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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MOHAVE

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

COME NOW, the Defendants, and each of them, by and through their attorney, the undersigned, and provides this Court with its Reply to Plaintiff's Response in Opposition to Defendants' Motion to Dismiss.

The Plaintiff has no standing to complain before this Court and no legal position to argue any issue set forth in Plaintiff's Complaint against these answering Defendants. Plaintiff is not subject to nor a protected person under the Codes, Covenants and Restrictions (CC&Rs) encumbering subdivision Tract 4076-A of the Desert Lakes Golf Course & Estates. Each tract of Desert Lakes Golf Course & Estates in fact has separate CC&Rs, or as the case may be regarding the Plaintiff's residence in subdivision Tract 4163, no CC&Rs at all dealing with any issue complained of in Plaintiff's Complaint. Various tracts were subdivided by different subdividers and different

developers. Tract 4163, the subdivision in which the Plaintiff is an owner, has no recorded CC&Rs encumbering that particular project. See **Exhibits G, H, I, J, K, L and M** attached hereto and made a part hereof as if fully set forth herein. Desert Lakes Golf Course & Estates is not and was never a master planned community and no master set of codes, covenants and restrictions has ever been recorded by any subdivision developer with a master set of CC&Rs. Each tract or subdivision was an independent, stand alone subdivision either with its independent CC&Rs or no CC&Rs.

Having no interest, no entitlements, no benefits and no rights whatsoever to the Tract 4076-A subdivision, the Plaintiff has no standing to argue any alleged violations of the 4076-A subdivision CC&Rs. It appears that Plaintiff has perhaps confused miscellaneous reports that individual subdividers and developers over the years have, from time to time, submitted to the Arizona Department of Real Estate. Plaintiff appears to be of the mistaken belief that the Arizona Department of Real Estate or reports submitted thereto somehow create title impediments or entitlements. Plaintiff's beliefs in that respect are not supported by any law, ordinance, recorded covenants, restrictions or authorities and none have been submitted by Plaintiff in response to Defendants' pending Motion to Dismiss. Defendants' Motion should be granted and Defendants' attorney's fees assessed in their entirety against Plaintiff all in accordance with the response previously filed herein and the Memorandum of Points and Authorities hereinafter set forth.

RESPECTFULLY SUBMITTED this 1st day of March, 2018.

LAW OFFICES OF DANIEL J. OEHLER

Daniel J. Oehler,
Attorney for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

Let there be no confusion whatsoever in regard to the Defendants' entitlement to their pending Motion to Dismiss. Plaintiff's Complaint concerns a single lot within the Desert Lakes Golf Course & Estates subdivision known as Tract 4076-A. A developer in the late 1980s subdivided and developed the 4076-A subdivision and recorded CC&Rs exclusive to that subdivision. Plaintiff complains that she has been harmed by the conduct of the Defendants, despite

the fact that the Plaintiff does not own any land within the subdivision. Plaintiff is a total stranger to the subdivision and the lot therein which is the subject matter of Plaintiff's Complaint.

Plaintiff correctly sets forth on page 9 of her Response the cite previously delivered in the original Motion to Dismiss out of the subdivision Tract 4076-A CC&Rs in paragraph 19, that "any person or persons owning property located within the subdivision to prosecute proceedings at law or in equity against all persons violating ... such covenants ..." The problem, of course, is that the Plaintiff is not "any person... owning property located in the subdivision..." The homeowners association mentioned in the CC&Rs was never created. The Plaintiff is not a person that owns any lot within the 4076-A subdivision. Plaintiff has no standing pursuant to the CC&Rs to bring any action or contest any activity within the 4076-A subdivision. There is no privity between Plaintiff and the Tract 4076-A subdivision owners. Plaintiff seems to confuse, once again, Arizona Department of Real Estate reports as representing title impediments or encumbrances. Plaintiff cites no authority and there is no authority showing privity of contract/standing on the part of the Plaintiff to enforce Tract 4076-A CC&Rs.

Plaintiff appears to be arguing that subdivision 4076-A is some sort of planned community that includes multiple other separately subdivided properties and that Plaintiff therefore can prosecute alleged violations that have allegedly occurred throughout the six-plus individual subdivisions in the general area where she resides. Plaintiff's belief is flatly in error. Subdivision Tract 4076-A is not part of any "planned community" as defined under the provisions of A.R.S. §33-1802(4):

> "4. "Planned community" means a real estate development that includes real estate owned and operated by or real estate on which an easement to maintain roadways or a covenant to maintain roadways is held by a nonprofit corporation or unincorporated association of owners, that is created for the purpose of managing, maintaining or improving the property and in which the owners of separately owned lots, parcels or units are mandatory members and are required to pay assessments to the association for these purposes. Planned community does not include a timeshare plan or a timeshare association that is governed by chapter 20 of this title or a condominium that is governed by chapter 9 of this title."

Subdivision Tract 4076-A has its sole and separate CC&Rs. Each subsequent subdivision in the area owned and developed by at least four different owner/subdividers included their sole and

separate CC&Rs, excepting only subdivision Tract 4163 where the Plaintiff is an owner that has no CC&Rs. See **Exhibits G through M**, inclusive. These multiple separate properties developed over an approximate 18-year period are separate entities without any homeowner association ever being formed and without any common property, without mandatory membership, without any management, without any maintenance requirements and without any assessments.

Plaintiff apparently confuses the fact that a second and distinct subdivision 4076-B was created by the subdivider/developers in Desert Lakes Golf Course & Estates, that included an unimproved "parcel" known as "Parcel VV" (see **Exhibit H**, p. 3). "Parcel VV" about 18 years later and after mesne sales of the parcel, ultimately was re-subdivided by T&M Ranching & Development, LLC, ("T&M"). An examination of the CC&Rs covering the subdivision known as Tract 4076-B specifically outlined the various lots that were subject to setback requirements in this individual subdivision. The Court will note that "Parcel VV" was not a "lot" but rather a "parcel" to which no setbacks of any type were included in the 4076-B CC&Rs. See **Exhibit F** (Motion to Dismiss). Rather, the land upon which Plaintiff resides and that was 18 years later developed by a completely different owner subdivider, namely, T&M Ranching & Development, LLC, has never been subject to any CC&Rs setback requirements of any type. See also **Exhibit N** attached hereto and made a part hereof as if set forth in full herein. "Parcel VV" of subdivision known as Tract 4076-B was originally designated in the 4076-B tract to be developed and re-subdivided at some point in the future as a "multi-family tract" (see **Exhibit H**, p. 3, the plat map of this subdivision) and was excluded from the setback paragraphs in the Tract 4076-B CC&Rs. See **Exhibit F** of Defendants' Motion to Dismiss, ¶6.

Plaintiff has graciously attached as Exhibit 1 to her Response the Arizona Department of Real Estate Public Report for Tract 4163 developed or re-subdivided by T&M. The Public Report is dated February 5, 2003. The Public Report is a document prepared by the subdivider and submitted to the State of Arizona Department of Real Estate. It is not a recorded covenant. Standard Department of Real Estate language appears on page 6 of the Public Report prepared by T&M. Amongst other things, it indicates that "conditions, reservations and restrictions that may run with the land including city and county zoning restrictions should be investigated by you." It further

indicates that "restrictions are recorded as cited in the following title exceptions and per the subdivision plat." Attached is a copy of the subdivision plat (**Exhibit M**). No restrictions are cited thereon. No restrictions were recorded with Tract 4163 and Plaintiff clearly has not submitted any documentation whatsoever indicating that Tract 4163 has recorded restrictions or covenants of any type. Plaintiff has not provided any legal basis for her standing to complaint about subdivision Tract 4076-A

What the Public Report prepared by the subdivider and sent to the State of Arizona states on page 7 is that there is no property owners association. When asked to identify if there are any assessments for the property owners association, the subdivider clearly states: "None." Having reported that there is no property owners association, the balance of the standard Department language is irrelevant - with no association, there can be no payments due, no assessments and indeed there never has been. This language is a boilerplate part of the Public Report despite the fact that there is no property owners association. Similarly, the last paragraph on page 8 of the Public Report advises a future owner that they are to read the recorded declaration of covenants, conditions and restrictions, articles of incorporation for the non-existent homeowners association for this subdivision to determine the prospective purchaser's rights. There are, of course, no restrictions, no articles of incorporation, no homeowners association, not in 2003 when T&M created the subdivision nor ever thereafter.

FACT CONCLUSION

The Defendants are current and/or former property owners of "Lot 2, Block H, of the Desert Lakes Golf Course & Estates, subdivision Tract No. 4076-A, according to the plat of record in the office of the County Recorder of Mohave County, Arizona, recorded June 2, 1989, at Fee No. 89-26061." This is the single lot that is the subject matter of Plaintiff's Complaint. The Plaintiff owns a residence on two lots in a separate subdivision developed and subdivided 18 years later by a different property owner and different subdivider, namely, "Lots 8 and 9, of Desert Lakes Golf Course and Estates Unit 'E', subdivision Tract No. 4163, according to the plat thereof, recorded September 13, 2001 at Fee No. 2002-62000, in the Office of the County Recorder of Mohave County, Arizona."

In 1989, an owner subdivider created a subdivision known as Desert Lakes Golf Course & Estates Tract 4076-A. Simultaneous with recording the subdivision plat, the owner subdivider caused to be prepared and recorded a set of CC&Rs exclusive to subdivision Tract 4076-A.

Thereafter, the same owner subdivider recorded subdivision Tract 4076-B. Simultaneous with the recordation of subdivision 4076-B, the owner subdivider caused to be prepared and recorded a set of CC&Rs exclusive to subdivision Tract 4076-B.

Thereafter, between 1990 and 2002, multiple different owner subdividers recorded additional subdivisions utilizing the name Desert Lakes Golf Course & Estates. Each and every subdivision, excepting only one, upon its plat recordation in the office of the Mohave County Recorder simultaneously caused to be recorded a separate and exclusive set of CC&Rs, each of which were exclusive to the subdivision plat they were then developing. The single exception to this procedure occurred in 2002 when an owner by the name of T&M Ranching & Development, LLC, re-subdivided "Parcel VV" that was originally within subdivision Tract 4076-B. The re-subdivision of this original B-tract parcel did not include any CC&Rs attributable to subdivision Tract 4163. Although the lands that were re-subdivided in Tract 4163 were originally a parcel within subdivision Tract 4076-B, the CC&Rs attributable to Tract 4076-B did not include any front, rear or side setback requirements or limitations that applied to Parcel VV, and, thereafter, there have never been any CC&Rs setting forth minimum front, side or rear setback limitations for the lots created by T&M Ranching & Development, LLC, for its subdivision known as Tract 4163.

The identical fact analysis applies to Plaintiff's allegations concerning signage that has been alleged by Plaintiff against the Defendants occurring in subdivision 4076-A.

Plaintiff is not a lot owner and has no incidents of ownership of any type or nature to any lands located in subdivision Tract 4076-A, nor does the Plaintiff own any lot within the subdivision known as Tract 4076-B. Plaint iff has no standing to initiate or litigate any alleged voilation by any lot owner in her distant neighbor's subdivision as is shown in the original Motion to Dismiss previously filed herein and as is further set forth hereinafter.

THE LAW

There are a multitude of cases from multiple jurisdictions that clearly identify the rule dealing

with the issue of who may enforce restrictive covenants against a property owner. The general rule is that in a situation where property is developed in multiple tracts or sections at different times and each tract is specifically covered with its individual CC&Rs, the subject CC&Rs apply only to the lots within the individual subdivision. In this type of situation which is clearly that which is before the Court, the owner of a lot in one separate subdivision or one tract is not in a position and cannot enforce CC&Rs that apply to a lot in another subdivision. See Morengo Hills, Inc. v. Watson, 368 So. 2d 856 (Ala., 1979). As stated by the Supreme Court of Alabama in Morenga Hills, Inc., supra:

> "We recognize the general rule that where a subdivision is developed in sections and each section is platted and recorded at different times, restrictive covenants for each particular section apply only to lots within that section. Therefor, the owner of a lot in one section cannot enforce restrictive covenants applicable to a lot in another section of the same subdivision. Lillard v. Jet Homes, Inc., 129 So.2d 109 (La.Ct. Of App. 1961).
>
> This general rule appears to have developed in situations where a property owner in one subdivision attempted to enforce restrictive covenants against a property owner in another subdivision. Craven County v. First Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E. 2d 620 (1953); Rooney v. Peoples Bank of Arapahoe County, 32 Colo.App. 178, 513 P.2d 1077 (1973); Nelson v. Flache, 487 S.W.2d 843 (Tex.Civ.App.1972); Reid v. Standard Oil Co., 107 Ga.App. 497, 130 S.E.2d 777 (1963); Lillard, supra." Morengo, supra, at pp. 857, 858.

The same principle has been developed in a multitude of other jurisdictions. An example similar to the Morengo Hills, Inc., supra, decision is found in the Kuchler v. Mark II Homeowners Ass'n, Inc., 412 N.E.2d 298 (Ind.App. 1 Dist., 1980), where the Indiana Appellate Court in a similar situation found:

> "We note that it has been held that where the grantor's entire tract of land is developed in separate sections and not as a single unit, there is no general plan or scheme which would permit owners in all the subdivisions to enforce restrictive covenants against each other. Rooney v. Peoples Bank of Arapahoe County, (1973) 32 Colo.App. 178, 182, 513 P.2d 1077, 1080 (and cases cited therein)." Id., at p. 300.

Subsequently, the Court of Appeals of the State of Indiana in King v. Ebrens, 804 N.E.2d 821 (Ind. App., 2004), has addressed a situation almost identical to that which is before this Court. The King, supra, court dealt with an original single parcel of land owned by an original grantor. The grantor or subdivider, if you would, imposed certain restrictions on several lots that the grantor sold

and, subsequently, the grantor out of the same plot of ground actually developed a multi-lot platted subdivision. The homeowners association in the subdivision asserted that the association had standing to enforce the neighboring properties' covenants and restrictions which were substantially identical to those in the platted subdivision. It was uncontested that the restrictions were similar if not identical. The adjoining lot owners took the position that the homeowners association lacked standing because the homeowners association (those attempting to enforce the restriction) did not own any of the adjoining lots.

The King, supra, court found that, because the homeowners attempting to enforce the restrictions did not own any lot within the tract of land, they did not have standing. The King, supra, court also addressed the issue of common scheme or plan of development. There, those owners attempting to enforce covenants and restrictions against the neighboring property were not allowed to do so, the court finding that:

> "... there is no general scheme or plan of development where different developers platted separate subdivisions and although at one time there was an entire tract of land, but it was developed in separate sections or subdivisions and not as a single unit, there is no general plan or scheme which would permit owners in all of the subdivisions to enforce restrictive covenants against each other." Id., at p. 829.

See also, Rooney v. Peoples Bank of Arapahoe County, 32 Colo.App. 178, 513 P.2d 1077 (1973). More specifically, the Rooney, supra, decision out of Colorado deals with an almost identical fact pattern underlying the issue before our Court. The Rooney, supra, decision, in discussing the common scheme or plan rule, found as follows:

> "[The common scheme or plan] rule is applicable to owners of lots within Range View Subdivision. It appears from the plat of the subdivision, and from the restrictive covenants applicable to the lots in this plat, that Range View Subdivision was developed under a general plan or scheme. However, the rule does not authorize owners of lots in subsequently platted subdivisions to enforce the covenants with regard to lots in other subdivisions unless all five subdivisions were developed as a part of a general plan or scheme for the development of the entire area.
>
> The five subdivisions were developed as separate and distinct units. A separate plat was filed for each subdivision. The tract was not developed as a single contemporaneous unit. In similar factual situations, courts of other jurisdictions have held that where the grantor's entire tract of land is developed in separate sections and not

as a single unit, there is no general plan or scheme which would permit owners in all the subdivisions to enforce restrictive covenants against each other." Id., at 1080.

ATTORNEY'S FEES

Defendants request an award of their attorney fees incurred. Plaintiff brings her action alleging a contract right to do so flowing out of paragraph 19 of the subdivision Tract 4076-A CC&Rs (Exhibit E to Defendants' Motion to Dismiss) or, in the alternative, out of similar language found in the CC&Rs of a neighboring subdivision, Tract 4076-B, in paragraph 20 (see Exhibit F to Defendants' Motion to Dismiss), that allows the successful party to recover attorney fees. Plaintiff further requests and alleges recovery of attorney fees pursuant to A.R.S. §12-349. Defendants also claim their entitlement to attorney fees and costs pursuant to the provisions of A.R.S. §§12-349.01 and as previously set forth in their Motion to Dismiss. See, Vicari v. Lake Havasu City, 222 Ariz. 218, 213 Pl3d 367, 373 (App. 2009); Baker v. Baker Ariz.App. 1995, 900 P.2d 764, 767.

CONCLUSION

The Plaintiff is not an owner within the subdivision known as Tract 4076-A and has no standing to seek injunctive or other relief of any type against the Defendants.

RESPECTFULLY SUBMITTED this 1 day of March, 2018.

LAW OFFICES OF DANIEL J. OEHLER

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COPY of the foregoing emailed this 3rd day of March, 2018, to:

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Exhibits to Motion to Dismiss

Exhibit	Description
A	Special Warranty Deed to Knight
B	Warranty Deed to Ludwig
C	Joint Tenancy Deed to Roberts
D	Chicago Title confirmation no CC&Rs Unit E Tract 4163
E	CC&Rs Tract 4076-A
F	CC&Rs Tract 4076-B

Exhibits to Reply to Response to Motion to Dismiss

Exhibit	Description
G	1989 - Final Plat Tract 4076-A
H	1989 - Final Plat Tract 4076-B
I	1990 - Final Plat Tract 4076-C
J	1990 - Final Plat Tract 4076-D
K	1997 - Final Plat Unit F Tract 4132
L	2000 - Final Plat Unit H Tract 4159
M	2002 - Final Plat Unit E Tract 4163
N	2002 - Allen G. Robberson Plat Unit E Tract 4163 recorded 9/13/2002