.O. Box 1391
- 10 Prescott, AZ 86302-1391
- 11 Attorneys for Property Owner James Varilek

- 12 Noel J. Hebets, Esq.
- 13 Noel J. Hebets, PLC
- 14 2515 North 48th Street, #3
- 15 Phoenix, AZ 85008
- 16 Attorney for William M. Grace

- 17 Robert E. Schmitt, Esq.
- 18 Murphy, Schmitt, Hathaway & Wilson, PLLC
- 19 P.O. Box 591
- 20 Prescott, AZ 86302
- 21 Attorneys for Robert H. Taylor and Terri A. Thomson-Taylor

- 22 William H. "Bill" Jensen
- 23 14556 Howard Mesa Loop
- 24 Williams, AZ 86046
- 25 pro se

- 26 Gary & Sabra Feddema
- 27 9601 East Far Away Place
- 28 Prescott Valley, AZ 86315
- pro se

- William R. and Judith K. Stegeman Trust
- 9200 East Far Away Place
- Prescott Valley, AZ 86315
- pro se

1 Karen L. and Michael P. Wargo
2 9200 East Spurr Lane
3 Prescott Valley, AZ 86315
4 pro se

5 Linda J. Hahn
6 10367 W. Mohawk Lane
7 Peoria, AZ 85382
8 pro se

9 Sergio Martinez and Susana Navarro
10 10150 N. Lawrence Lane
11 Prescott Valley, AZ 86315
12 pro se

13 Lloyd E. and Melva J. Self
14 9250 E. Slash Arrow Drive
15 Prescott Valley, AZ 86315
16 pro se

17 Rynda and Jimmy Hoffman
18 9650 E. Spurr Lane
19 Prescott Valley, AZ 86315
20 pro se

21 William and Shaunla Heckethorn
22 9715 E. Far Away Place
23 Prescott Valley, AZ 86315
24 pro se

25 Leo M. and Marilyn Murphy
26 9366 E. Turtlerock Road
27 Prescott Valley, AZ 86315
28 pro se

1 Rhonda L. Folsom
2 9305 N. Coyote Springs Road
3 Prescott Valley, AZ 86315-4517
4 pro se

5 Kenneth Paloutzian
6 8200 Long Mesa Drive
7 Prescott Valley, AZ 86315
8 pro se

9 Bonnie Rosson
10 8950 E. Plum Creek Way
11 Prescott Valley, AZ 86315
12 pro se

13 John and Rebecca Feddema
14 9550 E. Spurr Lane
15 Prescott Valley, AZ 86315
16 pro se

17 Robert Lee Stack and Patti Ann Stack
18 Trustees of the Robert Lee and Patti
19 Ann Trust utd March 13, 2007
20 10375 Lawrence Lane
21 Prescott Valley, AZ 86315
22 pro se

23 John D. and Dusti L. Audsley
24 966 N. Stirrup High Drive W.
25 Dewey, AZ 86327
26 pro se

27 Dana E. and Sherrilyn G. Tapp
28 8595 E. Easy Street
Prescott Valley, AZ 86315
pro se

Richard and Beverly Strissel
9350 E. Slash Arrow Drive
Prescott Valley, AZ 86314
pro se

- 1 Jesus Manjarres
- 2 105 Paseo Sarta #C
- 3 Green Valley, AZ 85614
- 4 pro se

- 4 Nicholas Corea
- 5 4 Denia
- 6 Laguna Nigel, CA 92677
- 7 pro se

- 7 Jack and Dolores Richardson
- 8 505 Oppenheimer Drive, #4
- 9 Los Alamos, NM 87544
- 10 pro se

- 10 Eric Cleveland
- 11 9605 E. Disway
- 12 Prescott Valley, AZ 86315
- 13 pro se

- 14 Robert and Patricia Janis
- 15 7685 N. Coyote Springs Road
- 16 Prescott Valley, AZ 86315
- 17 pro se

- 17 Mike and Julia Davis
- 18 9147 E. Morning Star Road
- 19 Prescott Valley, AZ 86315
- 20 pro se

- 20 Richard and Patricia Pinney
- 21 P.O. Box 1558
- 22 Chino Valley, AZ 86323
- 23 pro se

24
25 Jody Werner

- 26
- 27
- 28