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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF MOHAVE

8 NANCY KNIGHT,
9 Plaintiff,
10 vs.

11 GLEN LUDWIG and PEARL LUDWIG, Trustees
12 of THE LUDWIG FAMILY TRUST; FAIRWAY
13 CONSTRUCTORS, INC.; MEHDI AZARMI;
14 JAMES B. ROBERTS and DONNA M.
15 ROBERTS, husband and wife; JOHN DOES 1-10;
16 JANE DOES 1-10; ABC CORPORATIONS 1-10;
17 and XYZ PARTNERSHIPS 1-10.
18 Defendants.

NO.: CV-2018-04003


**DEFENDANTS' RESPONSE
TO PLAINTIFF'S SECOND
MOTION FOR DECLARATORY
JUDGMENT FILED APRIL 12,
2019**

17 COME NOW, the Defendants, by and through their attorney, the undersigned, and
18 respectfully requests this Court to deny Plaintiff's Second Motion for Declaratory Judgment
19 filed April 12, 2019, all in accordance with the following Memorandum of Points and
20 Authorities.

21 Declaratory judgment on the issues before this Court is inappropriate, does not apply
22 and should be denied once again.

23 RESPECTFULLY SUBMITTED this 10th day of May, 2019.

24 LAW OFFICES OF DANIEL J. OEHLER

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26 Daniel J. Oehler,
27 Attorney for Defendants

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 HISTORY

3 On December 19, 2018, the Plaintiff submitted to this Court her first Motion for
4 Declaratory Judgment. The alleged issue/purpose of Plaintiff's December 19, 2018 Motion
5 requested that the Court declare that, that certain set of Covenants, Conditions and
6 Restrictions for Desert Lakes Golf Course & Estates Tract 4076-B recorded December 18,
7 1989, in the Office of the Mohave County Recorder in Book 1641, Pages 895-901, "have not
8 been abandoned..." See, Plaintiff's 12/19/2018 Motion, p. 4, line 3.5. Plaintiff further
9 alleged in her December 19, 2018 prayer for relief that the Plaintiff personally has the
10 ". . . legal right to enforce through prosecution . . ." the subject CC&Rs. See Plaintiff's
11 12/19/2018 Motion, p. 4, lines 7-9.

12 Thereafter, on January 4, 2019, Defendants collectively filed their Response advising
13 the Court, amongst other things, that the issue at hand in Count 2 of Plaintiff's underlying
14 Complaint (Count 1 having been dismissed with prejudice by the Court on June 6, 2018) has
15 been developed in the multiple prior motions that have been presented to this Court, is
16 whether or not FACTUALLY the individual provisions in the CC&Rs have been
17 continuously violated or, more globally, whether as a result of a period that exceeds 30 years
18 the subject CC&Rs have been systematically and consistently ignored and violated resulting
19 in the fact that the entirety of the CC&Rs have become unenforceable under Arizona law.
20 This is the ultimate determination to be made by this Court either via summary judgment or
21 after trial.

22 Defendants further argued in their January 4, 2019 Response that a motion for
23 declaratory judgment under the facts of this case and supported by both the Rules of Civil
24 Procedure and case law, that such a motion under the facts at bar is an abuse of process, is
25 inappropriate and that such motion should not have been filed in December 2018, or at any
26 time.

27 Thereafter, this Court, on March 8, 2019, and after the Court considered Plaintiff's
28 December 19, 2018 Motion, Defendants' January 4, 2019 Response, and Plaintiff's January

1 7, 2019 Reply, found that the “. . . declaratory judgment as requested by the Plaintiff would
2 be inappropriate at this time.” and denied the Motion.

3 Despite the recent ruling of this Court on Plaintiff’s failed December 2018 declaratory
4 judgment effort regarding Plaintiff’s request to uphold the entire set of CC&Rs for Tract
5 4076-B that were clearly found to be inappropriate and improper, the Plaintiff has,
6 nonetheless, proceeded on April 12, 2019, to file a Second Motion for Declaratory Judgment
7 this time alleging that one provision of the CC&Rs has not been abandoned, although
8 violated consistently for 30 years, yet Plaintiff alleges that the signage restriction is
9 enforceable. The difference between the first denied declaratory judgment motion to today’s
10 is simply that today’s deals with only one of the 17 restrictions.

11 Plaintiff’s current re-filing seeking declaratory judgment should be considered by the
12 Court to be an effort on the part of the Plaintiff to effectively obtain the Court’s
13 reconsideration of this Court’s Order denying the originally requested Motion for Declaratory
14 Judgment. Plaintiff’s actions in regard to this second Motion are certainly on the fringe of
15 simply requesting the same relief denied Plaintiff by this Court in its March 8, 2019 Order
16 but on a narrower point dealing with only one of the approximate 17 restrictions. Should this
17 Court upon review consider Plaintiff’s Second Motion for Declaratory Judgment effectively
18 constitutes a motion for reconsideration under A.R.C.P., Rule 7.1(e), Defendants submit to
19 the Court their apology for filing this Response. Defendants, however, are of the belief that,
20 at a minimum, a limited response is proper and permitted under the Rules of Civil Procedure.

21 As is hereinafter set forth, the Plaintiff’s current approach seems to be based on the
22 fact that, although the enforceability of the CC&Rs globally and as a whole has been
23 determined by this Court not to be the proper subject of a declaratory judgment, Plaintiff
24 seems now to argue that on a paragraph-by-paragraph basis, Plaintiff will successfully
25 accomplish Plaintiff’s objective to secure a judgment from the Court, without any evidence
26 being submitted to the Court. To do this, the Court would be required to ignore the
27 Defendants’ argument of abandonment of both the individual and collectively the entirety
28 of the set of CC&Rs. Such a position is, once again as indicated in the Defendants’ prior

1 Response to Plaintiff's First Motion for Declaratory Judgment, inappropriate, improper and
2 warrants a finding by this Court that Plaintiff should bear the fees and costs incurred by the
3 Defendants in preparation of this Response.

4 **THE LAW**

5 Defendants incorporate herein the entirety of these Defendants' January 4, 2019,
6 Response memorandum dealing with Plaintiff's unsuccessful efforts to obtain an order from
7 this Court on the basis of a Title 12 declaration of judgment.

8 For all of the reasons and in accordance with both the statutory provisions of Arizona
9 Revised Statutes Title 12 and the case law previously cited to this Court on January 4, 2019,
10 Plaintiff's current application should be denied.

11 Today, Plaintiff alleges and/or continues to allege that declaratory judgment lies
12 because she is "uncertain and insecure" with respect to her rights advising this Court in her
13 memorandum that the Court should declare that Plaintiff's position is correct (without going
14 to trial or without filing a motion for summary judgment) and that this Court should simply
15 accept the position of the Plaintiff based on Plaintiff's pleadings and enter an order that the
16 Plaintiff is right and Defendants are wrong and that "such declaration shall have the force
17 and effect of a final judgment or decree." Indeed, this is a very simple way to avoid the issue
18 in controversy. Plaintiff's rule of law is that Plaintiff is right and Defendants are wrong.
19 Ignore the facts and enter judgment for the Plaintiff is the premise of Plaintiff's argument.
20 Plaintiff's submitted photographs attached to her Motion that depict real estate signs on a lot
21 owned by the Defendants and on one or more lots owned by non-defendants that violate the
22 provisions of paragraph 12, page 4, of the subject CC&Rs that read:

23 "12. No sign, advertisement, billboard or advertising structure
24 of any kind shall be erected or allowed on any of the unimproved lots,
25 and no signs shall be erected or allowed to remain on any lots,
26 improved or otherwise, provided, however, that an owner may place on
his improved lot "For Sale" signs, "For Lease" signs or "For Rent"
signs so long as they are of reasonable dimensions."

27 are clearly in violation of this paragraph. That is not an issue. The issue is whether the sign
28 restriction violates either A.R.S. Title 33 or is otherwise unenforceable. Plaintiff simply

1 ignores the actual issue before the Court, that being, the factual determination of the validity
2 or invalidity of the restrictions.

3 Here, in Plaintiff's most recent April 12, 2019 Motion for Declaratory Judgment,
4 Plaintiff takes the position that Exhibit B to that Motion, which depicts a sign that clearly
5 complies with the legislative size limitations set forth in A.R.S. §33-441(A) but alleges that
6 the wording of the sign or sign rider or the logo of the realtor or the logo of the owner
7 somehow are not compliant with §33-441. Defendants' position is that this is a factual issue
8 for this Court to decide. Facts matter. Two fact issues are the subject matter of paragraph
9 12 of the 1989 restrictions. Issue one, and the predominant issue, is whether or not paragraph
10 12 of the CC&Rs and/or the entirety of the CC&Rs are or are not enforceable as a result of
11 the 30-year abandonment, and hundreds of signs displayed in Tract 4076-B that have
12 consistently violated paragraph 12 of those restrictions. The second factual obstacle that the
13 Plaintiff must cross is a Court determination of whether or not §33-441 in and of itself
14 generally makes illegal the majority of the paragraph 12 restrictions. The Court must decide,
15 after the facts are presented, if the words "Will Build to Suit" fall within the independent
16 protection of the statutory action that was taken by the Arizona Legislature in 2009 that
17 rendered illegal the owner use of for sale/lease on site advertising restrictions. Plaintiff
18 simply asks this Court, without the benefit of any evidence, to enter judgment in favor of the
19 Plaintiff. Facts matter. Evidence matters. Declaratory judgment does not apply.

20 As is indicated in Plaintiff's current pleadings requesting a declaratory judgment,
21 Plaintiff seems to suggest, on page 4, lines 11.5 through 19.5, that regardless of the
22 provisions of A.R.S. §33-441, and/or perhaps whether or not as a result of the consistent
23 unenforcement of any of the CC&Rs in question, that A.R.S. §33-440, allows the Plaintiff
24 to ignore the 30 years of violations of paragraph 12, allow the Plaintiff to ignore A.R.S. §33-
25 441 because Plaintiff holds a "private covenant" that delivers to Plaintiff the right to prevent
26 any signage of any type arguing that A.R.S. §33-441 does not apply to any "for sale" or any
27 signage in Tract 4076-B or Tract 4163 because Plaintiff has a "private right" or "private
28 covenant" to enforce the entirety of paragraph 12 of the restrictive covenants, therefore, the

1 Court must issue its declaratory judgment as it is a needed ruling “. . . for public safety as
2 unimproved lot signage is left unattended for years resulting from wind, rain, rust and
3 uprooting of riders whereby these signs become a hazard to persons or property over time.”
4 See, Plaintiff’s Second Motion for Declaratory Judgment 04/12/2019, p. 4, lines 14.5 through
5 18.5. Plaintiff then references the Court to her Exhibits E and F a “build to suit” sign
6 located on a lot owned by the Defendants that includes a rider which includes the name of
7 one of the Defendants’ realtors, U.S. Southwest, and the name of one of the Defendants,
8 Fairway Constructors, Inc. (Exhibit E), as well as a non-party sign lying on the ground,
9 Exhibit F.

10 It would appear, therefore, that Plaintiff suggests to this Court an entitlement to a
11 judgment by this Court against the Defendants and in favor of the Plaintiff because the
12 subject matter is a private covenant that apparently exists irregardless of (1) whether or not
13 there has or has not been an abandonment, (2) whether or not A.R.S. §33-441 applies to the
14 sign utilized by some of the Defendants, but also as a result of Plaintiff’s argument that
15 public safety is an issue regarding “unimproved lot signage” that becomes a hazard over
16 time. See, Plaintiff’s Second Motion for Declaratory Judgment 04/12/2019, p. 4, line 15.5.

17 Plaintiff’s positions on all of these issues are not proper declaratory judgment subjects,
18 issues, nor are they appropriate for consideration by this or any other Court for any of the
19 reasons set forth in Plaintiff’s pending Motion.

20 SUMMATION

21 As previously argued by these responding Defendants, no issue raised in Plaintiff’s
22 current Motion is the appropriate subject matter of a motion for declaratory judgment. This
23 matter is long past reaching a stage in which both parties seek a coercive remedy. Hundreds
24 of individual defendants exist who have not been named as parties to this action. Effectively,
25 each and every property owner in Desert Lakes Golf Course & Estates, Tract 4076-B
26 and, as a result of the original Carlisle Order, Desert Lakes Golf Course & Estates, Tract
27 4163 are required to be made parties to this action by the Plaintiff as all owners in these two
28 subdivisions rights and entitlements would be impacted. For all these reasons, this,

1 Plaintiff's Second Motion for Declaratory Judgment should be denied.

2 Plaintiff's actions, as are represented by Plaintiff's April 12, 2019 second filing for
3 declaratory judgment, should be denied and warrants an award of Defendants' attorney's fees
4 and costs. Such an award at this time is appropriate when the Court takes into consideration
5 Plaintiff's April 4, 2018 Motion for Stay of Execution, combined with Plaintiff's May 2,
6 2018 Motion for Leave to Amend Complaint for Count 2, Plaintiff's Motion to Alter or
7 Amend Orders 3 and 4 filed June 20, 2018, followed by Plaintiff's October 22, 2018 Motion
8 for Leave to Amend/Motion to Reconsider thereafter followed by Plaintiff's November 13,
9 2018 Motion for Injunctive Relief, later followed by Plaintiff's first Motion for Declaratory
10 Judgment filed December 19, 2018, followed by Plaintiff's current second Motion for
11 Declaratory Judgment filed April 12, 2019, followed by Plaintiff's April 12, 2019 pending
12 Motion for Reconsideration of the denial of Plaintiff's First Motion for Declaratory
13 Judgment, and finally by Plaintiff's pending April 26, 2019 Motion for Reconsideration of
14 the Court's June 11, 2018 Ruling Dismissing Count 1 of Plaintiff's Complaint With
15 Prejudice, which when taken collectively represent a series of filings that may well constitute
16 a violation of A.R.S. §12-3201. At a minimum, Plaintiff's conduct clearly represents
17 conduct that mandates an award of these Defendants' attorney's fees and costs incurred in
18 preparing this Response.

19 RESPECTFULLY SUBMITTED this 10 day of May, 2019.

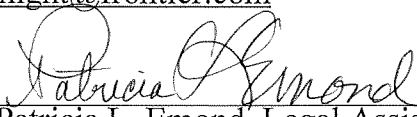
20 LAW OFFICES OF DANIEL J. OEHLER

21 
22 Daniel J. Oehler,
23 Attorney for Defendants

1 **COPY** of the foregoing emailed
2 this 10th day of May, 2019, to:

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