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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

DEFENDANTS' MOTION TO JOIN REQUIRED PARTIES PURSUANT TO RULE 19(a), ARIZ. R. CIV. P., OR IN THE ALTERNATIVE, MOTION TO DISMISS PLAINTIFF'S CAUSE OF ACTION PURSUANT TO RULE 12(b)(7), ARIZ. R. CIV. P.

COME NOW, the Defendants by and through their attorney, the undersigned, and respectfully move this Court to order the Plaintiff to join as necessary and indispensable parties, all property owners in Desert Lakes Golf Course and Estates, Tract 4076-B, Tract 4076-D, and Tract 4163 pursuant to Rule 19(a), Ariz. R. Civ. P.

Rule 19 of the Arizona Rules of Civil Procedure sets forth the requirement of all courts to, when applicable, enter such orders as may be necessary to require the joinder of parties. More specifically, Rule 19(a) reads:

> "(a) Persons Required to Be Joined if Feasible.
>
> (1) A Person Required to Be Made a Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person required to be made a party has not been joined, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

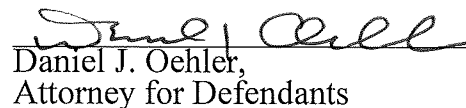
(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party."

The Plaintiff initiated this action that unquestionably impacts every lot owner in the three affected subdivisions, each of whom might be joined in this action.

The Defendants, in accord with the attached Memorandum of Points and Authorities, respectfully request that this Court enter an order ordering the Plaintiff to either join all property owners in Plaintiff's cause of action or, in the alternative, the Court should dismiss Plaintiff's Complaint pursuant to A.R.C.P. Rule 12(b)(7) after entering an order for an award of attorney fees on this Motion and on each and every previously granted motion submitted by the Defendants dating back to the inception of this cause of action in 2018.

RESPECTFULLY SUBMITTED this 20th day of October, 2021.

LAW OFFICES OF DANIEL J. OEHLER



Daniel J. Oehler,
Attorney for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

THE FACTS

Previously, the Defendants have filed a Motion for Summary Judgment. The subject filing occurred on or about December 6, 2019. The Summary Judgment in question delineated the issues before the Court that the Defendants believe can be reduced to an examination of whether or not there has been a partial abandonment or total abandonment of the Codes, Covenants and Restrictions (hereinafter simply referred to collectively as the "Covenants") that were recorded in 1989 and simultaneous with the recordation of the subdivision plat for Desert Lakes Golf Course & Estates Tract 4076-B (hereinafter "Tract 4076-B"). The principal and substantive issues that have been raised by the Plaintiff point in pertinent part to Covenant 6 that deals with the front yard, rear yard and side yard setback requirements. Other Covenants, of course, are also in play such as fencing, individual lot access to the golf course, the color pallette at least for wrought iron typically dealing with rear and side yard issues, and minimum requirements of the square footage of the homes that are authorized in the Covenants. Tract 4076-B included multiple unsubdivided tracts within the subdivision plat. Over a period of time several of those tracts were re-subdivided by later owners thereof and on that basis Desert Lakes Golf Course & Estates Tract 4076-D (hereinafter "Tract 4076-D") was ultimately developed out of one of the B-Tract parcels, as was Desert Lakes Golf Course & Estates Tract 4163 (hereinafter "Tract 4163"), the location of Plaintiff's residence. The five (5) Defendants herein were not the developers of any of the three subdivision tracts at issue.

Upon recordation of the Final Plat by the developers of Tract 4076-B, a set of CC&Rs were also recorded. Previous rulings by the Court in this matter have determined that the Tract 4076-B Covenants cover all three subdivisions in controversy.

Tract 4076-D when it was recorded included the recordation of an overlay set of CC&Rs or covenants very similar to the Tract 4076-B Covenants.

Tract 4163 upon recordation of this subdivision plat, no overlay set of covenants were added to the pre-existing Tract 4076-B Covenants.

At or shortly prior to the time of filing in December of 2019 of the Defendants' Motion for Summary Judgment, there were approximately 186 homes built on the approximate 269 original subdivided lots within the three subject Tracts. One hundred thirty nine (139) of the subject lots were golf course frontage lots upon which a total of 97 homes had been constructed (see Defendants' Motion for Summary Judgment, p. 5, lines 19-22). The facts in question above referenced were independent findings set forth in the Affidavit of a licensed land surveyor, Eric Stephan, the Affidavit of Tracy Weisz who has been involved in the construction of multiple residences throughout the entire Desert Lakes Golf Course & Estates project dating back well in excess of 10 years. See the respective Affidavits appended to the Defendants' Motion for Summary Judgment. The Surveyor Stephan's Affidavit addressed the issue of setback violations principally on those subject lots that are adjacent to the Desert Lakes Golf Course and those located in Tract 4163. Mr. Stephan testified that in regard to Tract 4163 that represented originally 32 platted lots, several lots had been combined resulting in there ultimately being 25 lots available for construction out of the originally platted 32. Twenty four (24) of the 25 available lots in the subdivision's ultimate development have in fact been built upon. Of that total, 100% of the homes built in Tract 4163, including that of the Plaintiff, violate the rear yard setback requirements that are sought to be enforced by the Plaintiff against the pending five (5) Defendants, including the Plaintiff's home which is located less than 10 feet from the golf course (a 10-plus foot violation of the rear yard setback). Plaintiff's home, for instance, also violates the side yard setbacks in the Covenants. Yet, Plaintiff seeks to enforce the setbacks against apparently some but not all owners. Plaintiff has admitted these facts in multiple pleadings and admissions before this Court.

Regarding Tract 4076-D, this tract consists of 12 lots upon which there have been built 10 homes. Of the 10 homes in question, eight (8) of the 10 homes constructed have rear yards adjacent to the golf course, have rear yard projections into the 20-foot rear yard setback. The rear yard projections into the 20-foot CC&R setback requirement vary from one (1) foot to as much as 12 feet (see ¶11, p. 2, of the Affidavit of Eric Stephan).

Tract 4076-B, in its original configuration at the time of recordation of the subdivision plat in 1989, consisted of 225 single family lots. As a result of lot combinations, the available lots in Tract 4076-B and Tract 4163 have been slightly reduced. One hundred eighty one (181) homes were identified by Surveyor Stephan in November 2019 in the three subject tracts. Out of the 181 homes, Stephan's Affidavit identified that 116 homes included construction into the Covenant prohibited rear yard setback. Tabulating front yard violations and/or side yard violations was not financially reasonable, although the same definitely exist including the Plaintiff's admiited side yard violation.

Multiple other violations were discussed within Defendants' summary judgment application and supported via an affidavit of Robert L. Morse, a licensed surveyor and professional engineer, affidavits of other existing (Grand Canyon/Mckee) and former (Kukreja) home builders who have built in the subject tracts. The relevancy of these facts are illustrative of the issues that Plaintiff's cause of action affects every single owner in Tract 4076-B, Tract 4076-D and Tract 4163.

At the time this law suit was filed in 2018 the five Defendants owned six (6) lots, or .022% of the total subdivision lots. At the time of this memorandum, the five (5) Defendants own four (4) lots, or .0149% of the subdivided lots in the three tracts in Desert Lakes Golf Course and Estates in Tract 4076-B, no lots in Tract 4076-D, and no lots in Tract 4163. Plaintiff and Plaintiff's spouse reside in Tract 4163. Each and every such landowner in these three subdivisions is a necessary and indispensable party to the action that has been brought by the Plaintiff.

A factual example of the impact intended by the Plaintiff in Plaintiff's own words are set forth in **Exhibits A and B** attached hereto. **Exhibit A** is a a copy of Plaintiff's letter under date of May 14, 2021, to Ronald and Shirley Miller, the owners of a Tract 4076-B residence. Plaintiff's letter alleges that the Millers' home encroaches into the front and rear yard setback. Plaintiff's intent through the successful prosecution of this litigation will permit/authorize Plaintiff to take action against the Millers as Plaintiff states in paragraph 3 of her May 14, 2021, demand, "Your property has a front yard setback of 15 feet and a rear

yard setback of 12 feet." Mrs. Knight goes on in paragraph 5 to clearly advise the Millers that it is Plaintiff's intent to initiate litigation against the Millers seeking an order to demolish those portions of the Miller residence that violate the subject setbacks. The Plaintiff's demand reads:

> "You can avoid a Breach of Contract Complaint for CC&R violations by remedying the offending building and projections that are in violation of Paragraph 6 of the CC&Rs. A response from you or your attorney within fifteen days (15 days) of the date on this letter will be accepted as a good faith attempt for remedy that is expected to be followed up with an agreed upon date for a Contract for demolition of the offending violations. In Arizona, the precedent for CC&R violations is removal of the offending violations." (See, **Exhibit A**, Plaintiff's 5/14/2021 letter, ¶5.)

More recently, similar correspondence dated July 24, 2021, has been authored by the Plaintiff again reflecting the Plaintiff's intention upon apparently successful completion of the pending litigation as to what Plaintiff intends regarding Thomas and Diane Gauthier should they purchase a pre-existing home built apparently in 1991 (per Plaintiff Knight) as a result of the fact that the subject home located in Tract 4076-D at 5985 South Mountain View Road allegedly violates paragraph 6 of the Tract 4076-B Covenants in question. Plaintiff tells the Gauthiers that should they purchase the subject home:

> "Remedy of the violation to cut away the entire rear yard enclosed patio cover is an option. In Arizona, the precedent for remedy of CC&R violations is removal of the offending violations." (See, **Exhibit B**, Plaintiff's letter 7/24/2021, ¶1.)

Mrs. Knight goes on to state:

> "My right to prosecute violations in Tract 4076-B was adjudicated by the Mohave County Superior Court in Case No. 2018-04003." (See, **Exhibit B**, Plaintiff's letter 7/24/2021, ¶4.)

Finally, the Plaintiff, Mrs. Knight, advises the Gauthiers:

> "I expect an email response within seven days (7 days) that this letter has been received and evidence of your choice of remedy of the violations or a completed copy of the Sellers Property Disclosure Statement within fifteen days (15 days) of the date of this letter. My goal is to protect uninformed buyers from being the ones to be named in the pending Breach of Contract Complaint." (See, **Exhibit B**, Plaintiff letter 7/24/2021, ¶5.)

In addition to the five (5) existing Defendants who are current defined targets of the Plaintiff, the Plaintiff's cause of action will impact an additional minimum of 116 homes and their respective homeowners that have identified rear yard encroachments and an unknown number of front yard and side yard encroachments out of the 181 single family residences referenced in the Stephan Affidavit back in December 2019. This lawsuit will severely and negatively affect virtually every existing residence located in the subject tracts referenced by Mr. Stephan in paragraph 9 of his Affidavit. Note that the Stephan Affidavit only references the discussed violations of the setback Covenant. There is a high likelihood that every residence in these three subdivisions violates one or more of the Covenants and will be under the Knight knife having living rooms, patios, bedrooms, and kitchens "cut away." There are hundreds of additional violations dealing with rear yard fencing, use of chain link fencing such as that employed by the Plaintiff at her setback violating home, direct lot access to the golf course, color pallette violations, square footage violations, and others.

It is without arguable basis that a decision in the matter before this Court will have resounding substantial, far reaching impact on all owners that are subject to the 1989 Covenants as a direct result of Plaintiff's Complaint. Plaintiff seeks orders from this Court that particular properties of the Defendants or that have been constructed by the Defendants be at least partially demolished. Plaintiff has by various motions previously filed by Plaintiff targeted four or five other homeowners demanding a partial demolition of their homes. Plaintiff's ultimate intention should Plaintiff receive favorable treatment from this Court is to proceed against other Plaintiff-selected homeowners. Plaintiff has expressly stated that it is Plaintiff's intention to target other owners but apparently not all of Plaintiff's neighbors nor the Plaintiff's own Covenant breaking residence. These intentions are clearly discernable from the facts set forth in this memorandum and collectively the Plaintiff's pleadings previously filed herein.

There have been few if any issues upon which the five existing parties in this 3 ½+ year journey through the court system have agreed. More recently, Plaintiff has obtained the counsel of an attorney and from that event, the parties have at least found common ground

on one important issue, that is, in part, the subject matter of this very Motion. All owners in Tracts 4076-B, 4076-D and 4163 are both necessary and indispensable parties and further that Rule 19, Ariz. R. Civ. P., applies to the matter before this Court. The lone disagreement between counsel on this issue is whether it is the Plaintiff or one or more of the Defendants who must bring before this Court the approximate 500 individual owners of the approximately 250 lots in question. Any ruling by this Court except a general dismissal for failure to join necessary and indispensable parties under Rule 12, Ariz. R. Civ. P., will significantly affect each and every one of the absent lot/home owners by potentially bringing about a massive and costly series of at least partial home demolition projects totaling into the tens of millions of dollars to at least a minimum of the partially inventoried 116 homes with recognized setback violations (including the home owned by Plaintiff and Plaintiff's spouse that would require partial destruction to the rear approximate 11 feet of Plaintiff's home, as well as the removal of a portion of the side of Plaintiff's home, the removal of Plaintiff's chain link fencing and the repainting of Plaintiff's fences. These drastic outcomes to the majority of the absent owners' homes would be necessary to avoid having the Court create a patchwork of the restrictive covenants that would apply to some but apparently not all lots. Either the restrictive covenants apply to all or none of the lots as they exist today.

QUESTIONS

The questions before us today are:

(1) Are all lot owners both necessary and indispensable parties? Counsel for both Plaintiff and the five existing Defendants believe they are both necessary and indispensable!

(2) What is Arizona law regarding the application and enforcement of the Covenants as to <u>all</u> or only some of the lots in the three subdivision tracts?

(3) Under the facts, does the Plaintiff or do the answering Defendants have the burden of joining all of the lot owners in the three tracts? The Plaintiff has initiated this action and the five existing Defendants have alleged that it should be dismissed.

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THE LAW APPLIED TO THE FACTS

The State Bar of Arizona Committee regarding the application of this, Rule 19, as amended through May 21, 2021, stated in pertinent part:

> "The present rule, with its judicial gloss and terms of indispensable, necessary, and proper parties, has proved confusing and difficult to apply. The revision (referencing the amendment to Rule 19 effective January 1, 2017) seeks to substantiate practical procedures to deal with problems where otherwise desirable joinder is difficult. At the same time, it retains the basic principal that parties MUST be joined where this is required by 'equity and good conscience.'" Shields v. Barrow, 58 U.S. 130, 17 How. 130, 15 L.Ed. 158 (1854); Bolin v. Superior Ct., 85 Ariz. 131, 333 P.2d 295 (1958); Smith v. Rabb, 95 Ariz. 49, 386 P.2d 649 (1963); State of Washington v. United States, 87 F.2d 421 (9th Cir. 1936). (Emphasis supplied.)

In particular, this Court must take note of Rule 19(a)(2) Joinder by Court Order and the fact that it is not a discretionary option of the Court. Subsection (2), in pertinent part, states: "... the court must order that the person be made a party..."

As to the question of responsibility of bringing into this litigation the approximate 500+ additional parties representing the approximate 265 lots (269 minus 4 lots currently owned by the existing Defendants equals 265 lots and assuming that the vast majority of the individual 265 lots are each owned by two typical joint tenant owners, e.g., husband and wife, we can use as a generalization 500 missing necessary and indispensable owners that will be affected by the outcome of Plaintiff's law suit). Noteworthy in this discussion is the fact that Plaintiff has filed or initiated this cause of action and the five (5) existing Defendants have not filed either a cross claim nor counter claim in the action.

Plaintiff appears to agree that all lot owners are both necessary and indispensable, however, suggests that the Defendants must bring the approximate 265 lot owners/non-parties before the Court. Although this will be further discussed, the direct and succinct answer can be found at 59 Am. Jur. 2d, p. 524, Section 97, that reads:

> "The burden of procuring the presence of all such indispensable parties is on the plaintiff."

The law is clear that should this Court rule favorably for the Plaintiff, the result will

require removing and/or demolishing some portions of virtually every residential structure in these affected subdivisions. Should Plaintiff succeed, all violations for all homes must be abated as the law does not allow or permit the "hopscotch" or "patchwork" application of the Covenants. The CC&Rs will either rise or fall on all lots (including the Plaintiff's) resulting in a tsunami tidal wave of litigation carrying with it millions of dollars of property value losses and multiple years of disruption throughout the entire community. Covenant 6 (side, front and rear yard setbacks) known violations exceed well in excess of 50% of all homes built in the three tracts and 100% of those built in Plaintiff's Tract 4163. Covenant 6 represents the most significant issue brought forward by the Plaintiff. There are multiple additional covenant violations such as fencing violations include fence height, use of chain link, failure to construct required fencing, individual lot access (gates) to the golf course, violation of the Covenant's color pallette, minimum square foot violations and the like are found repeatedly and consistently throughout all three tracts (see, generally, Defendants' Motion for Summary Judgment and the un-refuted Affidavits in support thereof).

Arizona's law is clear. It's all or none. Amendments to the Covenants must apply to all. See, La Esperanza Townhome Ass'n, Inc. V. Title Sec. Agency of Arizona, 142 Ariz. 235, 689 P.2d 178 (Ariz. App. 1984) that, in turn, quoted Riley v. Boyle, 434 P.2d 525, 6 Ariz. App. 523 (1967):

> "We held that any amendment to a set of restrictive covenants must have uniform application to all lots in the subdivision and an amendment which purported to modify the restrictions only as to one lot or a number of lots, but not all the lots, was null and void. We stated:
>
> 'The restrictions imposed pertain to all lots in the subdivision and a fair construction of the words permitting amendments indicate that the power to amend is only as to restrictions for all lots in the subdivision.' (Emphasis added) 6 Ariz.App. at 526, 434 P.2d 525.
>
> We held that to construe the amendment language to permit 51 percent of the lot owners to exempt their property from some or all the restrictions while leaving the remainder of the subdivision subject to those restrictions would lead to an unintended result. We stated:
>
> 'Certainly such an interpretation could easily result in a

> patchwork quilt of different restrictions according to the views of various groups of 51 per cent and completely upset the orderly plan of the subdivision.' 6 Ariz.App. at 526, 434 P.2d 525.

The Court of Appeals has addressed a case with similar indispensable party issues in dealing with a set of covenants wherein the plaintiff was seeking to enforce the covenants and the defendant was alleging the affirmative defense of abandonment. The defendant filed a Rule 19 motion. The trial court denied the motion for joinder. The Court of Appeals in Cundiff v. Cox, No. 1 CA-CV 15-0371 (Ariz. App. 2016), in pertinent part, stated:

> "As to the Coxes' appeal, we affirmed the trial court's grant of summary judgment regarding the defenses of estoppel, laches, and unclean hands, *id* at ¶¶20-27, leaving only the defense of abandonment (of the Declaration and, accordingly, section nineteen's non-waiver clause) to be decided. Finally, in addressing the trial court's denial of the Coxes' motion for joinder, we noted that '[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.' *Id.* at ¶32. We concluded 'that the absent property owners are necessary parties given the issue to be decided in this case' and must be joined, and directed the trial court to 'determine on remand whether these parties are also indispensable under Rule 19(b),' Ariz. R. Civ. P. *Id.* at ¶36.
>
> On remand, the trial court determined that the other property owners subject to the Declaration were indispensable parties, and ordered the Cundiffs to serve and join all necessary and indispensable parties."

NOTE: Plaintiff's attorney herein, Mr. Coughlin, was the attorney for one of the multiple plaintiffs in Cundiff v. Cox, supra, which is "NOT FOR OFFICIAL PUBLICATION UNDER ARIZONA RULE OF THE SUPREME COURT 111(C), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE." Defendants cite the Court to this case purely for its "persuasive value" as it complies with the three requirements allowing citation to unpublished decisions under certain circumstances that became effective January 1, 2015. First, Cundiff, supra, was decided after January 1, 2015; second, the undersigned knows of no opinions that adequately and squarely addresses the issue before the Court; and third, the citation is not to a de-published opinion or a de-published portion of an opinion.

A case discussing the general issue of some but not all lots being governed by CC&Rs and enforced according to the covenants' terms and with many of the same fact patters as those before this Court is the more recent decision found in Raimey v. Ditsworth, 227 Ariz. 552; 261 P.3d 436 (Ariz. App. 2011). Here the court was dealing with a set of original covenants that were later amended. There was no homeowners association. There were no common assets. There were no common areas, no assessments, and only a voluntary recreation club. Note the three subdivisions before us today have no homeowners association, no common areas and no dues. The Court in Raimey, supra, opined:

> "The lot of one homeowner cannot be considered separate and apart from its relation to all lots within a subdivision.
>
> * * *
>
> ... Riley v. Boyle, 6 Ariz. App. 523, 526, 434 P.2d 525, 528 (1967) (allowing a majority of homeowners to impose restrictions on some, but not all lots, 'could easily result in a patchwork quilt of different restrictions ... and completely upset the orderly plan of the subdivision'). Therefore, to ensure uniformity in the application of deed restrictions Raimey's holding necessarily applies to all homeowners within the Six Sections.
>
> * * *
>
> In other words, no reasonable argument could be made that the covenants were unenforceable as to the plaintiffs but enforceable against all other lot owners. Thus, Scholten supports our holding that the Second Amended Declarations are invalid as to all homeowners in the Six Sections." Raimey, supra, at p. 440.

WHAT IS A NECESSARY AND INDISPENSABLE PARTY?

In 1854, the U.S. Circuit Court for the Eastern District of Tennessee at 58 U.S. 130; 15 L.Ed. 158 in Shields v. Barrow, discussed the law regarding parties who must be included and generally this 167 year old case holds effectively good law today when quoting from a yet earlier case before it:

> "...the general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit ought to be made parties, either as plaintiffs or defendants, in order to prevent a multiplicity of suits, and that there may be a complete and final decree among all the parties

interested."

The Ninth Circuit Court of Appeals in State of Washington v. U.S. at 87 F.2d 421 (9th Cir. 1936), stated:

> "There are many adjudicated cases in which expressions are made with respect to the tests used to determine whether an absent party is a necessary party or an indispensable party. From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court render justice between the parties before it? (3) Will the decree ade, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination in the absence of such party, be consistent with equity and good conscience?"

In 1971, the Arizona Supreme Court in Town of Gila Bend v. Walled Lake Door Co., 490 P.2d 551 (1971), stated:

> "An indispensable party, under Rule 19, Rules of Civil Procedure, 16 A.R.S., is one who has such an interest in the subject matter that a final decree cannot be made without either affecting his interest or leaving the controversy in such condition that a final determination may be wholly inconsistent with equty and good conscience. The test of indispensability in Arizona is whether the absent person's interest in the controversy is such that no final judgment or decree could be entered, doing justice between the parties actually before the court and without injuriously affecting the rights of others not brought into the action. Bolin v. Superior Court, 85 Ariz. 131, 333 P.2d 295 (1958); Silver v. Superior Court, 83 Ariz. 49, 316 P.2d 296 (1957)."

BURDEN

Plaintiff alleges breach of the contract CC&R obligations resulting in violations of the Covenants by the current five (5) Defendants. Current Defendants have not filed a cross-claim nor counterclaim, rather, Defendants have alleged abandonment, an affirmative defense. It is the Plaintiff who must bring before the Court all other lot owners, the majority (at least 116) of which have built homes encroaching on one or more of the CC&R required setbacks. Of the at least 116 homes violating these alleged Covenants or restrictions, the current Defendants represent a minute percentage of the ownership within the tracts perhaps

as high as .022% or as low today as .0149%. It would lead to an absurd result if the Defendants were ordered to partially demolish a portion of an existing home that lies between a home owned by a nonparty on both the left side of the Defendant's home and the right side of Defendant's home that are not required to demolish or destroy the encroaching portions of these neighboring homes. As stated in West v. State, 203 Ariz. 546, 58 P.3d 28 (Ariz. App. 2002), the Arizona Court of Appeals in discussing who's burden it is in matters dealing with tort law and which party is obligated to join in litigation the "burden of serving all potentially responsible persons is placed on the plaintiff." (58 P.3d 32.) The burden in contract should be identical. The Defendants before this Court are not suing anyone. The Defendants here are defending their conduct alleging a defense of abandonment. The Plaintiff is the one who has brought the action before the Court and is responsible to collect all of the parties who are owners within the three tracts of the three subdivisions to be certain that subsequent to the conclusion of the pending action all lot/house owners will be fairly and equitably treated, including the Plaintiff and Plaintiff's spouse. Should the Court fail to require all additional owners be joined by the Plaintiff in this litigation, this Court at the discretion of the Plaintiff, may find itself dealing with hundreds of new law suits on exactly the same issues, all of which may lead to mixed, different and dissimilar results delivering a true "patchwork" of permitted violations and randomly enforced violations of the Covenants throughout the three subdivision tracts. Grossly unequal inequitable results will undoubtedly occur which is precisely what Rule 19 seeks to prohibit.

All lot owners must be joined as both necessary and indispensable parties. Failing to do so, Plaintiff's Complaint must be dismissed.

The Covenants cannot be enforced against the existing five Defendants owning .0149% of the lots and not against the remaining ±500 lot owners. The majority of owners that have built their homes in these three subdivisions are also in violation of one or more of the additional Covenants.

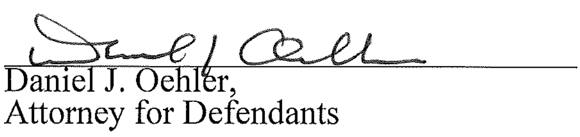
Finally, the Plaintiff has initiated the action and is seeking enforcement of the 30-year stagnant and previously unenforced Covenants. Plaintiff is responsible to "bring in" all those

who will be affected by Plaintiff's actions. Until all lot owners are joined, the Rule 19 mandate of insuring fairness and equity to all owners will be foresaken.

It is therefore respectfully requested that this Court enter a finding that all lot owners are both necessary and indispensable parties to this litigation who must be brought before this Court by the Plaintiff, and failing to do so, Plaintiff's Complaint must be dismissed, and these Defendants awarded their fees and costs incurred in this action.

RESPECTFULLY SUBMITTED this 20 day of October, 2021.

LAW OFFICES OF DANIEL J. OEHLER



Daniel J. Oehler,
Attorney for Defendants

COPY of the foregoing emailed
this 20th day of October, 2021, to:

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(928) 753-0785 Danielle
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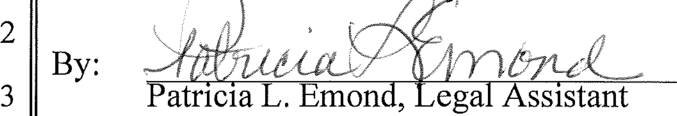
By: 
Patricia L. Emond, Legal Assistant

Knight v. Ludwig, et al.
Mohave County Superior Court
Docket No. CV-2018-04003

EXHIBIT A

Ronald and Shirley Miller
1716 Bell St.
La Verne, CA 91750-3401

May 14, 2021

Dear Mr. and Mrs. Miller,

This is a courtesy notice that is intended to provide you with information regarding your property's Covenant, Conditions and Restrictions (CC&Rs) setback violations. Litigation for CC&R violations in Desert Lakes Golf Course and Estates Subdivision Tract 4076-B has been ongoing since 2018. The Defendants in that case disclosed the setback violations on your home and it was verified by Mohave County Development Services. I had attempted to Amend the Complaint prior to Mr. Siavosh's sale of the home to you but the Court refused. The last attempt in this case, for an amendment to this Breach of Contract Complaint to include your home was denied by the Court on May 10, 2021. Trial will be expedited in that case with a new Complaint being filed against current owners of homes in violation of the CC&R setback violations. Evidence of remedy of your property's setback violations is an option for you in order to avoid legal action.

Based on the Plot Plan provided by Development Services, your rental property at 1951 E. Desert Dr. displays both a front yard and rear yard setback violation. Christine Ballard, Manager of Development Services, claimed they issued the permit for your home in error. There exists considerable evidence that it was not an error but deliberate given the parties familial connections in the chain of ownership of this Assessor Parcel Number and connections of the developer to Mohave County Development Services.

Regardless of motive, the County should not issue permits in violation of the County approved Special Development Residential (SD/R) zoning for twenty foot (20') setbacks, front and rear (Res. 93-122). Your property has a front yard setback of fifteen feet (15') and a rear yard setback of twelve feet (12').

Due to the County not abiding in the SD/R zoning, you may have recourse for a Breach of Duty Complaint. This requires that you first file a Claim for Damages with the Clerk of the Board of Supervisors and wait for a letter from Risk Management prior to filing your law suit against Mohave County.

You can avoid a Breach of Contract Complaint for CC&R violations by remedying the offending building and projections that are in violation of Paragraph 6 of the CC&Rs. A response from you or your attorney within fifteen days (15 days) of the date on this letter will be accepted as a good faith attempt for remedy that is expected to be followed up with an agreed upon date for a Contract for demolition of the offending violations. In Arizona, the precedent for CC&R violations is removal of the offending violations.

Sincerely,
Nancy Knight
nancyknight@frontier.com

Knight v. Ludwig, et al.
Mohave County Superior Court
Docket No. CV-2018-04003

EXHIBIT B

Thomas & Diane Gauthier
5985 S. Mountain View Rd
Fort Mohave, AZ 86426

July 24, 2021

This is a courtesy notice that is intended to provide you with information regarding the property that you currently have for sale that is in violation of the Desert Lakes Golf Course and Estates' Covenant, Conditions and Restrictions (CC&Rs). While law does not require you to disclose the CC&R violations to potential buyers, it is recommended to disclose by the Arizona Department of Real Estate. Remedy of the violation to cut away the entire rear yard enclosed patio cover is an option. In Arizona, the precedent for remedy of CC&R violations is removal of the offending violations.

Your property situated at 5985 S. Mountain View Rd. is in violation of the twenty foot (20') rear yard setback (entire rear yard projecting and enclosed patio cover) pursuant to the Plot Plans provided by Development Services. Refer to Servitude 6 located in Book 1641 Page 897 of the Tract 4076-B CC&Rs. Your home was built in 1991 and displays Tract 4076-B Block F, lot 81 on the building permit. The zoning in effect in 1991 was SD/R and it was "clarified" to apply to all lots in Desert Lakes in 1993 (Res. 93-122). The current identifier of Tract 4076-D is subject to the Tract 4076-B CC&Rs in accordance with the approved Preliminary Plat that created Subdivision 4076 in 1988. CC&Rs run with the land. Also, refer to Servitude 7, for Block F that describes your lot with a Frontage Road on Page 897.

A copy of the CC&Rs should have been provided to you on purchase of this home or you may email a request to me for a PDF of the Declaration. I can also provide you with a PDF of Res. 93-122.

My rights to prosecute violations in Tract 4076-B was adjudicated by the Mohave County Superior Court in case No. 2018-04003. Defendants in that case are attempting dismissal for abandonment of the CC&Rs. Complete abandonment would need to be proven which in my opinion is futile. I did not abandon my responsibility to win a 3-2 vote from the Board of Supervisors for Mehdi Azarmi's attempted violation. I did not abandon my rights to prosecute violations in case No. 2016-04026. A video of our Subdivision is evidence that we do not have "complete abandonment" which would be necessary given our non-waiver clause (paragraph 20 on Page 899) according to attorney consult.

I expect an email response within seven days (7 days) that this letter has been received and evidence of your choice of remedy of the violations or a completed copy of the Sellers Property Disclosure Statement within fifteen days (15 days) of the date on this letter. My goal is to protect uninformed buyers from being the ones to be named in the pending Breach of Contract Complaint.

Sincerely,
Nancy Knight
nancyknight@frontier.com