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JEANNE HICKS, Clerk  
BY [Signature] Deputy

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7 Attorneys for Plaintiffs

8 **IN THE SUPERIOR COURT OF ARIZONA**  
9 **COUNTY OF YAVAPAI**

10 **JOHN B. CUNDIFF and BARBARA C. )**  
11 **CUNDIFF, husband and wife; BECKY NASH, )**  
12 **a married woman dealing with her separate )**  
13 **property; KENNETH PAGE and KATHRYN )**  
14 **PAGE, as Trustee of the Kenneth Page and )**  
15 **Kathryn Page Trust, )**  
16 **Plaintiffs, )**  
17 **vs. )**  
18 **DONALD COX and CATHERINE COX, )**  
19 **husband and wife, )**  
20 **Defendants. )**

Case No. [REDACTED]  
Division 1 ✓

**PLAINTIFFS' MOTION**  
**IN LIMINE**  
**TO PRECLUDE DEFENDANTS'**  
**INTRODUCTION OF LAY WITNESS**  
**OPINION TESTIMONY**  
  
(Oral Argument Requested)

21 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and  
22 through undersigned counsel, hereby moves this Court for its order precluding Defendants from  
23 introducing into evidence lay witness opinion testimony on an ultimate issue of fact in this case.

24 This motion is supported by the following memorandum of points and authorities, attached  
25 exhibit, as well as the entire record in this proceeding.

26 RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of September, 2004.

FAVOUR MOORE & WILHELMSSEN, P.A.

By: [Signature]  
David K. Wilhelmsen  
Marguerite Kirk

**DIV. 1**  
**SEP 13 2004**

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Statement of Case**

3 This case involves Defendants Cox's use of their property as a commercial or business  
4 enterprise and other violations of the recorded Declaration of Restrictions. *Cundiff, et al. v. Cox, First*  
5 *Amended Complaint, CV 2003-0399, March 18, 2004.* Plaintiffs are neighboring landowners who are  
6 also subject to the June 13, 1974 Declaration of Restrictions that apply to Defendants' land. *Id.*  
7 Defendants have raised the affirmative defenses of waiver, estoppel and abandonment of the covenants  
8 and restrictions. *Cundiff, et al. v. Cox, Answer to First Amended Complaint, May 21, 2004 at ¶24, p.3.*

9 Defendants have taken the position that other landowners in the area are also in violation of  
10 the recorded Declaration of Restrictions, including but not limited to the prohibition against  
11 commercial activity, and that these violations constitute an abandonment of the covenants and  
12 restrictions. *Cundiff, et al. v. Cox, CV 2003-0399, Defendants' Rule 26.1 Disclosure Statement, August*  
13 *30, 2004, at §I Factual Basis for Defenses, p.3, at lines 15-24 (a true and correct copy of said*  
14 *reference attached hereto and incorporated by reference herein as Exhibit "1.")* In an effort to  
15 establish the affirmative defenses of abandonment, waiver or estoppel, Defendants have disclosed a  
16 number of witnesses who lack the personal knowledge, whose testimony is premised upon  
17 inadmissible hearsay, and who are expected to offer testimony on Defendants' behalf as to an ultimate  
18 issue and conclusion of law. *Id. at §III Witnesses Whom Defendants Expect to Call at Trial, at pp.5-8*  
19 *(a true and correct copy of said reference attached hereto and incorporated by reference herein as*  
20 *Exhibit "2.")*

21 **II. Defendants' Proffered Lay Witness Testimony Violates**

22 **Arizona Rules of Evidence, Rules 602 and 701**

23 Defendants' proffered lay witness testimony as to other alleged violations of the recorded  
24 covenants and restrictions in the subdivision violates Rule 602, Ariz.R.Evid. Rule 602 provides in  
25 relevant part:

26 A witness *may not* testify to a matter unless evidence is introduced sufficient to

1 support a finding that the witness has personal knowledge of the matter....

2 *Id. (emphasis added)*. Furthermore, Rule 701 precludes lay witnesses from testifying “in the form of  
3 opinions or inferences” unless,

4 ...those opinions or inferences which are (a) rationally based on the perception of the  
5 witness and (b) helpful to a clear understanding of the witness’ testimony or the  
determination of a fact in issue.

6 *Id.* Rule 701 precludes a lay witness from testifying as to conclusions of law. *Young v. Environmental*  
7 *Air Products, Inc.*, 136 Ariz. 206, 665 P.2d 88 (App. Div. 2 1982), *aff’d as modified*, 136 Ariz. 158,  
8 665 P.2d 40. Expert opinion testimony is permissible where “scientific, technical, or other specialized  
9 knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue....”  
10 *Rule 702, Ariz.R.Evid.*

11 In this case, Defendants have disclosed several lay witnesses who will purportedly testify as  
12 to violations of the recorded Declaration of Restrictions in the Coyote Springs Ranch subdivision,  
13 “including the business use of those properties.” *Cundiff et al. v. Cox, Defendants Rule 26.1*  
14 *Disclosure Statement at §III Witnesses Whom Defendants Expect to Call at Trial, pp.7-8 (disclosing:*  
15 *Christin Bowra; Jeff and Mychel Westra; Wendy Ditterman; Bill Jensen; Kevin Eickleberry; Charles*  
16 *Hildebrant; and, Sheila Cahill) (a true and correct copy of relevant portions of Defendants’*  
17 *Disclosure Statement attached hereto and by this reference incorporated herein as Exhibit “1.”)* With  
18 the exception of lay witness Cahill, those witnesses disclosed by Defendants are owners of property  
19 in the Coyote Springs Ranch subdivision subject to the June 1974 recorded covenants at issue in this  
20 case. However, *none* of these lay witnesses disclosed by Defendants is alleged to be conducting a  
21 business enterprise on their land, or otherwise in violation of the recorded covenants and restrictions.  
22 *Compare: lay witnesses Karrie Decker; Frank and Laura Lamberson; Mike and Karen Wargo; and,*  
23 *RT Contracting Specialists, LLC, that Defendants have identified as witnesses who will allegedly*  
24 *testify as to “the business use of their property” (Exhibit “1” at pp.6-7.)*

25 These lay witnesses – Bowra, Westra, Ditterman, Jensen, Eickleberry, Hildebrant, and Cahill  
26 – and their purported testimony as disclosed by Defendants, establish that each lacks the requisite

1 personal knowledge under Rule 602 to testify as to other property owners use of their land for business  
2 enterprises, or other violations of the recorded Declaration of Restrictions.

3 Moreover, even if these lay witnesses Defendants expect to call at trial did possess personal  
4 knowledge of violations in the subdivision of the restrictive covenants, their testimony is not helpful  
5 to a clear understanding of the facts in this case. Consequently, to allow any of these witnesses to  
6 testify as to other subdivision landowners' alleged violations of the covenants and restrictions also is  
7 in violation of Rule 702, which expressly requires that the lay witnesses testimony is not only  
8 "rationally based on the perception of the witness," but more importantly, is "helpful to a clear  
9 understanding of the witness' testimony *or the determination of a fact in issue.*" *Rule 702(b),*  
10 *Ariz.R.Evid. (emphasis added).* These witnesses Defendants have disclosed would be, if permitted  
11 to testify, providing opinion testimony as to facts which are neither complex nor beyond the ability  
12 of a lay juror to understand that would otherwise necessitate such opinion testimony. Their purported  
13 testimony would be tantamount to testifying as to a conclusion of law; that is, whether other property  
14 owners are indeed operating business enterprises on their property which constitutes a *violation of the*  
15 *recorded restrictions.*

16 The problems associated with allowing Defendants to call these lay witnesses at time of trial,  
17 who apparently lack personal knowledge and would be testifying as to their opinion on a conclusion  
18 of law, is manifestly compounded by allowing Defendants to call Sheila Cahill to testify. Identified  
19 as an employee of Palmer Investigative Services, Defendants intend to have her testify on "her  
20 investigation of violations" of the recorded restrictions; "her findings" as to the number of purported  
21 violations of the covenants; and, "her finding regarding the number of properties presently" operating  
22 a business enterprise in violation of the restrictive covenants. *Exhibit "1" at p.8, lines 11-19.* Cahill  
23 is not a landowner in the Coyote Springs Ranch subdivision governed by the June 1974 Declaration  
24 of Restrictions. Thus, she obviously lacks personal knowledge to testify as to facts in this case as  
25 required by Rule 602. Defendants did not disclose Ms. Cahill as an expert witness. Ms. Cahill's  
26 investigations and "findings" are obviously commissioned by Defendants or their counsel, making her

1 their agent. Clearly, Defendants seek to introduce her testimony (based upon her “investigation” into  
2 violations of the covenants in the subdivision) in a back-door attempt to introduce testimony for which  
3 an expert witness would be prohibited. Additionally, Ms. Cahill’s testimony would not be helpful to  
4 the *determination* of a fact in issue, as required under Rule 701, as she would be testifying as to an  
5 ultimate issue of fact, rather than underlying facts. Indeed, even if she qualified as an expert, Ms.  
6 Cahill’s testimony would not assist lay jurors with understanding the facts at issue, since the  
7 dispositive facts in this case are not beyond the common knowledge and experience of lay individuals.  
8 *State v. Logan, 199 Ariz. 256, 17 P.3d 101 (App. Div.1 2000), rev. granted, vacated, 200 Ariz. 564,*  
9 *30 P.3d 631 (where juror as competent as expert to determine fact in issue, it is error to admit expert*  
10 *opinion testimony as it will be of no assistance to the trier of fact.)*

11 **III. Conclusion**

12 Defendants are legally proscribed by Rules 602 and 701, Ariz.R.Evid., from introducing lay  
13 witness testimony from Bowra, Westra, Ditterman, Jensen, Eickleberry, Hildebrant and Cahill, as to  
14 violations of any of the recorded covenants by any landowner in the subdivision. None of these lay  
15 witnesses disclosed by Defendants has the requisite personal knowledge to testify as to violations of  
16 any covenant by any landowner. More importantly, Defendants are disingenuously attempting to  
17 utilize lay opinion testimony to testify as to ultimate issues of fact or conclusions of law in obvious  
18 violation of Rule 701.

19 Therefore, Plaintiffs respectfully request that this Court enter its order precluding Defendants  
20 from introducing as witnesses at time of trial Christin Bowra; Jeff and Mychel Westra; Wendy  
21 Ditterman; Bill Jensen; Kevin Eickleberry; Charles Hildebrant; and, Sheila Cahill, to testify on those  
22 ultimate issues of fact and conclusions of law as disclosed by Defendants.

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DATED this 9<sup>th</sup> day of September, 2004.

FAVOUR MOORE & WILHELMSSEN, P.A.

By:   
David K. Wilhelmsen  
Marguerite Kirk  
Post Office Box 1391  
Prescott, Arizona 86302-1391  
Attorneys for Plaintiffs

Original of the foregoing  
filed this 9<sup>th</sup> day of September, 2004  
with:

Clerk, Superior Court of Arizona  
Yavapai County  
Prescott, Arizona

A copy hand-delivered this 9<sup>th</sup> day  
of September, 2004 to:

Honorable David L. Mackey  
Division One  
Superior Court of Arizona  
Yavapai County  
Prescott, Arizona

and, a copy hand-delivered this  
9<sup>th</sup> day of September, 2004 to:

Mark Drutz  
Jeffrey Adams  
MUSGROVE, DRUTZ & KACK, P.C.  
1135 Iron Springs Road  
Prescott, Arizona 86302  
Attorneys for Defendants Cox

By:   
Marguerite Kirk

1 Mark W. Drutz, #006772  
2 Jeffrey R. Adams, #018959  
3 MUSGROVE, DRUTZ & KACK, P.C.  
4 1135 Iron Springs Road  
5 Prescott, Arizona 86305  
6 (928) 445-5935

7 Attorneys for Defendants

8 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**  
9 **IN AND FOR THE COUNTY OF YAVAPAI**

10 JOHN B. CUNDIFF and BARBARA C.)  
11 CUNDIFF, husband and wife;  
12 ELIZABETH NASH, a married woman  
13 dealing with her separate property;  
14 KENNETH PAGE and KATHRYN  
15 PAGE, as Trustee of the Kenneth Page  
16 and Catherine Page Trust,

17 Plaintiffs,

18 v.

19 DONALD COX and CATHERINE  
20 COX, husband and wife,

21 Defendants.

CASE NO. CV 2003-0399

DIVISION 3

**DEFENDANTS' INITIAL RULE  
26.1 DISCLOSURE STATEMENT**

22 Defendants, Donald Cox and Catherine Cox, ("Defendants") by and through undersigned  
23 counsel, disclose the following information pursuant to Rule 26.1 of the Arizona Rules of Civil  
24 Procedure.

25 **I. FACTUAL BASIS FOR DEFENSES.**

26 Defendants are the owners of property located in Coyote Springs Ranch at 7325 N. Coyote  
27 Springs Road, Prescott Valley, Arizona ("Subject Property") that was purchased in April, 1998.  
28 Beginning in the year 2000, Defendants began making improvements to the Subject Property for  
purposes of using it as a tree farm on which trees and shrubs were to be grown and which were to be  
relocated at various times to Defendants retail and wholesale business locations on Highway 69 and  
Viewpoint Drive. Since the year 2000, Defendants constructed improvements to the Subject Property  
that have included constructing a driveway, drilling a well, establishing electricity and placing thereon

- 1           4.     Laches.  
2           5.     Unclean Hands.  
3           6.     Defendants/Counterclaimant further assert as defenses against Plaintiff's claims those  
4 defenses set forth in their Answer to Plaintiffs' First Amended Complaint. Upon request, counsel for  
5 Defendants will provide Plaintiffs with applicable legal authority supporting the Defendants' defenses  
6 and will supplement this disclosure as applicable in the event additional defenses are identified  
7 through the course of discovery.

8     **III.   26.1(a)(3) WITNESSES WHOM DEFENDANTS EXPECT TO CALL AT TRIAL**

9           **Catherine Cox**  
10          **c/o Jeffrey R. Adams**  
11          **MUSGROVE, DRUTZ & KACK, P.C.**  
12          **Post Office Box 2720**  
13          **Prescott, Arizona 86302-2720**

14          Catherine will testify as to her knowledge of the Subject Property and the Declaration of  
15 Restrictions affecting the Subject Property at the time of Defendants purchase of Subject Property as  
16 well as Defendants' use of the Subject Property. Catherine will also testify as to her knowledge  
17 regarding other properties in the Coyote Springs Ranch area and the use of those properties and her  
18 observations regarding the use of those properties.

19          **Donald Cox**  
20          **c/o Jeffrey R. Adams**  
21          **MUSGROVE, DRUTZ & KACK, P.C.**  
22          **Post Office Box 2720**  
23          **Prescott, Arizona 86302**

24          Donald will testify as to his knowledge of the Subject Property and the Declaration of  
25 Restrictions affecting the Subject Property at the time of Defendants purchase of same as well as  
26 Defendants' use of the Subject Property. Donald will also testify as to his knowledge regarding other  
27 properties in the Coyote Springs Ranch area and the use of those properties and her observations  
28 regarding the use of those properties.

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**James Cox**  
**c/o Jeffrey R. Adams**  
**MUSGROVE, DRUTZ & KACK, P.C.**  
**Post Office Box 2720**  
**Prescott, Arizona 86302**

Donald will testify as to his knowledge of the Subject Property and any Declaration of Restrictions affecting the Subject Property at the time of Defendants purchase of same as well as Defendants' use of the Subject Property. James will also testify as to his knowledge regarding other properties in the Coyote Springs Ranch area and the use of those properties and her observations regarding the use of those properties.

**John B. Cundiff and Barbara C. Cundiff**  
**Kenneth Page and Katheryn Page, as Trustee of the Kenneth Page and Catherine Page Trust**  
**Elizabeth Nash**  
**c/o David K. Wilhelmsen**  
**FAVOUR, MOORE & WILHELMSSEN, P.A.**  
**Post Office Box 1391**  
**Prescott, Arizona 86302**

They will testify as to their knowledge of the Declaration of Restrictions affecting the Subject Property as well as their knowledge of the Defendants and their use of the Subject Property prior to their filing of this lawsuit. They will also testify as to other properties in Coyote Springs Ranch which may be affected by enforcement of the Declaration of Restrictions, the use of those properties and their knowledge regarding other violations of the Declaration of Restrictions including their own.

**Robert J. Launders**  
**LAUNDERS - LAW OFFICES OF ROBERT J. LAUNDERS**  
**8186 East Florentine Road, Suite B**  
**Prescott Valley, Arizona 86314**  
**(928) 775-5409**

Robert Launders will testify as to his knowledge of Coyote Springs Ranch and the Declaration of Restrictions. Robert will also testify regarding (i) his meeting with Defendants during which he provided Defendants with legal advice authorizing them to utilize the Subject Property in the manner currently employed, (ii) his conduct during a meeting at the Church located in Coyote Springs Ranch involving Coyote Springs Ranch homeowners, and (iii) his knowledge regarding violations of the Declaration of Restrictions including his own.

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**Alfie Ware and Jane Doe Ware  
Dan Sanders and Jane Doe Sanders  
Address to be provided upon receipt**

They will testify as to their knowledge of the events leading up to the filing of the above-referenced matter, his motive for, and arrangements with the Plaintiffs for, the Wares' payment of Plaintiffs' attorneys' fees, costs and expenses, their knowledge of the Declaration of Restrictions and violations thereof, their participation in meetings conducted at the Wares' home concerning this lawsuit, their contacts and communications with owners of property governed by the Declaration of Restrictions governing the Subject Property.

**Karrie Decker  
10800 Coyote Springs Road  
Prescott Valley, Arizona 86314  
(928) 775-0946**

Karrie Decker will testify as to her knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties.

**Frank Lamberson and Laura Lamberson  
8920 Easy Street  
Prescott Valley, Arizona 86314**

Frank and Laura Lamberson will testify as to her knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of their property.

**Mike Wargo and Karen Wargo  
9200 E. Spurr Lane  
Prescott Valley, Arizona 86314  
(928) 772-5915**

Mike and Karen Wargo will testify as to her knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of their property.

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**Christin L. Bowra**  
**9000 E. Turtle Rock Road**  
**Prescott Valley, Arizona 86314**

Christin Bowra will testify as to her knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of those properties.

**Jeff Westra and Mychel Westra**  
**9000 E. Turtle Rock Road**  
**Prescott Valley, Arizona 86314**

Jeff and Mychel Westra will testify as to their knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of those properties.

**R T Contracting Specialists, LLC**  
**10555 N. Orion Way**  
**Prescott Valley, Arizona 86314**

R T Contracting Specialists, LLC will testify as to her knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of those properties including its own property.

**Wendy Ditterman**  
**Address to be provided when obtained and confirmed.**  
**(928) 848-0267**

She will testify as to her knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of those properties. She will further testify as to her knowledge of meetings in the Coyote Springs Ranch area regarding the use of the Subject Property and articles she has written about this subject in the Lonesome Valley News.

**Bill Jensen**  
**Address to be provided when obtained and confirmed.**  
**(928) 779-7631**

He will testify as to his knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of those properties.

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**Kevin Eickleberry**  
**Address to be provided when obtained and confirmed.**

He will testify as to his knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of those properties.

**Charles A. Hildebrant**  
**8420 Pronghorn Lane**  
**Prescott Valley, Arizona 86314**  
**(928) 772-4599**

Charles will testify as to his knowledge of the Coyote Springs Ranch subdivision and any violations of the Declaration of Restrictions affecting said properties including the business use of those properties.

**Sheila Cahill**  
**Palmer Investigative Services**  
**P.O. Box 10760**  
**Prescott, Arizona 86304**  
**(928) 778-2951**

She will be called to testify regarding (i) her investigation of violations of the Declaration of Restrictions in the portion of Coyote Springs Ranch where the Subject Property is located including (ii) her findings showing that more than 90 percent of the properties located in the portion of Coyote Springs Ranch governed by the subject Declaration of Restrictions, including those owned by Plaintiffs, that are currently in violation of the Declaration of Restrictions and (iii) her findings regarding the number of properties presently violating Paragraph 2 of said Declaration of Restrictions.

**Robert D. Conlin**  
**Margaret Dell Conlin**  
**David A. Conlin**  
**Address to be provided when obtained and verified.**

They will be called to testify regarding their knowledge surrounding the creation of the Declaration of Restrictions and that they did not intend the Declaration of Restrictions to prohibit the type of use of the Subject Property currently employed by Defendants.

Defendants intend to call as witnesses all parties identified during Plaintiffs' depositions as persons or entities conducting business and/or commercial activities on their properties located in Coyote Springs Ranch whose contact information was already provided to Plaintiffs during their