LAW OFFICES
DANIEL J. OEHLER
2001 Highway 95, Suite 15
Bullhead City, Arizona 86442
(928) 758-3988
(928) 763-3227 (fax)
djolaw@frontiernet.net

Daniel J. Oehler, Arizona State Bar No.: 002739
Attorney for Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

NANCY KNIGHT, Plaintiff, vs. GLEN LUDWIG and PEARL LUDWIG, Trustees of THE LUDWIG FAMILY TRUST; FAIRWAY CONSTRUCTORS, INC.; MEHDI AZARMI; JAMES B. ROBERTS and DONNA M. ROBERTS, husband and wife; JOHN DOES 1-10; JANE DOES 1-10; ABC CORPORATIONS 1-10; and XYZ PARTNERSHIPS 1-10. Defendants.	NO.: CV-2018-04003 **REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

COME NOW, the Defendants, and for their collective Reply to Plaintiff's Responses to Defendants' dispositive Motion for Summary Judgment, and submit to the Court the attached Memorandum of Points and Authorities.

Plaintiff's Response fails to comply with the provisions of A.R.C.P. Rule 56(c)(3) and Defendants are, pursuant to A.R.C.P. Rule 56(a) entitled to have Defendants' dispositive Motion granted.

Defendants further, in accord with the attached Memorandum of Points and Authorities, respectfully move this Court for an order granting Defendants' Motion for Summary Judgment, dismissing Plaintiff's Complaint and awarding Defendants their costs and attorney fees herein incurred. There are no reasonably disputable facts as to the issue of a general abandonment of the subject relevant covenants. The law in the State of Arizona

clearly supports Defendants' legal position that there has been an abandonment of the CC&R/covenants that encompassed the lands within the recorded subdivision Tract 4076-B Desert Lakes Golf Course and Estates, as well as the two post 1989 subdivisions, Tract 4076-D and Tract 4163, created out of parcels of real property originally subdivided within Tract 4076-B. The facts, supported by multiple affidavits, reflect an abandonment of the CC&Rs that have gone without enforcement over a long period of time (approximately 30 years), have been widely and consistently violated dating back to, or close to their recordation in 1989. Construction of significantly more homes in violation of multiple relevant provisions of the covenants than those few homes that were compliant with the scheme of development outlined within the covenants. Defendants have submitted current Arizona case law that supports a factual finding of abandonment resulting in rendering the 1989 covenants unenforceable.

RESPECTFULLY SUBMITTED this 13th day of January, 2020.

LAW OFFICES OF DANIEL J. OEHLER

Daniel J. Oehler,
Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

A brief examination of Plaintiff's document entitled "Response to Defendants' Statement of Facts" as well as Plaintiff's document captioned "Response to Defendants' Motion for Summary Judgment" and the "Plaintiff's Statement of Facts," each of which were filed December 27, 2019, is provided to the Court for its consideration.

Defendants will start with Plaintiff's Response to Defendants' Statement of Facts ("SOF"). On pages 2, 3 and 4, Plaintiff appears to be philosophizing about what Plaintiff thinks might happen should this Court find there has, under Arizona law, been an abandonment of the CC&Rs. The feeling of Plaintiff as to the factual outcome for the consequences of applying the law to the undisputed facts is not at issue before the Court.

At pages 4 and 5, Plaintiff advises this Court that the Affidavits submitted by

Defendants are hearsay, the Plaintiff stating such in an unsworn (or even verified) blatant statement of the Plaintiff to refute or challenge the affiants' testimony. This procedure appears to be a practice that Plaintiff follows throughout both of Plaintiff's Statements of Facts." Each such statement of Plaintiff is in violation of Rule 56(c), A.R.C.P. Note, so as not to be repetitive, this process of Plaintiff simply to "deny" or refute or object or simply state opposition to a fact or, for that matter, the law is not an acceptable nor actionable counter to Defendants facts presented under oath by the Defendants' affiants. Words such as "The CC&Rs are enforceable, no ifs about it" (see, Response to Defendants' SOF, p. 6, line 17), are exemplary of Plaintiff's responsive pleading throughout.

Plaintiff continues to claim the existence of a subdivision known as Tract 4076 although such a subdivision or tract has never been recorded and clearly does not exist. A "preliminary plat" does not a subdivision make! A preliminary plat is a planning tool. Regardless, the issue before the Court is the enforceability of the CC&Rs recorded for and specifically describing the lots and parcels located in Tract 4076-B. The issue is not whether the lands within some "preliminary plat" do or do not include Tract 4076-B, or whether at the time of recordation that the CC&Rs exclusively applicable to Tract 4076-B were valid, the issue is are they legally, under the law, enforceable today. (See, Plaintiff's Response, p. 7.)

Through pages 8, 9 and 10, Plaintiff opines generally on "cures" to what appears to be Plaintiff's admissions of the virtually hundreds of setback violations of the covenants by suggesting after the fact potential "cures" to those violations by implementing and creating a year 2020 "clustering" amendment to the 1989 CC&Rs (see, Plaintiff's Response to Defendants' Statement of the Case, p. 30) within Tract 4076-B which Plaintiff in her second Statement of Facts suggests can be utilized to reduce the "diminished value" issue Plaintiff is raising apparently allowing Plaintiff and her Tract 4163 subdivision owners to retain their 10' and sometimes less than 10' rear yard setback violations without the necessity of "cutting down" and removing or destroying their violating covered patios as Plaintiff suggests must be done at pp. 39 and 40 of Plaintiff's Response to Defendants' Statement of the Case for

those owners not as fortunate as Plaintiff's "cluster" neighbors.

Plaintiff presents a statement from a Board of Supervisors meeting regarding "protected views" (p. 10, line 14) as germane to the issue before the Court. Such a Board of Supervisors comment is fully irrelevant as to any "proof" issue before us concerning the actual question before the Court – enforceability.

Plaintiff also on p. 10 discusses the Alan Patch Affidavit submitted by Defendants where Plaintiff alleges Tract 4076-D, a derivative resubdivision of Tract 4076-B, is a "shameful" regulation violation by Mohave County (p. 10, lines 22-27). Plaintiff then goes on to allege that Plaintiff "has not been adjudicated rights to prosecute Tract 4076-D" (p. 10, lines 19-20) although Tract 4076-D is a subdivided parcel that was within Tract 4076-B, exactly as was Tract 4163 where Plaintiff resides. Remember also that Plaintiff throughout claims legal standing to enforce, regulate and oversee all lands within a "Preliminary Plat" known as Desert Lakes Golf Course and Estates Tract 4076, a nonexistent subdivision, as well as lands and subdivisions that are merely close by or in the general area of Desert Lakes Golf Course and Estates such as Fairway Estates. Yet Plaintiff now disclaims any "standing" to litigate or include Tract 4076-D, a legal mirror image of Tract 4163.

Plaintiff refutes Defendants' submitted Affidavit of Robert L. Morse, P.E., R.L.S., alleging the Morse Affidavit includes a statement that Plaintiff's home was built within "approximately 8.5 feet of the rear property line" when, according to Plaintiff's apparent measurement, it is actually "9.19" feet of the line. Note that the Tract 4076-B CC&Rs which this Court has found to apply to Tract 4163 mandate that construction must be no closer than 20.0 feet. (See, Plaintiff's Response to Defendants' SOF, p. 11, lines 12 and 13.)

Plaintiff challenges the McKee Affidavit submitted by Defendants. Plaintiff states that this nonparty general contractor affiant complied with the rear yard setback of 20 feet called out in the CC&Rs for apparently two homes affiant constructed and as a result of the fact that two of the several homes constructed comply with the 1989 CC&Rs refutes the McKee Affidavit that the value of the remaining Tract 4076-B lots will be reduced in value and negatively impacted if those lot owners cannot build a covered patio within 10 feet of

the rear property line. (See, p. 11, lines 14-27.) This is but another example of Plaintiff attempting to refute by simply saying Plaintiff doesn't agree with the sworn testimony submitted to the Court. (A.R.C.P., Rule 56(e).)

Plaintiff's statements on p. 12 referencing what Plaintiff calls "Arizona Rooms" supports the Defendants' position of abandonment of the CC&Rs. The majority of Tract 4076-B, all of Tract 4163 golf course homes and 8 of the 10 homes in Tract 4076-D have covered rear yard patios or Arizona Rooms as Plaintiff calls them that are allowed by Mohave County ordinance within the 20' rear yard setbacks. (See, Plaintiff's Response to Defendants' SOF, p. 12.) These homes violate the CC&Rs but not Mohave County Zoning and they represent the majority, not the minority, of homes constructed within all three subdivisions in question. Plaintiff goes on in Plaintiff's Response subsequently to suggest multiple "cures" except for Plaintiff's and Plaintiff's Tract 4163 neighbors because those homes are in a "cluster" and apparently "cluster" homes don't count or are not included or limited by the CC&R setback mandates. Other homeowners can tear down their Arizona Rooms or, as Defendants understand Plaintiff, buy land to the rear of their homes from the current owner of the golf course, the Fort Mojave Indian Tribe, so that the violators might purchase 10 more feet through this hypothetical future acquisition and then apparently be compliant with the CC&Rs (see, Plaintiff's Response to Defendants' Motion for Summary Judgment, p. 18, lines 18-28, p. 19, lines 1-10). "Cures" proposed by Plaintiff, be it purchasing 10 feet of ground from an Indian tribe for each of the majority of golf course homes, tearing the Arizona Room off the house, adding more house by converting garages to living area to achieve minimum square footage requirements, tearing fences down, removing chain link "fabric," sealing gates to the golf course, slicing a foot or an inch off the side of an owner's home to eliminate side yard violations, lowering wall/fence heights to achieve compliance, etc., are <u>not</u> the issue before this Court. The existing structures are the proof of abandonment of the original development plan. It is not relevant that the developer, T&M Ranching who developed Plaintiff's residential Tract 4163 did or did not use good planning and whether Mohave County did or did not violate its own regulations dealing with

frontage roads (see, Plaintiff's Response to Defendants' SOF, p. 12, lines 22-28, p. 13, line 1) to any issue before the Court beyond further clear evidence of an abandonment of the CC&Rs within these subdivisions per the sworn and unrefuted testimony of multiple affiants.

Plaintiff next discusses "signage" or Covenant 12. Here, Plaintiff's defense, if you would, is that industry standard sized real estate signs are dangerous. Plaintiff's secondary response is that A..S. §33-441 does not effectively or directly allow the words "Build to Suit," that these words are advertising and a violation of Mohave County's Sign Ordinance. (See, Plaintiff's Response to Defendants' SOF, pp. 13-18.)

Whether the everyday real estate sign used throughout Mohave County, the State of Arizona and the United States is a dangerous instrumentality and whether Plaintiff has a "constitutionally protected right" to be protected from these signs is not at issue before this Court. Nor is the fact that Plaintiff is currently attempting to convince the Arizona Legislature to amend the provisions of A.R.S. §33-441 the issue before this Court. Again, the issue is whether or not as a result of approximately 30 years of violating Covenant 12 by the general real estate industry, by lot owners individually, by contractors and others, has this Covenant 12, along with the majority of other germane and relevant covenants, been long ago abandoned and therefore become unenforceable. If Plaintiff chooses to pursue a legislative change regarding A.R.S. §33-441 to "... protect real estate sales over public safety," (see, Plaintiff's Response to Defendants' SOF, p. 18, lines 13 and 14) that is just fine, Plaintiff is entitled to do so. If Plaintiff desires to lobby for an ordinance amendment with Mohve County regarding advertising on signs, Plaintiff is entitled to do so, however, Plaintiff should not, and is not entitled to, do so in the matter before this Court. Plaintiff's Legislature efforts to change statutes or ordinances is not relevant to any issue before this Court.

The vast majority of Plaintiff's points in Plaintiff's "Response to Defendants' Motion for Summary Judgment" and particularly Plaintiff's separate "Statement of Facts," therein are one and the the same. Defendants will not therefore individually respond to each, separately touching only on a few fact items raised and not hereinabove discussed.

Plaintiff discusses at length in Plaintiff's memoranda Plaintiff's multiple failed efforts

to amend Plaintiff's Complaint and Plaintiff's multiple failed Motions for Reconsideration. These previously argued motions are fully irrelevant to the Defendants' pending Motion for Summary Judgment.

In place of affidavits, Plaintiff offers what Plaintiff calls "snapshots" of "social media" (see, Plaintiff's Response to Defendants' Motion for Summary Judgment, p. 7, lines 15-29, p. 10, lines 1-13) to refute Defendants' affiants' sworn statements. These "snapshots" fail to meet the A.R.C.P. Rule 56 minimum criteria.

There is no meaningful value to a decision in this matter attributable to the fact that the Fort Mojave Indian Tribe somewhat recently purchased Desert Lakes Golf Course and Plaintiff's allegation that the Tribe needs protection (see, Response to Defendants' Motion for Summary Judgment, p. 10, lines 14-27) and that the Plaintiff is attempting to provide that protection through the prosecution of this action.

Plaintiff's alleges a $40,000 loss resulting from Plaintiff's litigation in a different lawsuit dealing with Plaintiff's neighbors and the difficulties and costs Plaintiff incurred with Plaintiff's attorneys. That issue plays no part whatsoever in the matter at hand. Whether the Plaintiff wanted to rebuild a wall separating Plaintiff from Plaintiff's neighbor and build a wall consisting of concrete block and a few pieces of wrought iron so that Plaintiff could look through Plaintiff's CC&R prohibited chain link fence was left to Plaintiff's choice, all parties agreeing that resolution of that matter was not an admission by Plaintiff or Defendants as to the validity or applicability of any CC&Rs. (See, Plaintiff's Response to Defendants' Motion for Summary Judgment, p. 15, lines 1-5.)

The uncontestable fact is that the significant majority of existing golf course homes and many of the non golf course homes subject to this controversy encroach into their rear yard setbacks as permitted by Mohave County Zoning Ordinances but prohibited by the Tract 4076-B CCRs. Effectively, this fact is admitted throughout Plaintiff's response documents submitted to this Court regarding Defendants' pending dispositive Motion for Summary Judgment. Plaintiff's "cure theories" that are not supported as some sort of offset by any case nor statutory law either in the State of Arizona nor elsewhere known to the undersigned

is perhaps best summarized by the Plaintiff's own statement in opposition to Defendants' pending Motion as follows:

> "15. Material Fact: Defendants refused a private settlement conference. Plaintiff attempted to confer on a Private Settlement with the Defendants over a year ago. There exists no remedy for setback violations adjacent to the golf course for projecting patio covers except to cut away the projecting portion or negotiate a purchase of golf course land from the Mojave Tribe who owns the golf course and can abandoned portions of some parcels to be appended to lots as was done with the former owners of the golf course for Plaintiff's Parcel VV. To date, the Mojave Tribal Council Chairman has not responded to the Plaintiff regarding a potential purchase of unused golf couse land. It is believed that Defendants have the power and influence to negotiate such an agreement as was stated in the Plaintiff's email with the Subject line 'Informal Settlement Conference Information' as emailed to opposing counsel Oehler for Misters Ludwig and Azarmi to consider.
>
> Since sending that Email over a year ago some details have changed conditions as follows: (1) the Tribal Council has made a significant investment in improving the greens - even closing for three months to reseed and install turf. 2) Now that we understand golf course owners in the past have abandoned a portion of Parcel KK for non-residential use, the Tribal Council may be open to selling a portion of drainage easement parcels to help property owners become compliant for the twenty foot rear yard setback. 3). Plaintiff has learned that Fairway Estates is not within the boundary of Desert Lakes as Development Services had led her to believe in their Sharpie Pen outlined map; however, the Defendants do have HOA enforcement experience for their Fairway Estates development and most likely have boilerplate demand letters already drafted. 4) Some of those wooden fences that Plaintiff had observed in 2018 have since been taken down. 5) Plaintiff has learned that the County Ordinance prohibits parking lots on residential lots, however, parking trailers and boats on rented lots behind a screened fence may still be a viable option for our residents as opposed to renting storage space some distance from home." Plaintiff's Response to Motion for Summary Judgment, p. 18, lines 18-28, p. 19, lines 1-21.

The issue, once again, is not the "cure, but rather the legal enforceability of the CC&Rs given their 30 year abandonment and the fact that ±75% of the subdivision's build out homes have been built in contradiction of the CC&Rs.

Plaintiff suggests Defendants' Motion for Summary Judgment somehow fails on the basis of Judge Carlisle's June 11, 2018 Order that "puts words in the mouth of the Honorable Judge Carlisle." (See, Response to Defendants' Motion for Summary Judgment, p. 23, line

1.) Plaintiff is, for the first time, complaining about the use of the word "derivative," in the signed Carlisle Order justifying the Court's finding that Plaintiff had "standing" to pursue this litigation regarding all lots and parcels in Tract 4076-B despite the fact Plaintiff only owns a lot in Tract 4163. Plaintiff's point in this argument is difficult to detect other than to state that it appears irrelevant to anything before this Court today. The meaning of the word "derivative" in the context of Judge Carlisle's Order is:

> "... relating to, or constituting a work that is taken from, translated from, adapted from, or in some way further developed from a previous work." Black's Law Dictionary, B. Garner, (8th Ed.), p. 475.

Tract 4163 was further developed from a resubdivision of parcels within Tract 4076-B as was Tract 4076-D. Plaintiff claims Plaintiff's Tract 4163 subdivision "was a corrupt change in the 1993 SD/R clarified twenty foot setbacks and the County Subdivision Regulations..." and Plaintiff states that Plaintiff has told the County Attorney about this and "expects an answer." (See, Plaintiff's Response to Defendants' Motion for Summary Judgment, p.23, lines 12-18.) Again, the issue is whether over the past 30 years have Tract 4076-B CC&Rs been abandoned as is reflected in the hundreds of major violations that exist today. This case has nothing to do with Plaintiff's personal definition of "derivative." Tract 4076-D is in the exact position, for the purpose of this Motion, as Tract 4163, both subdivisions having been carved out of Tract 4076-B parcels.

Plaintiff is correct that it does appear that the Telecommunications Act of 1996 in 47 CFR, Volume 1, Chapter I, Subchapter A, Part 1, Subpart S, of the 282 page Act may have rendered illegal the 1989 CC&R prohibition covering most satellite dishes just as the Arizona State Legislature's law set forth in A.R.S. §33-441 gutted the no "for sale" sign covenant.

Plaintiff is also correct that Tract 4163 is not a subdivision of two complete parcels that are/were in Tract 4076-B but rather Tract 4163 was created out of one full parcel and a portion of a second parcel, both originally subdivided and located in Tract 4076-B. The relevance of this fact is unknown regarding the issue before the Court.

Plaintiff espouses on the next several pages Plaintiff's alleged entitlement to Plaintiff's lost wages and other nonparty compensation entitlements (see, Plaintiff's Response to Defendants' Motion for Summary Judgment, pp. 29, 30 and 40). Again, no relevancy exists to the pending Motion.

Plaintiff's arguments regarding Plaintiff's points and authorities follow:

This area of the Response begins with what would appear to be yet another motion for reconsideration with the Plaintiff arguing that there exists a subdivision that does not exist, namely, something called Tract 4076. The Plaintiff seems to admit that it (Tract 4076) was never recorded stating that it was "approved," and apparently therefore this planning tool in the subdivision process in the mind of the Plaintiff has some unknown efficacy.

Plaintiff's Arizona and Washington cases cited do not address the issue raised in this Motion – the status of enforceability of the 1989 CC&Rs that have consistently and thoroughly been ignored and violated.

Plaintiff raises the issue of "indispensable parties" which, again, is not currently before this Court and, needless to say, Plaintiff's argument of Defendants' responsibility to bring before this Court the owners of approximately 240 lots is reversed, that is, should this matter proceed further, the Plaintiff will be obligated to take such steps to bring aboard those property owners as deemed necessary by the Court after any appropriate Rule 19 motions are filed and ruled upon. This is not an issue before the Court today.

Plaintiff claims that violations are not significant nor substantial with the exception of the Defendants' violations. (See, Plaintiff's Response to Defendants' Motion for Summary Judgment, p. 39, lines 12-15.) Yet, there are uncontested facts before this Court of hundreds of major covenant violations involving the significant majority of the existing residences in these 240 lot subdivisions yet over a 30 year period the Defendants have constructed only 17 of the homes located therein. Unrebutted statistics do not deliver credibility to Plaintiff's allegations.

///

///

CONCLUSION

"A reasonable inference requirement thereby avoids unnecessary trials, which is the essential purpose of Rule 56." as quoted from Plaintiff's Response and is now before the Court. The Court should grant Defendants' dispositive Motion, awarding fees and costs subsequent to the filing of appropriate affidavits in support thereof.

RESPECTFULLY SUBMITTED this 13th day of January, 2020.

LAW OFFICES OF DANIEL J. OEHLER

Daniel J. Oehler,
Attorney for Defendants

COPY of the foregoing emailed this 13th day of January, 2020, to:

Honorable Lee F. Jantzen
Mohave County Superior Court
Division 4
401 E. Spring Street
Kingman, Arizona 86401
(928) 753-0785 Danielle
dlecher@courts.az.gov

Plaintiff Pro Per
Nancy Knight
1803 E. Lipan Circle
Fort Mohave, Arizona 86426
(928) 768-1537
nancyknight@frontier.com

By: Patricia L. Emond
Patricia L. Emond, Legal Assistant