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DEPUTY

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

**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

**IN AND FOR THE COUNTY OF MOHAVE**

NANCY KNIGHT,

Plaintiff,

vs.

GLEN LUDWIG and PEARL LUDWIG, Trustees of THE LUDWIG FAMILY TRUST; FAIRWAY CONSTRUCTORS, INC.; MEHDI AZARMI; JAMES B. ROBERTS and DONNA M. ROBERTS, husband and wife; JOHN DOES 1-10; JANE DOES 1-10; ABC CORPORATIONS 1-10; and XYZ PARTNERSHIPS 1-10.

Defendants.

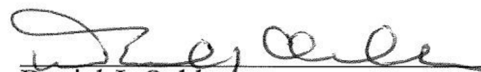
NO.: CV-2018-04003

**OBJECTION TO PLAINTIFF'S MOTION TO AMEND COUNT 2 OF HER COMPLAINT**

COME NOW, the Defendants, by and through their attorney, the undersigned, and object to Plaintiff's Motion to Amend Count 2 of Plaintiff's Complaint. This Objection is supported by the attached Memorandum of Points and Authorities and is filed in accordance with the provisions of the Arizona Rules of Civil Procedure, Rules, 8, 9, 12 and 15.

RESPECTFULLY SUBMITTED this 14 day of May, 2018.

LAW OFFICES OF DANIEL J. OEHLER



Daniel J. Oehler
Attorney for Defendants

## MEMORANDUM OF POINTS AND AUTHORITIES

Rule 15 of the Arizona Rules of Civil Procedure (A.R.C.P.), and more specifically, Rule 15(a)(2) applies to the matter before the Court. Previously, this Court has considered Defendants' Motion to Dismiss. The basis of the dismissal application has been briefed by both sides and the Court has heard oral arguments ruling, as a matter of law, that the Motion to Dismiss was appropriately considered by the Court as a motion for summary judgment. The Court announced its decision granting Defendants' requested dismissal on a summary judgment basis in open court as to Count 1 of Plaintiff's Complaint and there are currently pending before this Court requested forms of final order.

Under the applicable rules, a motion to amend the remaining Count 2 of Plaintiff's original Complaint can be initiated and Count 2 can be amended only after consideration by the Court and at the discretion of the Court (see, A.R.C.P., Rule 15(a)(2)).

This Court's verbal decision being issued immediately subsequent to the conclusion of oral arguments on the Defendant's then pending Motion to Dismiss, disposed summarily Count 1 of Plaintiff's Complaint. Count 1 alleged that certain of the Defendants had initiated a request before the Mohave County Planning Commission to amend certain setback requirements throughout the various separate subdivisions that were independently and separately created by different developers, each of which, with one exception, ultimately recorded separate CC&Rs and each of which were assigned and given separate tract numbers, although, collectively, all of the subject separate subdivisions utilized in part the name "Desert Lakes Golf Course & Estates."

Count 1 of Plaintiff's Complaint alleged CC&R violations, specifically, setback requirement violations on a specific lot owned and occupied by the Roberts Defendants. The Roberts Defendants' residence is located within Tract 4076-A.

In Plaintiff's prayer for relief regarding the alleged set back violations that purportedly occurred at 5732 Club House Drive, a Tract 4076-A lot that the portion of the Roberts' home be removed. The Court found on April 2, 2018, that on the basis of standing, the Plaintiff did not have standing to litigate Tract 4076-A alleged violations or purported violations, and therefore has dismissed Count 1 of Plaintiff's Complaint.

Plaintiff, at that point, as a result of the Court's finding that Plaintiff, who resides in Tract 4163, which is a "resubdivided" parcel of Tract 4076-B does have potential standing to argue purported signage violations and is in a position to attempt compliance with the Tract 4076-B CC&Rs that permit a person who owns property within Tract 4076-B to individually or personally enforce the CC&Rs of that subdivision. Plaintiff, of course, does not reside in Tract 4076-B, but rather Tract 4163, which, again, is a resubdivision of a portion of Tract 4076-B. In any event, Count 2 of Plaintiff's Complaint is, as of this writing, the only existing Count that is before this Court and is, therefore, the single remaining basis for any potential amendment and any such amendment is fully within the discretion of this Court. Count 2 requests injunctive relief (see page 16, line 11 of Plaintiff's original Complaint). It requests at paragraph 61 "preliminary and permanent injunctions enjoining the Defendants from all current signage violations on unimproved lots." Plaintiff's Complaint further, in paragraph 62, requests "preliminary and permanent injunctions enjoining Defendants from any existing or future violations of CC&Rs including but not limited to setback reductions and signage on unimproved lots." Although original Count 2 does not specify <u>any</u> specific existing setback violation in Tract 4076-B and of course an injunction against future hypothetical events is not actionable. Plaintiff requests in paragraph 63 that:

> "Plaintiff is entitled to reasonable monetary compensation that does not exceed the jurisdictional limit of the Court including but not limited to filing fees, compensation for hours of research, emails, letters and postage, and physical and emotional distress from the battle to protect her Desert Lakes Community from CC&R violations the amount found due by a jury herein or found due by judgment of the court."

Count 2 of the original Complaint is the remaining count before this Court and specifically the count and only count that is or can be subject matter of Plaintiff's requested amendment. In Plaintiff's Complaint, her request for relief dealing exclusively with Count 2 allegations asked for "an injunction immediately and permanently removing all signage on unimproved lots that is in violation of Desert Lakes Golf Course & Estates CC&Rs." Plaintiff's proposed amendment, then, must be limited to those requested injunctions applying exclusively to Tract 4076-B, although, there are no specifically alleged violations identifying any party to the Complaint. Plaintiff goes on to request a recovery for her actual and consequential damages. Plaintiff further requests

"compensation" scheme proposing to deliver dollars to all property owners. Next, Plaintiff asks for a declaratory judgment with the Court forgiving CC&R construction violations for an unknown class of owners apparently to be forgiven by this Court once the Court determines that the subject owners had "... unknowingly purchased a home that had been built, in error or deliberately, by any builder, as out of compliance with the CC&Rs." Finally, Plaintiff asks for her attorney's fees and costs, although Plaintiff is a "pro per" complainant, is not an attorney and is not therefore eligible to be awarded attorney's fees for the actions she has undertaken.

With the above in view, we then look at the proposed amendment that is captioned "Breach of Contract - Violations of Covenants, Conditions and Restrictions," the same being attached to the Plaintiff's Motion to Amend.

## CLAIM PRECLUSION

First of all, we must address the issue of claim preclusion. This Court has previously, on the basis of its summary judgment holding, that Plaintiff is precluded from pursuing the cause of action against the Roberts and any alleged Tract 4076-A violations which are the only setback violations set forth in the original Complaint or the proposed Amended Complaint. It is unquestioned that a party may amend their pleadings only at the discretion of the court and after and if the court grants leave to allow such an amendment. Rule 15, A.R.C.P. It is further unquestioned that amendments are to be allowed liberally. See, MacCollum v. Perkinson, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996). This same Court of Appeals case states, however, that an amendment should not be granted in a situation where the court finds that the requested amendment results in undue delay in the request, bad faith, undue prejudice, or futility in the amendment. See, MacCollum v. Perkinson, 185 Ariz. at 185, 913 P.2d at 1103.

The issue of claim preclusion is briefly but succinctly addressed in several Arizona cases, including Tumacacori Mission Land Development, Ltd. v. Union Pacific Railroad Co., 231 Ariz. 517, 297 P.3d 923, 653 Ariz. Adv. Rep. 21 (Ariz. App. 2013), wherein the Arizona Court of Appeals, Division 2, Department B, as recently as 2013, states:

> "The doctrine of claim preclusion, or res judicata, bars a claim 'when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue between the same

> parties or their privities was, or might have been determined in the former action.' Hall v. Lalli, 194 Ariz. 54, ¶7, 977 P.2d 776, 779 (1999); see also, Aldrich & Steinberger v. Martin, 172 Ariz. 445, 448, 837 P.2d 1180, 1183 (App. 1992)." Tumacacori, supra, at p. 925.

The Tumacacori, supra, court went on to quote Airfreight Exp. Ltd. v. Evergreen Air Ctr., Inc., 215 Ariz. 103, ¶12, 158 P.3d 232, 237 (App. 2007), quoting Dressler v. Morrison, 212 Ariz. 279, ¶15, 130 P.3d 978, 981 (2006):

> "A single claim cannot be 'split,' and 'includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.' Heinig v. Hudman, 177 Ariz. 66, 865 P.2d 110, 115 (App. 1993), quoting Restatement (Second) of Judgments §254 (1982). 'Transaction' is interpreted pragmatically by considering whether the underlying facts are 'related in time, space, origin, or motivation,' and whether the parties would expect them to be treated as a unit for trial. Restatement §24." Tumacacori, supra, at p. 926.

In the Tumacacori, supra, court's conclusion dealing with this issue, the court found that in a situation where it found that:

> "... it would have been futile to permit Tumacacori to amend its complaint. Therefore, the court did not abuse its discretion by denying the motion to amend." Tumacacori, supra, at p. 926.

Practically speaking, we have the identical issue currently before the Court. Plaintiff is attempting to draw into her original Count 2 through her proposed amendment many of the same allegations that have been dealt with on the issue of front yard setback of the Roberts' home located at 5732 S. Club House Drive, Tract 4076-A, now pulling it back into Count 2 as she attempts to do in Plaintiff's new paragraphs 21, 26, 43, 48, 54 and 58 of Plaintiff's proposed Amended Complaint.

**FUTILITY**

A review of Plaintiff's prayer for relief set forth on pages 21 and 22 of the proposed Amended Complaint are not matters of relief that can nor will they be entered in Plaintiff's favor by this Court. First of all, Plaintiff is looking for a judgment from the Court alleging "attempts" on the part of undesignated defendants to violate the Declaration of Covenants, Conditions and Restrictions in Tract 4076-B. Plaintiff is looking for a recovery of "actual and consequential damages" being awarded to herself "for her efforts in the battle against the attempted violations of setback reductions

in Tract 4076-B." Plaintiff is apparently looking to initiate a class action on behalf of, as she describes, "all property owners for diminished value to be determined by the court or at time of trial due to the taking of front and/or rear views as a result of defendant's construction that violated the CC&Rs of Desert Lakes in Tract 4076-B." Plaintiff has fully failed to initiate and take such steps as are required under and pursuant to the provisions of Rule 23, A.R.C.P., in establishing class action litigation and processing certification orders as are required under the pursuant to Rule 23. Similarly, Plaintiff, of course, is not a licensed attorney and not in a position to initiate class actions on behalf of any property owner other than herself and on behalf of lots that are in Tract 4076-B per this Court's April 2, 2018, orders finding that the Plaintiff is a 4076-B lot owner.

Plaintiff alleges and seeks a judgment against the Defendants in the amount of $12,500.00 for and on behalf of the "Mohave County Development Services General Fund." See, proposed Amended Complaint, Prayer for Relief (I), p. 22, line 15. Each of these requests are "futile" efforts on the part of the Plaintiff, as the term "futile" is interpreted by a multitude of Arizona decisions discussed below. Attached hereto as **Exhibit A** is a copy of a letter from the Chief Civil Deputy of the County of Mohave which advises this Court and the world that Mrs. Knight, the Plaintiff in this cause of action, does not, cannot, did not and will not represent Mohave County or any branch of Mohave County in this or any action.

Plaintiff's requests are "futile" and represent "futility" which in and of itself is an appropriate basis for this Court to deny Plaintiff's Motion for Leave to Amend. As stated in Timmons v. Ross Dress for Less, Inc., 234 Ariz. 569, 572, ¶17, 324 P.3d 855, 858 (App. 2014), where the Court of Appeals found:

> "Motions to amend should be granted unless the court finds specific cause, such as futility, to deny the amendment." Id.

Indeed, Plaintiff's requests for relief and demands for judgment are futile and beyond that which the Court, under any circumstance, can legally grant. In addressing these issues, the Arizona Court of Appeals, as recently as 2017, in Twin City Fire Ins. Co. v. Leija, 403 P.3d 587 (Ariz. App. 2017), not only cited Timmons, supra, but also found that the superior court did not abuse its discretion in denying a motion to amend in stating:

> "Although mere delay may not justify denial of leave to amend, '[n]otice and substantial prejudice to the opposing party are critical factors in determining whether an amendment should be granted.' Owen v. Superior Court, 133 Ariz. 75, 79, 649 P.2d 278, 282 (1982) (quoting Hageman v. Signal L.P. Gas, Inc., 486 F.2d 479, 484 (6th Cir. 1973)). '[P]rejudice is 'the inconvenience and delay suffered when the amendment raises new issues or new parties into the litigation.' Spitz v. Bache & Co., Inc., 122 Ariz. 530, 531, 596 P.2d 365, 366 (1979) (quoting Romo v. Reyes, 26 Ariz.App. 374, 376, 548 P.2d 1186 (1976)." Twin City Fire Ins. Co., supra, at p. 595.

Clearly, new issues are being raised by the Plaintiff in her proposed Amended Complaint and beyond these new issues, each of which represent futile efforts on the part of the Plaintiff. Plaintiff's proposed amendments should not be allowed where they are but a futile gesture. As stated by Walls v. Arizona Department of Public Safety, 170 Ariz. 591, 826 P.2d 1217 (Ariz. App., 1991), the Arizona Court of Appeals in dealing with a previously entered summary judgment followed by a request to amend the pleadings, the Court found:

> "On this same issue, the court in Eria v. Texas Eastern Transmission Corp., 377 F.Supp. 344, 345 (E.D.N.Y. 1974), stated as follows: 'While it is true that leave to amend a pleading is usually freely given, ... if the amended pleading could be defeated by a motion for summary judgment, [the court's] grant[ing] [of] leave to amend would be a futile gesture.' Therefore, the trial court did not abuse its discretion in denying Walls' leave to amend his complaint." Walls, supra, at p. 1223.

Class action efforts cannot be pursued by non-lawyer pro per complainants. Plaintiff does not represent Mohave County, a body politic. Plaintiff is not entitled to recover attorney's fees for her "pro per" legal practice.

**CONCLUSION**

Plaintiff has not alleged a single specific allegation dealing with setback issues that have occurred in Tract 4076-B by any Defendant herein. The setback issue that was set forth in Plaintiff's original Complaint existed in Count 1. Count 1 has been dismissed by this Court. There is nothing to amend in regard to Count 1. Plaintiff's efforts to bootstrap her way back into nonspecific possible alleged future setback violations in Tract 4076-B is not a litigable issue. One cannot, for instance, in clear and black and white language, prosecute a defendant for a possible future civil wrong on the basis that the speculative alleged future civil contract violation might at some unknown future date

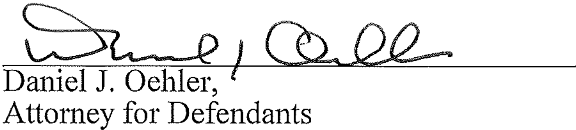
come about. Effectively, Plaintiff is alleging throughout the majority of her proposed Amended Complaint that some or perhaps all of the Defendants might violate at some unknown date in the future a CC&R setback requirement. Such a claim is futile and not actionable. We cannot prosecute one for a possible civil wrong that has not occurred.

At the conclusion of the summary judgment hearing, Plaintiff was left with a potential ability to prosecute alleged code violations by the named Defendants as to signage violations, if any, that may have occurred in Tract 4076-B, exclusively. Any effort on the part of Plaintiff to process a class action suit on behalf of all owners in the Desert Lakes community is futile. Plaintiff is not eligible to initiate and has not properly initiated a Rule 23 class action litigation. Plaintiff does not represent Mohave County and cannot prosecute an action on behalf of a third party even if Plaintiff were a licensed attorney unless or until Plaintiff was retained by Mohave County to do so. Even then, Plaintiff's cause of action seeking reimbursement for expenses incurred by Mohave County's compliance with the County's notification requirements as set forth in Mohave County's ordinances does not represent an actionable wrong. One cannot successfully acquire a judgment for the benefit of Mohave County on the basis that Mohave County incurred expenses required by Mohave County to comply with Mohave County's own ordinance, namely, the notification and processing requirements as set forth in the County Planning Commission application process. Plaintiff's requests in her Amended Complaint and Plaintiff's allegations therein set forth are either "issue precluded" as to the Roberts and the Roberts' home and are "futile, all in accordance with the decisions cited hereinabove. Plaintiff's request to amend her Complaint should be denied.

Defendants are entitled to and should be awarded, in accordance with the provisions of A.R.S. §12-341.01 and A.R.S. §12-349, as well as the provisions of A.R.S. §12-3201, their actual attorney's fees and costs incurred in preparing this Objection.

RESPECTFULLY SUBMITTED this 11 day of May, 2018.

LAW OFFICES OF DANIEL J. OEHLER



Daniel J. Oehler,
Attorney for Defendants

1 **COPY** of the foregoing emailed
this 14th day of May, 2018, to:
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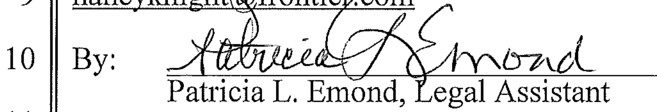

10 By: Patricia L. Emond, Legal Assistant

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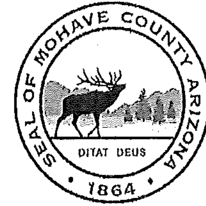
**Knight v. Ludwig, et al.**
**Mohave County Superior Court**
**Docket No. CV-2018-04003**

# EXHIBIT A

# MOHAVE COUNTY ATTORNEY

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May 4, 2018

Daniel J. Oehler
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Re: Reply to May 3, 2018 letter regarding: Knight v. Fairway Constructors, Inc. et al., Mohave County Superior Court, Docket No. CV-2018-04003

Dear Dan:

I am in receipt of the above referenced letter. Thank you for bringing this issue to our attention. Please be advised that (1) Mrs. Knight is not authorized to bring a claim of restitution on behalf of Mohave County for the allegations contained in lawsuit CV-2018-04003, (2) Mrs. Knight has never received authorization to seek damages in this lawsuit on behalf of Mohave County, (3) Mrs. Knight is not employed by Mohave County and she does not have Mohave County's authority to speak on its behalf, (4) Mrs. Knight is not a Deputy Mohave County Attorney, and (5) the Mohave County Board of Supervisors has not hired Mrs. Knight to represent them in this or any other matter.

The County is not a party to this action. Mohave County strives to treat all persons fairly and equally, and it is not the County's intent to join lawsuits that involve private, non-county disputes.

Feel free to contact if you have additional questions or concerns. Have a good day,

Sincerely,

Ryan H. Esplin
Deputy Mohave County Attorney

copy: Tim Walsh, Christine Ballard