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JG

Plaintiff Pro Per

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

NANCY KNIGHT, Plaintiff, and GLEN LUDWIG Trustee of THE LUDWIG FAMILY TRUST; FAIRWAY CONSTRUCTORS, INC.; MEHDI AZARMI; JOHN DOES 1-10; JANE DOES 1-10; ABC CORPORATIONS 1-10; and XYZ PARTNERSHIPS 1-10. Defendants.	Case No.: **CV 2018-04003** **PLAINTIFF'S RESPONSE TO DEFENDANT'S JULY 6, 2023 MOTION REGARDING CLARIFICATION OF THE ORAL ARGUMENT HEARING SCHEDULED FOR JULY 27, 2023** Hon. Judge Nielson

Comes Now, Plaintiff Pro Per Nancy Knight, who has reason to believe. pursuant to this court's Status Conference statements, that this Court is conducting Oral Arguments for at least the ten issues in this response that is limited to 17 pages.

MEMORANDUM OF POINTS AND AUTHORITES

1. Stating a Claim of abandonment of Deed Restriction(s) pursuant to Rule 12(b)(6).

The February 2, 2023 Motion for Summary Judgment (MSJ) filed by the Plaintiff became moot when the urgency had passed without a response from the now recused court. That MSJ has nothing to do with the upcoming Oral Arguments.

On March 1, 2023 Plaintiff "filed" a Motion to Strike Defendant's Dec. 6, 2019 MSJ with a Statement of Facts that would have dismissed the abandonment claim. Note: A date error was in the footnote that did not conform with the "filing" date of March 1. The Motion specifically referenced **Rule 12**, and also included Mr. Azarmi's motives.

On March 6, 2023, Plaintiff responded to Defendant's motion to strike her March 1 motion and stated that she believed the issue of the Defendants not following **Rule 12** for stating a claim of "complete abandonment" is being resolved in Plaintiff's March 1 Motion to Strike Defendant's December 2019 MSJ. Since December 2019, Rule 12 has been violated by Mr. Oehler.

On or about April 27, 2023 Hon. Judge Jantzen recused himself from the case.

On May 4, 2023, the case was reassigned to this court.

On June 12, 2023, Plaintiff motioned this Court for attorney Oehler to state a claim of abandonment pursuant to **Rule 12** and to conform to an extension of time to serve indispensable parties with their service packet as filed on June 9, 2023.

No issues of material facts exist in the case without the Defendant's stating their claims pursuant to Rule 12 (b)(6). Only then will a jury be required for decisions of fact.

At this time, the court can rule on issues of law and end this case. Issues of law are prohibitive in the body of this 17 page limit, therefore **Exhibit 1** provides evidence.

2. Rules of Law on Abandonment

Rules of law are critical for this case to either move forward to trial or be settled by this court. The test for determining a complete abandonment of a **Deed Restriction**, as

opposed to complete abandonment of the **Declaration** - which is the "entire set of Restrictions" – is found in *Burke v. Voicestream*, 207 Ariz at 399, ¶ 26, 87 P.3d at 87

> ¶ 26 The non-waiver provision would be ineffective if a complete abandonment of the entire set of Restrictions has occurred. The test for determining a complete abandonment of deed restrictions — in contrast to waiver of a particular section of restrictions — was set forth by our supreme court in *Condos v. Home Development Company*, 77 Ariz. 129, 267 P.2d 1069 (1954): "[W]hether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions, defeat the purposes for which they were imposed and consequently amount to an abandonment thereof." Id. at 133, 267 P.2d at 1071.

The *Burke* court held that the violations of section 4 have not destroyed the fundamental character of the neighborhood and concluded as a matter of law that the non-waiver provision remained enforceable. And in *Cundiff*, the fundamental character of the neighborhood was captured in a video where the nine acre parcels with dirt roads maintained the fundamental character of the intent for a rural, residential community. **See Exhibit 1**

The Supreme Court confirms that a "section of restrictions" cannot be parsed out. Defendants cannot claim frequency of only rear yard setbacks. The front, rear and side yard count is 977 section 6 setbacks if all 244 lots are built out. **See Exhibit 1**

In contrast, Plaintiff can parse out enforcement for her claims of Injunctive Relief for sections 6, 12 and 20 (advertising signs, front and rear yard setbacks, and attempts or threats to the Declaration). Id. at Summary of the case.

> In *Condos v. Home Development Co.*, 77 Ariz. 129, 267 P.2d 1069 (1954), the Arizona Supreme Court held that the fact that several provisions within a restrictive covenant were violated did not prevent the owners of property described in the restrictions from enjoining violations of other provisions within the restrictive covenant.

From *Condos v. Home Development Co.*, 77 Ariz. at ¶133

> The only question presented, as we view it, which deserves our consideration is whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions, defeat the purposes for which they were imposed and consequently to amount to an abandonment thereof.

It is undisputed that the overall character of the Desert Lakes Tract 4076 Subdivision continues as an established general plan comprised of a golf course with residential lots that has not changed nor undergone the fundamental change required to constitute legal abandonment of the entire **Declaration** as the Defendants wish to claim. In other words, the non-waiver provision in section 20 remains enforceable.

This trial court is requested to use the same standard as in *Coll. Book Ctrs.*, 225 Ariz. At 539, ¶18, 241 P.3d at 903.

> ¶ 18 On appeal, we recognized at the outset that absent a non-waiver provision, deed restrictions may be considered abandoned or waived "if frequent violations of those restrictions have been permitted." *Id.* at 398, ¶ 21, 87 P.3d at 86.
>
> But when CCRs contain a non-waiver provision, a restriction remains enforceable, despite prior violations, so long as the violations did not constitute a "complete abandonment" of the CCRs. *Id.* at 399, ¶ 26, 87 P.3d at 87.
>
> Complete abandonment of deed restrictions occurs when "the restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed;.]" *Id.* (quoting *Condos v. Home Dev. Co.*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071

Desert Lakes has a non-waiver provision and it is enforceable because Desert Lakes has not experienced "complete abandonment of the CCRs" which means the Declaration has not been abandoned. Even if some sections have violations that have been permitted, frequency claims may not be considered in an abandonment case that has a non-waiver provision.

Assuming arguendo, Plaintiff has not "permitted" fence violations and the Hon. Judge Langford, in CV 2016 04026, negotiated for Plaintiff Knight to win back a portion of her lost views of the golf course and surrounding area that were taken by Mr. Oehler's client, Chase, and sold to a buyer, Edwards, with the advertised claim of having a "privately located pool and spa". Edwards became an acrimonious new neighbor and sold the home to Frey.

Plaintiff has not acquiesced on her own rear yard and side yard setback violations that Mohave County is being sued for in CV 2022 00177. The County committed zoning fraud and violated Res. 93-122 when approving Plaintiff's home with less than a twenty foot rear yard setback. The County breached their duty to accurately inspect setbacks that caused the Plaintiff's side yard setback of less than five feet and portion of Plaintiff's rear yard setback at less than ten feet.

Plaintiff seeks remedy from all parties involved that includes Mohave County, Defendant Kukreja (owner of Parcel VV in 1998), Defendant Azarmi (Vice President of Ludwig Engineering Associates who created Plaintiff's Tract 4163 Plat by squeezing 32 small lots into the five acres of land with ten foot rear yard setbacks). Kukreja's and Azarmi's representatives espoused development of patio homes like those built by

Azarmi in his Fairway Estates subdivision and where a POA was proposed for the 32 small lots to be annexed to an existing POA. The only existing POA in 1998 that is adjacent to Tract 4076-B is Azarmi's Fairway Estates POA. Res. 98-349 differentiated the "owner/subdivider" (Kukreja of 1043 Arizona Properties) from the "developer" and any reasonable person would clearly conclude that the developer of the proposed patio homes and annexation to a POA was Mr. Azarmi – in Plaintiff's opinion.

CEO Passantino did not acquiesce on the County's claim that Parcel VV was reserved for Multifamily housing when the CC&Rs and the County approved SD/R zoning for the entire Subdivision Tract 4076 expressly forbids multifamily housing. That error in zoning was formally abandoned from Parcel VV in 1991.

Defendant T&M Mohave Properties in CV 2022 00177 did not acquiesce in the condition that Tract 4163 be annexed to a POA and the Board of Supervisors granted removal of that condition of approval.

Deed Restrictions have not been thoroughly disregarded for fences, setbacks, multifamily housing, fee-based homeowner association, and advertising signs. These restrictions have not experienced a defeated purpose. Remedy for fences occurred in CV 2016 04026. Remedy to prevent defeat of section 6 and 12 is in the hands of this court. Remedy to prevent defeat of section 8 (Frey's fence) and 12 (Plaintiff's and seven property owner's setbacks) is pending in CV 2022 00177.

Plaintiff contends that any reasonable person would conclude that any claim of abandonment of a deed restriction is futile given the cutting away remedy that has already occurred as a part of CV 2016 04026 where cement block walls were cut away and

restored to compliance with the County imposed design and the CC&Rs. Mr. Oehler was the defense counsel in that 2016 case and knows full well that remedy prevents defeat of a servitude.

In CV 2022 00177, patio covers that are less than twenty feet from the property line can be cut away. Side yard setbacks that are less than five feet could be easily resolved by amending the County zoning ordinance and the Desert Lakes CC&Rs with a language change that states the side yard setback is five feet or ten feet between two adjacent structures.

The purpose of the five foot side yard setback restriction is for air, light, and fire protection. The purpose would not be defeated by the language change. In fact, the language change was already proposed by President Nancy Knight of the Unincorporated Association (UA) in her First attempt to amend Tract 4076-B CC&Rs that was mailed in June 2022. It is a part of the record in this case where attorney Coughlin defended Knight, unsuccessfully for the Gag Order, against the former alleged biased court and attorney Oehler. The UA does not enforce CC&Rs but can provide exceptions and variances by amendment or Committee. The proposed amendment to servitude 6 states,

> Owners approve an exception to the five foot (5') side yard setback, if due to an error in construction, as long as there is a total of ten feet (10') between two adjacent lot structures.

There exists no deed restriction that cannot be remedied; therefore, there exists no deed restriction that can be ruled as completely abandoned. This court may rule that

based on law, the defendants cannot claim abandonment of any deed restriction because remedy is available to prevent defeat of purpose.

A difference exists between "complete abandonment" of the Declaration that does not exist and "complete abandonment" of a deed restriction. A claim of complete abandonment of a specific deed restriction per Rule 12 awaits Oral Argument on July 27.

3. Doctrine of the Case

The Doctrine is a rule of procedure and does not prevent a court from changing a ruling merely because the former court ruled at an earlier stage of the proceedings; nor does it prevent a different judge, sitting on the same case from reconsidering the first judge's prior nonfinal rulings. Non-final rulings lack specific language pursuant to Rule 54.

a. The Gag Order is a violation of Plaintiff's Constitutional right to free speech and should be reversed by this court. The Plaintiff was inappropriately punished for a page included in the Plaintiff's mailed June 2022 Ballot for the First attempt to amend the Tract 4076-B CC&Rs as part of the Plaintiff's right as "President of the Desert Lakes Golf Course & Estates Subdivision Tract 4076 Unincorporated Association" as quoted from paragraph 1 of the Recorded Original Resolution that used Mohave County's Subdivision Index for the short title of Desert Lakes Subdivision Tract 4076. The Index is a part of the record as used by Hon. Judge Carlisle in 2018. The Ballot for amendments to the Tract 4076-B CC&Rs had positive responses that included monetary contributions from some property owners toward the President's expenses in the mailing of the packet of information.

b. Denial of all Leave to Amend motions filed by the Plaintiff need review and reversal by this court. The now recused court could only give his opinion that Plaintiff's motions were "inappropriate".

c. When the County Attorney tells the Plaintiff to take her evidence of Affidavit Fraud to the local law enforcement agency and that agency makes a determination that it is a civil matter, it is not inappropriate for the Plaintiff to file a Motion for Leave to Amend the Complaint for Affidavit Fraud.

d. It was not inappropriate for Plaintiff's former attorney to file for Leave to Amend the Complaint for Breach of Contract and when it was denied by the now recused court, the parties became defendants in the separate 2021 case. That judge claimed these defendant's issues could be resolved in this 2018 case.

i. It was not inappropriate for the Plaintiff to file for Leave to Amend and for consolidation of those 2021 Breach of Contract defendants into this case as the judge in the 2021 case expected.

e. Due to page limitations for this Response, Plaintiff requests this court to reconsider, on his own, all denied motions made by the recused Judge including Unclean Hands and who is to suffer the costs of service on Indispensable Parties.

i. Case law is clear that it is the movant (Azarmi et. al.) who must follow Rule 19 and not Plaintiff Knight. See Attorney Coughlin's arguments and his Appeal document for case law on this issue.

4. Fraud Upon the Court for advertising signs

As argued by Plaintiff's attorney Coughlin, no Statute would protect dilapidated

signs that posed a risk of harm to persons and property. As proven by the Arizona Department of Real Estate, the "build to suit" signs are the developer's signs and are not for sale or for lease signs. As proven with photographic evidence, the developer's sheet metal signs and supporting structures were dilapidated.

Statue §33-441 was Fraud Upon the Court and upon the plaintiff as committed by attorney Oehler that stalled this case and prevented Injunctive Relief. Plaintiff suffers damages. As part of the record, County ordinances for off-premises business advertising is not allowed on residential lots. Sanctions on attorney Oehler are appropriate.

5. Injunctive Relief

Injunctive Relief for signs was inappropriately denied by the now recused court where contempt for public safety and contempt for fair competition favored the Defendants.

Injunctive Relief for setbacks was inappropriately denied where for years the defendants were allowed to continue the practice of violating the CC&Rs and passing their misdeeds off onto unsuspecting buyers of those homes. Those buyers are now subject to Breach of Contract for continuing setback violations.

See Exhibit 1 A – Injunctive Relief as a matter of law – Four Equities

In light of Arizona case law on the interpretation and enforcement of recorded covenants and restrictions, (1) Plaintiff Knight has a "strong likelihood of success on the merits", (2) Defendants violations clearly cannot be remedied by Plaintiff receiving compensatory damages. (3) The balance of hardships favors the Plaintiff. (4) Public policy favors relief to prevent a risk of harm to persons and property and unfair

competition with dilapidated self-serving business advertising signs and to prevent more victims of setback violations which in turn burdens the Arizona Court system.

Paragraph 61 and 62 of the Complaint.

> 61. Plaintiff is entitled to preliminary and permanent injunctions enjoining Defendants from all current signage violations on unimproved lots.
>
> 62. Plaintiff is entitled to preliminary and permanent injunctions enjoining Defendants from any existing or future violations of the CC&Rs including but not limited to setback reductions and signage on unimproved lots.

6. Proposed Order for notice to Indispensable Parties.

On September 28, Plaintiff found her attorney's Yellow Text Draft PDF of a Proposed Order and the condition that parties had until September 30, 2022 for changes. The attorney was notified by email to Withdraw ASAP and attorney Oehler was notified that Plaintiff Pro Per was back on the case. The attorney's legal assistant provided the Plaintiff with a Word document that could be copied for needed changes.

On September 29, Plaintiff's Proposed Order was filed; however, the court held it in abeyance until attorney Coughlin could return from vacation and officially withdraw.

Attorney Coughlin attended a Status Conference for his formal withdrawal and the court allowed the Plaintiff to make changes to the Proposed Order that had been held in abeyance.

On Nov. 14, 2022, Plaintiff filed her Notice of Proposed Final Orders along with a Proposed Final Order, sample Summons and Waiver of Service Form that was more appropriate for Indispensable Parties than for parties who are being sued.

On Feb. 17, 2023, in violation of the Constitution for decisions by the Court to be

made within 60 days, the now recused court said he would review the documents by 3:00 pm (time of his statement was 9:36 am on the Status Conference CD).

On June 9, 2023, Plaintiff filed a Motion with this court for an extension of time to serve indispensable parties. Plaintiff detailed for the court what she needs amended on Mr. Oehler's Order and reasons for what she could not follow or understand. What does significant mean? Why is the Waiver of Service Form inappropriate? Why must the Indispensable Parties suffer the costs and learning curve for TurboCourt? And more.

Consideration of this court on who is to serve notice on over 400 Indispensable Parties is the subject of fairness and following the rule of law.

In May 2020, the now recused court denied Plaintiff's motion to dismiss the Dec. 2019 MSJ on abandonment for the Defendants failure to join indispensable parties.

In February 2022, the now recused court issued a Rule 54 (b) Final Judgment for Plaintiff Knight to serve Indispensable Parties. Plaintiff's attorney filed an Appeal because the now recused court failed to follow the law of cases. The Order was not appealable because no party nor claim was dismissed with the Final Judgment.

In every case law found to date, the party who filed the Motion for Summary Judgment (MSJ) was the party that *must* serve the indispensable parties. The now recused court has not provided any reason as to why he chose to have the non-movant (Plaintiff Knight who filed the Complaint) serve the parties. The recused court's Final Judgment defies common sense and the rule of law.

See Exhibit 1 B - Who is to join necessary and indispensable parties in a Deed Restriction abandonment claim and Abuse of Discretion by the now recused Court

This court has an opportunity to right a wrong and rule on the law of cases that has existed since 1942 in *Sheets v. Dillon*. The party who seeks a ruling on abandonment is to serve the indispensable parties.

A dangerous precedent will be set in Arizona if this now recused court's Order is not reversed for the movant in an MSJ to serve parties. This precedent will chill anyone from ever again filing a Breach of Contract case and blight is the result of self-serving property owners who do not have rules to follow.

This court should give consideration to case law as attorney Coughlin had argued.

The Plaintiff's May 2020 Motion to dismiss the December 2019 MSJ for Failure of the Defendants to notice Indispensable Parties should govern Rule 19. It was an abuse of discretion for the now recused court to Order Plaintiff Knight to Serve the Parties.

This trial court is requested to apply the standard for the Defendant's 2019 MSJ as did the Appeal Court in *Burke* Id. ¶ 37 and ¶38 and as the Plaintiff has motioned this court for dismissal on March 1, 2023.

> ¶ 37 This court reviews a summary judgment to determine "whether a genuine issue of material fact exists and whether the trial court correctly applied the law." PNL Asset Mgmt. Co. v. Brendgen Taylor P'ship, 193 Ariz. 126, 129, ¶ 10, 970 P.2d 958, 961 (App. 1998).
>
> We view the facts most strongly against the moving parties. Id. When cross-motions for summary judgment have been filed, this court may evaluate the cross-motions and, if appropriate, remand with instructions that judgment be entered in favor of the appellants. Id.
>
> ¶ 38 We reverse the summary judgment in favor of SWC and Voicestream, and remand for entry of summary judgment and injunctive relief in favor of the Burkes plus any further necessary proceedings consistent with this

opinion. Section 4 of the Restrictions is applicable to the cellular tower and the Burkes are entitled to its enforcement.

7. Change of Venue

On March 22, 2023 Plaintiff filed a Motion for a Change of Venue and the now recused court did not rule on that Motion. If this court cannot bring closure for the only two issues that remain of Injunctive Relief and complete abandonment of some specific deed restriction(s) pursuant to Rule 12, then it is appropriate to grant Plaintiff a Change of Venue.

This case has dragged on far too long and Injunctive Relief should have been granted the minute the former court was provided the evidence that the signs were not protected by Statute §33-441 and where the Court had evidence that denial of Injunctive Relief allowed the Defendants to continue to violate the CC&Rs and cause victims of Breach of Contract. It is the current owner who is a party to breach of contract and not the party that caused the violation. The party that caused the violation and sold the home with violations, may be sued for Failure to Disclose but not for Breach of Contract.

8. Damages from attorney Oehler.

A preponderance of evidence exists for Plaintiff to be compensated double damages not to exceed $5,000 against attorney Oehler who defended a claim without substantial justification and for delays in the case. Plaintiff's costs, not including attorney Coughlin's fees and costs, exceeds $10,000 and the maximum allowed by law is up to $5,000. Plaintiff believes Attorney Oehler has willfully and maliciously violated his oath of professional conduct in this case. He refused to work with the Plaintiff on a revision to

the Proposed Order for Indispensable Parties. He has provided this court with no real evidence of any other developer who has signs on residential lots. He supported affiants who made false claims on their Affidavits. Azarmi's 50% Rule does not govern setbacks in Desert Lakes. Azarmi's claim that no enforcement has occurred in thirty years is known to be false by Oehler. Oehler has made false claims that golf ball barriers are to be considered one-and-the-same as boundary fences and cannot have chain link as the protective barrier fabric. He has made false claims that Tract 4163 does not have CC&Rs when he has real evidence from the T&M Public Report and Plaintiff's Title Insurance Policy that lists the CC&Rs for Plaintiff's home are in Book 1641, page 895. He has Hon. Judge Carlisle's ruling that the CC&Rs run with the land and he has the 1988 Preliminary Plat that created Tract 4076 where Parcel VV runs with the land associated with Tract 4076-B. He has made false claims of "for sale" signs being one-and-the-same as "build to suit" signs. Plaintiff will not be able to object during Oral Arguments if he feeds this court more misinformation.

9. Attorney fees for motions filed by the Plaintiff

The defendant's list of motions for claims of attorney fees were provided to the Plaintiff on or about May, 12, 2023. The seven motions filed by the Plaintiff were valid and necessary for defense of herself and in her efforts to prosecute wrongdoing. She should not be punished for her "Motion for Leave to Amend the Complaint for Affidavit Fraud", "Motion to Reconsider the Gag Order", "Motion to Reconsider who is to join parties", "Motion for consolidation of 8 defendants in the Yavapai County case" where that judge was led to believe that every one of their Breach of Contract issues could be

resolved in this 2018 case when the now recused court had denied attorney Coughlin's July 2021 Motion for Leave to Amend the Complaint for Breach of Contract, "Motion for Injunctive Relief", and "Motion to Dismiss the Abandonment Claim for Unclean Hands".

Also, it is highly inappropriate for attorney Oehler to attempt to bilk fees from the Plaintiff for anything that was **not a motion** made by the Plaintiff. Item 8 is yet another incident of Fraud Upon this Court and upon the Plaintiff for Mr. Oehler's orchestrated Status Conference that was not necessary, cost the Plaintiff a day's wages, and the Plaintiff never made a motion for any part of that Status Conference matter.

If any of Plaintiff's motions failed to follow Rules, she should be given an opportunity to Amend those Motions as a matter of law.

> "A pro se litigant should be given a reasonable opportunity to remedy defects in his pleadings if the factual allegations are close to stating a claim for relief." *Haines v. Kerner*, 404 U.S. 519-20, (1972).

10. Extension of time to serve Indispensable Parties

Indispensable parties are not being sued in this case as attorney Oehler now wishes this Court to rule or believe. Indispensable parties are noticed because their rights could be substantially affected by the outcome in this case on the issue of abandonment.

The Waiver of Service form is more appropriate for the Service Packet. The Arizona legislature recognizes the need to reduce costs of service. This is especially true and appropriate when over 400 parties are to be given notice of a law suit that could affect them.

CONCLUSION

At this point in time, the issues of law can be applied to Injunctive Relief and to Plaintiff's March 1, 2023 Motion to Strike the December 2019 MSJ for dismissal of the abandonment claim together with Plaintiff's March 9, 2023 Reply to the Defendants' objections. Case law has proven that the Declaration has not been abandoned and the non-waiver clause remains valid and enforceable. Case law has proven that Deed Restrictions have not been abandoned and a very simple remedy exists for Count Two (Injunctive Relief). The simple remedy is for the Defendants to stop violating the CC&Rs permanently. No more "build to suit" signs and no more New Home Construction Applications for less than twenty foot setbacks, front and rear.

The case will be resolved with no need for notice to Indispensable Parties because their rights will no longer be threatened by the Defendants' claim of abandonment.

In the absence of this court's ability to bring closure to Injunctive Relief and dismissal of the abandonment claim, the Defendants have the burden of proof for any **deed restriction** that they are now claiming as completely abandoned with no remedy and their claim now requires them to follow **Rule 12(b)(6)** before Indispensable Parties are Served.

RESPECTFULLY SUBMITTED this 10th day of July, 2023

Nancy Knight, Plaintiff Pro Per

Copy of the foregoing plus Exhibit 1 on pgs. 18-24 was emailed this day to:
djolaw10@gmail.com
Attorney Daniel Oehler, Counsel for the Defendants

Clarification on Oral Argument Issues
Exhibit 1

Exhibit 1

A. Injunctive Relief as a matter of Arizona case law

From *Cundiff v. Cox*, CV 2003-0399, Yavapai County Div. 3 "Verified Application for Preliminary Injunction".

Four Equities mandate issuance of preliminary injunction.

(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury not remediable by damages; (3) a balance of hardships in that party's favor; (4) public policy favoring the requested relief. *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture II,* 176 Ariz. 275. 280, 860 P.2d 1328, 1333 (App. 1993) citing *Shoen v. Shoen,* 167, Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990)

B. Who is to join necessary and indispensable parties in a Deed Restriction abandonment claim and Abuse of Discretion by the now recused Court

Taken, in pertinent part, from attorney Jeffrey Coughlin's November 29, 2021 "Plaintiff's Response to Defendant's Motion to Join Required Parties Pursuant to Rule 19(a)"

On October 25, 2021, this Court ordered the parties to brief the Court on the issue of which party must bear the burden of joining all necessary and indispensable parties...hereby responds to Defendant's motion and respectfully requests that if Defendants insist on maintaining their affirmative defense of abandonment, a defense which they bear the burden of proving, then this Court order Defendants to join all necessary and indispensable parties.

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiff did not sue all of the property owners in violation of the CC&Rs because section 20 of those CC&Rs specifically does not require that she do so.

Defendants in this case assert, among other things, an affirmative defense that the CC&Rs have been abandoned. Defendants have the burden of proving any affirmative

defense they assert.

ARGUMENTS OF LAW

A ruling in this case that the restrictions have been abandoned and are no longer enforceable against the Defendants' properties would affect the property rights of all other owners subject to the CC&Rs. In other words, the absence of 98% of the owners in Tract-B in this lawsuit means, according to Rule 19(a)(1)(A), that this Court "cannot accord complete relief among existing parties"; the necessary parties (the remaining owners in Tract 4076-B) must be joined.

As set forth in Section 20, an owner of property located within a subdivision has the lawful right to sue those in violation of the CC&Rs to file suit. The critical portion of Section 20 is the non-waiver clause which states:

> "[N]o failure of the Trustee or any other person or party to enforce any of the restrictions, covenants or conditions contained herein shall, in any event, be construed or held to be a waiver thereof or consent to any further or succeeding breach or violation thereof."

According to this provision, if Plaintiff fails to prosecute CC&R violations at one point in time against violators, she is not precluded from doing so at a later point in time.

The only reason the parties and this Court are engaged in this discussion is because Defendants asserted the affirmative defense of abandonment. Abandonment is extremely difficult to prove.

Deed restrictions are considered completely abandoned when "the restrictions imposed upon the use of lots in [a] subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions [and] defeat the purposes for which they were imposed." Condos v. Home Dev. Co., 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954), quoted in Coll. Book Ctrs., 225 Ariz. at 539, ¶ 18, 241 P.3d at 903.

Merely asserting the affirmative defense of abandonment does not mean that Plaintiff must then join all the necessary and indispensable parties. This is a procedurally flawed position and one that makes no sense.

If Defendants merely withdrew their abandonment defense, there would be no need to join any additional parties.

However, if Defendants insist on abandonment as one of their affirmative defenses, they bear the burden of proving the defense and because of the elements necessary to prove complete abandonment are so consequential, Defendants must join all necessary and indispensable parties.

The authority cited by Defendants at 59 AmJur 2d, §97, p. 524, supports Plaintiff's position, not Defendants'. On page 9, line 22 of Defendants' brief they state "Plaintiff appears to agree that all lot owners are both necessary and indispensable . . .."

Plaintiff does not so agree. Only as a result of Defendants asserting the affirmative defense of abandonment does the issue of Rule 19 arise.

Defendants then cite 59 AmJur 2d, §97, page 524 which contains the following language: "The burden of procuring the presence of all such indispensable parties is on the plaintiff". There is a footnote which Defendants failed to include in this quotation.

It is footnote # 23, which cites National City Bank v. Harbin Electric Joint-Stock Co. (CA9) 28 F. 2d 468, 61 ALR 961.

In that case, the court took the opposite position, stating:

> But, if we are right in the opinion that the joint depositors were indispensable parties to the action, then the law has cast upon the defendant in error the burden of procuring the presence of all such parties. New York Life Ins. Co. v. Smith (C. C. A. 9) 67 F. 694, certiorari denied 159 U. S. 262, 15 S. Ct. 1041, 40 L. Ed. 145; Franz v. Buder (C. C. A. 8) 11 F. (2d) 854, certiorari denied 273 U. S. 756, 47 S. Ct. 459, 11 L. Ed. 876.

National City Bank, above, at 472 (emphasis added).

E. The party who seeks to invalidate restrictions must bring in the interested parties and give them a day in court

Plaintiff in this case seeks to enforce the provisions of the CC&Rs, not abrogate them.

In a North Carolina case the plaintiff sought to condition the sale of a parcel of property to defendant without any deed restrictions and included as part of the sales contract a provision that imposed that condition. After the contract was fully executed Defendant refused to comply with the restriction and plaintiff sued for specific performance. After the trial court declared the restriction null and void, Defendant appealed.

In reversing the trial court's determination, the court of appeals ruled: The judgment herein is not conclusive as to anyone other than plaintiff and defendant. Plaintiff's predecessor in title and those who may claim that the covenant was inserted pursuant to a general plan or scheme of development are not estopped from hereafter asserting their rights thereunder. Under such circumstances, equity will not require defendant to comply with his contract in direct violation of the stipulation that the property is to be conveyed free of restrictive covenants.

If plaintiff desires to have this covenant invalidated and stricken from the deed of the original grantee, he must bring in the interested parties and give them a day in court. Sheets v. Dillon, 20 S.E.2d 344, 348, 221 N.C. 423, 427 (N.C. 1942) (Emphasis added).

Fifty-eight years later the North Carolina supreme court reiterated its Sheets determination in Karner v. Roy White Flowers, Inc., 351 N.C. 433, 527 W.E.2d 40 (N.C.2000).

First, it identified the only issue before it: The sole issue before this Court is whether the nonparty property owners of the Elizabeth Heights Subdivision as shown in map number 3 (Elizabeth Heights) were required to be joined in this action pursuant to Rule 19 of the North Carolina Rules of Civil Procedure.

Plaintiffs contend defendant's change-of-circumstances affirmative defense could result in the invalidation of the restrictive covenant requiring residential use of property in the subdivision. Consequently, the additional property owners should be joined as parties to the action. We agree.

Karner v. Roy White Flowers, Inc., 351 N.C. 435, 527 S.E.2d 40,42 (N.C. 2000).

Then the Karner court restated the Sheets determination as to who bears the burden of joining the non-party property owners:

This Court, in Sheets, specifically stated, "If plaintiff desires to have this covenant invalidated and stricken from the deed of the original grantee, he must bring in the interested parties and give them a day in court." Sheets, 221 N.C. at 432, 20 S.E.2d at 348 (emphasis added). Karner, at 437, 527 S.E.2d at 44.

Although the roles are reversed between the Sheets case and the present case, the legal principle is the same. The roles in the Karner case and the present case are identical.

The Defendants in the Karner case asserted an affirmative defense of "change of circumstances" which is the equivalent of the abandonment affirmative defense the Defendants have asserted in the present case.

The supreme court of North Carolina agreed with the plaintiffs' position that defendant's change-of-circumstances affirmative defense could result in the invalidation of the restrictive covenant requiring residential use of property in the subdivision and that as a result, the additional property owners should be joined as parties to the action.

It is the Defendants in the present case who desire to have the CC&Rs invalidated. Therefore, they must bring in the interested parties so those interested parties can have their day in court.

III. CONCLUSION

This Court ordered the parties to submit their positions regarding which parties are responsible for joining the necessary and indispensable parties. This issue would not exist but for Defendants' assertion of the affirmative defense of abandonment. It is without dispute that Defendants shoulder the burden of proving their affirmative defenses. The parties agree that the property owners in 4076-B are necessary and indispensable if this court rules on the abandonment issue. It logically follows that if Defendants bear the burden of proving abandonment, they bear the burden of joining the necessary and indispensable parties so those interested parties can have their day in court.