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5 Attorneys for Plaintiffs

6 **IN THE SUPERIOR COURT OF ARIZONA**
7 **COUNTY OF YAVAPAI**

9 **JOHN B. CUNDIFF and BARBARA C.)**
CUNDIFF, husband and wife; BECKY NASH,)
10 **a married woman dealing with her separate)**
property; KENNETH PAGE and KATHRYN)
11 **PAGE, as Trustee of the Kenneth Page and)**
Kathryn Page Trust,)

12 Plaintiffs,

13 vs.

14 **DONALD COX and CATHERINE COX,)**
husband and wife,)

15 Defendants.
16

Case No. CV 2003-0399

Division 1

**PLAINTIFFS' PRE-TRIAL
STATEMENT**

17 Pursuant to 16(d), Arizona Rules of Civil Procedure, Plaintiffs hereby file their pre-trial
18 statement with the Court. Plaintiffs' counsel have been unable to timely obtain from Defendants'
19 counsel their portion of the pre-trial statement, notwithstanding Plaintiffs' counsel's timely forwarding
20 to Defendants' counsel Plaintiffs' portion of the pre-trial statement in accordance with counsels' prior
21 agreement. Therefore, Plaintiffs reserve all right to object at time of trial to any witness or exhibit
22 Defendants intend on introducing into evidence, and further to object to Defendants' counsel's
23 characterization of any fact or issue as material, contested or uncontested.

24 **I. UNCONTESTED FACTS DEEMED MATERIAL**

25 A. Plaintiffs and Defendants are all owners of real property located in that portion of Coyote
26 Springs Ranch, Yavapai County, Arizona that is governed by a recorded Declaration of Restrictions

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1 dated June 13, 1974 (the "Declaration"). The Declaration provides, *inter alia*, that any property owner
2 may bring suit to enforce the restrictive covenants against any other property owner who is, or is
3 threatening, to violate any provision of the Declaration.

4 B. Defendants Cox have admitted that one of the criteria in their decision to purchase the
5 Coyote Springs Ranch property was their need for more property for Prescott Valley Growers.

6 C. At the time of their purchase of the Coyote Springs Ranch property, Defendants Cox had
7 both actual and constructive notice of the recorded Declaration of Restrictions dated June 13, 1974.

8 D. Since approximately 2000, Defendants Cox began to develop and utilize their Coyote
9 Springs Ranch real property for the production of trees, shrubs, and the like for their nursery business.
10 Defendants Cox have admitted that they, together with their two sons (Alan and James) are in
11 partnership conducting a nursery business known as "Prescott Valley Growers," that includes both a
12 retail and wholesale location. Defendants Cox have admitted that, at a minimum, the activities
13 conducted on the Coyote Springs Ranch location is a partnership asset.

14 E. Defendants Cox's development of the subject land included, *inter alia*, the drilling of a well
15 to provide irrigation for the trees; the installation of underground irrigation lines with "spaghetti" lines
16 that cover approximately 9 acres of the 10 acre subject property; the placement of equipment on the
17 subject property used for maintenance of the inventory trees; the placement of an outdoor portable
18 toilet facility (referred to as a "j-john") for employee use; and, construction of a perimeter fence.

19 F. Defendants Cox also applied for and obtained an agricultural use exemption from Yavapai
20 County pertaining to their use of the subject land.

21 G. Defendants Cox have had one full-time employee, who has been and continues to be
22 assisted by additional employees, that work exclusively at their Coyote Springs Ranch property since
23 approximately 2000. These employees are charged with maintaining all trees grown on the property
24 that are later transported to Defendants Cox's retail or wholesale nursery locations.

25 H. Defendants Cox have admitted that the trees located on the subject property are inventory
26 for their nursery business. Defendants Cox have further admitted that the purpose of growing the

1 inventory on the Coyote Springs Ranch property is for profit.

2 I. Defendants Cox's conduct on the property has continued unabated since approximately
3 2000, and Defendants Cox have increased the number of inventory currently on the property since that
4 time. Further, Defendants Cox have evidenced an intent to develop another approximate 10-acre
5 parcel of land they own in Coyote Springs Ranch for the same use and purpose.

6 **II. CONTESTED ISSUES OF FACT AND LAW**

7 A. Whether Defendants' use of their property for the production of trees, shrubs, and the
8 like for their nursery business is in violation of paragraph 2 of the Declaration.

9 B. Whether Defendants conduct on the subject property in maintaining an outdoor toilet
10 facility for employees, and/or maintaining additional structures on the property,
11 constitute violations of paragraphs 7(e) and 15 of the Declaration.

12 C. Whether Defendants' conduct on, and use of, their property in Coyote Springs Ranch
13 constitute one or more breaches of the Declaration.

14 D. Whether the Declaration has been abandoned.

15 Plaintiffs affirmatively state that the statement of uncontested and contested issues of fact and
16 law is not intended to be an exhaustive list of every fact, or inference drawn therefrom, or legal issue
17 that may be presented or argued at time of trial in this matter.

18 **III. OTHER ISSUES OF FACT AND LAW DEEMED MATERIAL BY PLAINTIFF**

19 A. Whether the non-waiver provision in the Declaration is enforceable.

20 **IV. PLAINTIFF'S WITNESSES.**

21 1. Plaintiffs, John and Barbara Cundiff; Becky Nash; and, Kenneth and Kathryn Page.

22 2. Defendants, Donald and Catherine Cox.

23 3. Waneta Offerman.

24 4. Robert Launder, Esq.

25 5. Doug Reynolds.

26 6. Donald James.

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7. Robert D. Conlin.
8. Representative of Yavapai County Planning & Zoning.
9. Steven Stein, CPA.
10. Dan Sanders.
11. Alan Cox.
12. David ("Dusty") Eiker.
13. James Cox.
14. All witnesses necessary to establish foundation for any exhibit introduced at time of trial, if necessary, including but not limited to, any agent or custodian of records for Realex Management, LLC, Capital Title Agency, Realty Executives, Yavapai County.

Plaintiffs reserve the right to call any witness listed by Defendants, without waiving any objection Defendants may make to the introduction by Defendants of that or any other witness Defendants may call at time of trial.

Plaintiffs further reserve the right to call any witness necessary for rebuttal or impeachment purposes as trial progresses.

V. PLAINTIFF'S TRIAL EXHIBITS

1. Certified copy of Cundiff Joint Tenancy Deed, dated April 2, 1992, recorded in book 2475, page 174.
2. Certified copy of Nash Warranty Deed dated August 21, 2000, recorded in book 3778, pages 627-629.
3. Certified copy of Nash Warranty Deed dated October 29, 2001, recorded in book 3875, pages 538-539.
4. Certified copy of Page Warranty Deed dated March 14, 2001, recorded in book 3820, pages 227-330.
5. Certified copy of Cox Warranty Deed dated April 21, 1998, recorded in book 3568, pages 863-865.
6. Certified copy of Declaration of Restrictions, dated June 13, 1974, recorded in book

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- 910, pages 680-682.
7. Documents received from custodian of records, Capital Title Agency in response to subpoena *duces tecum* regarding Cox's purchase of the subject real property located in Coyote Springs Ranch.
 8. Documents received from custodian of records, Realex Management, LLC dba Realty Executives of Prescott Area in response to subpoena *duces tecum* regarding Cox's purchase of the subject real property located in Coyote Springs Ranch.
 9. Documents provided in response to Defendants' request for production of documents.
 10. Defendants' deposition transcripts.
 11. Plaintiffs' deposition transcripts.
 12. Map of the subject area (attached to Plaintiffs' Request for Court's On-Site Inspection, previously provided).
 13. Copy of file maintained by Yavapai County Land Use Development Services regarding Defendants' application for an agricultural-use tax exemption on the subject property.
 14. Affidavit of Robert D. Conlin, dated November 4, 2004.
 15. Aerial photographs of the Coyote Springs Ranch subdivision and Defendants' property located in Coyote Springs Ranch for years 2000 and 2004.
 16. Documentation compiled by Plaintiffs regarding property owners Defendants have alleged are operating business in Coyote Springs Ranch.
 17. Prescott Valley Growers Partnership federal and state tax returns for 2000, 2001, 2002, 2003 and 2004.
 18. Individual federal and state income tax returns for Defendants Cox for 1998 through 2003.
 19. Underlying documentation and financial records for partnership tax returns if ordered produced by the Court.
 20. Inventory records maintained by Defendants for inventory (trees, shrubs, etc.) located

1 on the subject property for all years that Defendants have maintained inventory on the
2 subject property.

3 21. Documents pertaining to any and all improvements, structures, or developments made
4 on the subject property from 1998 to present.

5 22. Copy of Defendants Cox application for well drilling filed with the Arizona
6 Department of Water Resources, June 13, 2000.

7 23. Documents pertaining to all machinery, equipment, fixtures, supplies, tools and the
8 like maintained or used in any fashion on the subject property from 2000 to present.

9 24. Employee records for Prescott Valley Growers pertaining to Defendants wholesale,
10 retail and Coyote Springs Ranch property for 2000 through 2004.

11 25. Copy of Robert Launders' deposition transcript, *Smith v. McRoberts, et al.*, Yavapai
12 County Superior Court Case No. CV 2000-0472.

13 26. Any pleading, motion, judgment filed in *Smith v. McRoberts, et al.*, Yavapai County
14 Superior Court Case No. CV 2000-0472 which this Court may take judicial notice of.

15 27. Sheila Cahill affidavit, CV 2003-0399, September 29, 2004.

16 Plaintiffs reserve the right to introduce any pleading, motion, exhibit attached to any pleading
17 or motion, and any response to discovery filed or disclosed by Defendants.

18 Plaintiffs further reserve the right to introduce any exhibit listed by Defendants in this joint
19 pre-trial statement, notwithstanding any objection Plaintiffs may raise against the introduction of the
20 exhibit. Furthermore, Plaintiffs' use of any exhibit listed by Defendants herein shall not be deemed
21 a waiver of any objection by Plaintiffs to any other exhibit listed or introduced at time of trial by
22 Defendants.

23 Plaintiffs reserve the right to utilize any parties' deposition transcript, including exhibits
24 attached to any deposition transcript, in this proceeding as may be necessary during the course of trial.
25 Plaintiffs' reservation of this right does not operate as a waiver of any objection Plaintiffs may have
26 against Defendants' use of any deposition transcript, including any exhibit attached thereto, of any

1 party or witness during trial in this case.

2 **CERTIFICATION PURSUANT TO RULE 16(d), ARIZ.R.CIV.PROC.**

3 Undersigned counsel hereby certifies that all exhibits listed in Plaintiffs' pretrial statement
4 have been exchanged or made available to Defendants' counsel for inspection and copying.

5 RESPECTFULLY SUBMITTED this 21st day of July, 2005.

6 FAVOUR MOORE & WILHELMSSEN, P.A.

7
8 By: 
9 David K. Wilhelmsen
Marguerite Kirk

10 Original of the foregoing
11 filed this 21st day of July,
2005, with:

12 Clerk, Superior Court of Arizona
13 Yavapai County
14 Prescott, Arizona
15 86302

16 A copy hand-delivered this 21st day
17 of July, 2005 to:

18 Honorable David L. Mackey
19 Division One, Yavapai County
20 Superior Court of Arizona
21 120 S. Cortez St.
22 Prescott, Arizona 86302

23 and, a copy mailed this
24 21st day of July, 2005 to:

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

27 By: 
28 David K. Wilhelmsen
Marguerite Kirk