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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2015 JAN 30 PM 3:47

DONNA McQUALITY, CLERK ✓

BY: ~~M FEICHTER~~

Counsel for Defendants Robert and Catherine Cox

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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

16 Plaintiffs,

17 v.

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

20 Defendants.
21

Case No. P1300CV20030399

**COXES' RESPONSE TO JAMES
VARILEK'S OBJECTION TO
ASSIGNMENT OF CASE TO
DIVISION 1**

22 Donald and Catherine Cox, by and through undersigned counsel, pursuant to Rule 7.1, submit
23 this Response in the above-captioned matter.

24 As discussed below, the assignment of the case at bar to Division 1 (Hon. David L. Mackey)
25 is appropriate and, contrary to Varilek's assertion, such assignment would not result in clear error.
26 Cf. Varilek's Objection, p. 2:19. Varilek is aligned with the Cundiff-Plaintiffs, who in 2008 waived
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28

1 their right to a notice of change of judge. The dismissal of the *Varilek v. Veres* litigation renders
2 moot any potential peremptory right to strike Judge Mackey in the *Cundiff* litigation under Rule 42.
3

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 *Cundiff v. Cox*, Case No. P1300CV20030399 (“*Cundiff* litigation”) initially was assigned
6 to the Honorable David L. Mackey.

7
8 On September 18, 2008, the Cundiff-Plaintiffs, represented by the same attorney who now
9 represents Varilek, filed a Notice of Change of Judge. Judge Mackey ruled that the Cundiff-
10 Plaintiffs had waived their right to a Change of Judge:

11 Plaintiffs have waived the right to a Change of Judge, per Rule 42(f)(1)(D)(ii)(aa),
12 *Arizona Rules of Civil Procedure*, since the Court has issued rulings on contested
13 issues since the remand from the Court of Appeals.

14 Ruling Re: Notice filed September 22, 2008 (“**Waiver Order**”).

15 Prior to the filing of the *Coxes*’ Motion to Consolidate the *Cundiff* litigation and *Varilek v.*
16 *Veres*, Case No. P1300CV20090822 (“*Varilek* litigation”), Varilek filed a Notice of Change of
17 Judge. See Notice of Change of Judge dated July 27, 2009. On January 25, 2011, Division 4 (Hon.
18 Kenton D. Jones) entered a Ruling consolidating the *Cundiff* litigation and the *Varilek* litigation. See
19 Under Advisement Ruling, *Varilek* litigation, filed September 14, 2010; see also Ruling filed
20 January 25, 2011.
21

22
23 At the time he appeared in the case at bar in October of 2010, and filed his Notice of
24 Alignment with the Cundiff-Plaintiffs, Varilek at minimum had ‘constructive’ notice of Judge
25 Mackey’s Waiver Order; certainly his attorney, who represented the Cundiff-Plaintiffs in 2008, had
26 ‘actual’ notice of said Order. See Notice of Alignment filed October 27, 2010 (“Property Owner
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1 Varilek hereby requests alignment with the parties-Plaintiff on the issues remaining for adjudication
2 pursuant to the decision rendered in this case by the Arizona Court of Appeals, Division One”).

3
4 At the time the *Varilek* litigation was consolidated with the instant case, Varilek filed a
5 Request for Change of Judge pursuant to his previous request for a Rule 42 change of judge.
6 See Varilek’s Request for Judicial Re-Assignment filed March 25, 2011, at pp. 1-2 (“Varilek . . .
7 hereby requests that this Court re-assign the case based upon Varilek’s previous request under
8 Rule 42(f) when his action was assigned to this Court”), which was opposed by the Coxes and the
9 Cundiff-Plaintiffs. Judge Mackey granted the Request for Judicial Re-Assignment “*based upon both*
10 *James L. Varilek’s timely notice of change of judge in P1300CV20090822 [Varilek]* and
11 Administrative Order 2011-07” [emphasis added]. Thus, Judge Mackey’s judicial re-
12 assignment was based on a timely notice of change of judge filed in the *Varilek* litigation. However,
13 the dismissal of the *Varilek* litigation in March of 2013 has now rendered moot any potential
14 peremptory right on the part of Varilek to strike Judge Mackey in the *Cundiff* litigation under
15 Rule 42. See *Yavapai County v. Superior Court In and For Yavapai County* (consolidation does not
16 merge the consolidated suits into a single cause).

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20 Any right that Varilek may have had to challenge Judge Mackey’s assignment to the case at
21 bar as a result of consolidation is no longer available. Such a challenge would be tantamount to a
22 post-consolidation Rule 42(f) peremptory challenge in the face of the Cundiff-Plaintiffs Waiver,
23 which is prohibited. See Waiver Order, excerpted *supra*. This principle was explained in *Huerta*
24 *v. Nelson*, 222 Ariz. 44, 46, ¶¶ 8, 14, 20, 213 P.3d 193 (App. 2009):

25
26
27 ¶ 8 The plain language of the rule, which expressly applies to consolidated
28 cases, disposes of Petitioner’s argument. Although the rule grants a peremptory
change to “each side” “[i]n any action,” it expressly limits that right by providing that

1 “[e]ach action, *whether single or consolidated*, shall be treated as having only two
2 sides.” Ariz. R. Civ. P. 42(f)(1)(A) (emphasis added); *see also Brush Wellman*, 196
3 Ariz., at 348, ¶ 13, 996 P.2d at 1252 (Rule 42(f)(1) allows “one change of judge per
4 side, rather than per case”). Thus, pursuant to the rule, if a party in Case One
5 exercises its right to a change of judge before that case is consolidated with Case
Two, that preemptory change prevents a party on the same “side” in Case Two from
exercising an “of right” change of judge after consolidation.

* * *

6 ¶ 14 Consistent with the application of Rule 47(e) in *Moran*, we interpret
7 Rule 42(f)(1) to mean that when, for whatever reason, there are multiple parties in
8 a case, absent a showing of hostile interests within a “side” pursuant to subpart
9 (1)(A), there are only two “sides” and each may exercise only one preemptory change
of judge.

* * *

10 ¶ 20 We conclude Rule 42(f)(1)’s limit of a single preemptory change of
11 judge per side applies to a case after it is consolidated....

12 Varilek’s post-consolidation attempt to “object” to the assignment to Judge Mackey of the
13 instant case (e.g., *Cundiff* litigation) is “doomed” by the Cundiff-Plaintiffs’ waiver of the prior
14 preemptory change of Judge. *See Huerta*, 222 Ariz. at 47, ¶ 18; Waiver Order (excerpted *supra*).
15 Moreover, the *Huerta* court noted that in *Switzer v. Superior Court*, 176 Ariz. 285, 287, 860 P.2d
16 1338 (App. 1993), the “court acknowledged that under its interpretation of Rule 42(f)(1), ‘a party
17 who is brought into an action after some other party on its side of the case has used or waived a
18 notice of change of judge has lost a right that might have otherwise been available to it . . . [b]ut we
19 observed that the ‘harshness’ of that result is ameliorated by the fact that Rule 42(f) permits relief
20 to a ‘newcomer’ to a case that can show its interests are hostile to those on its side and also permits
21 a change of judge based on cause.’” *Huerta*, 222 Ariz. at 47, ¶ 16.

22 In short, the dismissal of the *Varilek* litigation has removed any impediment as to the
23 assignment of the case at bar to Judge Mackey, who presided over the case for eight (8) years and
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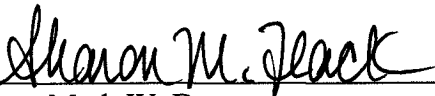
1 is familiar with the facts and procedural history. *See*, Notice re: Reassignment, filed November 6,
2 2013.

3
4 Moreover, even disregarding the foregoing, the reassignment of the *Cundiff* litigation to
5 Judge Jones is no longer an option. *See* Order, filed January 19, 2015, at p. 2.

6 WHEREFORE, Defendants Cox respectfully request that this matter remain with the
7 Honorable David L. Mackey, Division 1.

8
9 RESPECTFULLY SUBMITTED this 30th day of January, 2015.

10 MUSGROVE DRUTZ KACK & FLACK, PC

11
12 By: 

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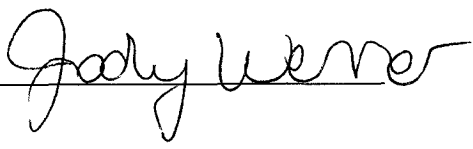
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