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8 *Attorneys for Defendants*

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

10 **IN AND FOR THE COUNTY OF YAVAPAI**

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

17 Plaintiffs,

18 v.

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

21 Defendants.

Case No. CV 2003-0399

Division No. 1

**MOTION *IN LIMINE* RE: PLAINTIFFS'
JOINT PRETRIAL STATEMENT
WITNESS LIST AND UNTIMELY
FIFTH SUPPLEMENTAL DISCLOSURE**

(Oral Argument Requested)

(Assigned to the
Honorable David L. Mackey)

22 Defendants, through counsel undersigned, move *in limine* to preclude Plaintiffs from calling
23 three (3) witnesses, who either were (i) not previously disclosed or (ii) untimely disclosed, past the
24 discovery cutoff date of June 30, 2005. The individuals not previously disclosed/untimely disclosed
25 are: (i) Alan Cox, (ii) David Eiker, and (iii) Steven Stein.
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27
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. Legal Argument.**

3
4 The date for **completion** of discovery in this case was Thursday, June 30, 2005. On July 11,
5 2005, Plaintiffs served their Fifth Supplemental Rule 26.1 Disclosure Statement. See Exhibit "1"
6 attached hereto. In their disclosure statement, Plaintiffs identified Steven Stein, CPA, as a witness,
7 who would testify "as to his preparation of Prescott Valley Growers' tax returns for the years 2000
8 through 2004." Id.

9
10 Plaintiffs then proceeded to list Mr. Stein as witness in their pretrial statement, which
11 Plaintiffs' counsel filed prior to notifying Defendants' counsel that they were doing so. (See Joint
12 Pretrial Statement ("**Statement**"), attached hereto as Exhibit "2", first received in draft via e-mail
13 by this office on Wednesday, July 20, 2005 at 4:25 p.m.).¹ Mr. Stein was untimely disclosed as a
14 witness, after the discovery cutoff date.

15
16 Next, (i) Alan Cox, and (ii) David Eiker never have been disclosed by Plaintiffs as
17 witnesses, nor has the substance of any testimony that each purportedly would provide. Yet,
18 Plaintiffs named the foregoing people as witnesses in their joint pretrial statement. Plaintiffs are
19 precluded from calling any of these people at trial.

20
21 All three of these people were known to Plaintiffs well before the discovery cut-off deadline.
22 In fact, in her June 22, 2004 deposition, over one year ago, Defendant Catherine Cox identifies Alan
23 Cox, an owner/partner in Prescott Valley Growers; Mr. 'Dusty' Eiker, an employee; and the
24 accountant who prepared her partnership tax returns, Steven Stein. (See Deposition of Catherine
25

26
27
28 ¹ Defendants were able to obtain a copy of Plaintiffs' final, filed version of the pretrial statement filed at 11:55 a.m., on July 21, from the Court on Friday, July 22, as Plaintiffs notified Defendants of the filing afterward.

1 Cox, pp. 7:5-9, 13:23, 66:9-12, 67:16-18, 71:23-24, and 86:2-4, attached as Exhibit "3" hereto).
2 Moreover, Defendants produced tax returns to Plaintiffs months ago. Defendants' 2004 '1040'
3 schedule and 1999-2004 'K-1' schedules were delivered to Plaintiffs' Counsel on April 18, 2005;
4 Defendants' 1998-2003 Returns were delivered to Plaintiff on March 7, 2005, with receipt
5 acknowledged on March 8. (See Exhibit "4" attached hereto). Plaintiffs have known about Msrs.
6 Cox, Eiker, and Stein for several months, but failed to disclose them or fairly describe the substance
7
8 of their testimony prior to discovery cut off (Stein) or at all (Cox; Eiker).
9

10 In accordance with Rule 7.2, Arizona Rules of Civil Procedure, undersigned counsel
11 attempted to contact Plaintiffs' counsel via telephone at approximately 9:00 a.m., July 22, 2005,
12 after obtaining from the Court a filed copy of Plaintiffs' Statement, which was not otherwise
13 provided to Defense Counsel. Undersigned counsel left a message for Attorney Wilhemsen, who
14 was not available. Undersigned counsel followed up with written correspondence, advising
15 Plaintiffs' counsel that a Motion would be filed, accordingly, unless counsel agreed to revise the
16 Statement Witness List. In correspondence transmitted to Defendants' counsel via facsimile at 2:15
17 on July 22, Plaintiffs communicated their intent *not* to revise the Statement's Witness List. It is clear
18 that Defendants could not present rebuttal evidence, as the date for completion of discovery has
19 passed. Consequently, Defendants are obliged to file this Motion.
20
21

22 Based on the foregoing, Plaintiffs should be precluded from using during trial the foregoing
23 three individuals at trial. The discovery cut-off date has passed. Plaintiffs have offered no reason
24 why this discovery/disclosure could not have been completed prior to the June 30, 2005 cutoff date.
25 At the request of Mr. Wilhemsen, undersigned counsel stipulated on June 24, 2005 that the date for
26 completion of discovery, among other activities, would be extended until June 30, 2005. Plaintiffs
27
28

1 have had more than two years to obtain and disclose the information and documents which are the
2 subject of this Motion but have failed to do so. Plaintiffs cannot now introduce never-before
3 disclosed persons as Witnesses.
4

5 Therefore, Defendants' Motion *in Limine* should be granted.

6 **II. Conclusion.**

7 Based on the foregoing, Plaintiffs should be precluded from calling during trial all three of
8 the foregoing witnesses.
9

10 RESPECTFULLY SUBMITTED this 22nd day of July, 2005.

11 MUSGROVE, DRUTZ & KACK, P.C.

12
13 By Sharon Sargent Flack
14 Mark W. Drutz
15 Jeffrey R. Adams
16 Sharon Sargent-Flack
17 *Attorneys for Defendants*

18 COPY of the foregoing mailed
19 this 22nd day of July, 2005, to:

20 Honorable David L. Mackey
21 Yavapai County Superior Court
22 Division 1
23 Yavapai County Courthouse
24 Prescott, Arizona 86301

25 David K. Wilhelmsen, Esq.
26 Marguerite M. Kirk, Esq.
27 Favour, Moore & Wilhelmsen, P.A.
28 1580 Plaza West Drive
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Prescott, Arizona 86302-1391
Attorneys for Plaintiffs



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Post Office Box 1391
2 Prescott, AZ 86302-1391
Ph: (928)445-2444
3 David K. Wilhelmsen, #007112
Marguerite Kirk, #018054

4 Attorneys for Plaintiffs

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

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

12 Plaintiffs,
13 vs.

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

15 Defendants.
16 _____)

Case No. CV 2003-0399

Division 1

**PLAINTIFFS' FIFTH
SUPPLEMENTAL
RULE 26.1
DISCLOSURE STATEMENT**

17 Pursuant to Rule 26.1(b)(2), Ariz.R.Civ.Proc., Plaintiffs, John and Barbara Cundiff, Becky
18 Nash, and Kenneth and Kathryn Page, hereby supplement their Rule 26.1 disclosure statement and
19 make the following additional disclosure.

20 **III. Identity of Witness(es) and Substance of Expected Testimony**

21 (I) Steven Stein, CPA
22 1113 West Mohawk Lane
23 Phoenix, Arizona 85027-3680
P: (623) 582-2688

24 Description of Testimony: Mr. Stein will testify as to his preparation of Prescott Valley Growers' tax
25 returns for the years 2000 through 2004.

26 . . .

1 **VIII. Existence, Location, Custodian and Description of Tangible Evidence and Documents**

2 Plaintiffs have identified the following tangible document and evidence that may be introduced
3 at time of trial:

4 (L) Prescott Valley Growers Partnership tax returns for 2000, 2001, 2002, 2003 and 2004
5 which are already in Defendants possession as they produced them through discovery.

6 Plaintiffs reserve the right to supplement their disclosure statements as discovery progresses.

7 DATED this 11TH day of July, 2005.

8 FAVOUR MOORE & WILHELMSSEN, P.A.

9
10 By: Marguerite Kirk
11 David K. Wilhelmsen
12 Marguerite Kirk

13
14 Original of the foregoing mailed
this 11TH day of July, 2005 to:

15 Mark Drutz
16 Jeffrey Adams
17 MUSGROVE, DRUTZ & KACK, P.C.
18 1135 Iron Springs Road
19 Prescott, Arizona 86305
20 Attorneys for Defendants Cox

21 By: Marguerite Kirk
22 David K. Wilhelmsen
23 Marguerite Kirk
24
25
26



2005 JUL 21 AM 11:55

JEANNE NICKS, CLERK ✓

BY: MB Burtton

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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

v Div 1

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

- 1 910, pages 680-682.
- 2 7. Documents received from custodian of records, Capital Title Agency in response to
- 3 subpoena *duces tecum* regarding Cox's purchase of the subject real property located
- 4 in Coyote Springs Ranch.
- 5 8. Documents received from custodian of records, Realex Management, LLC dba Realty
- 6 Executives of Prescott Area in response to subpoena *duces tecum* regarding Cox's
- 7 purchase of the subject real property located in Coyote Springs Ranch.
- 8 9. Documents provided in response to Defendants' request for production of documents.
- 9 10. Defendants' deposition transcripts.
- 10 11. Plaintiffs' deposition transcripts.
- 11 12. Map of the subject area (attached to Plaintiffs' Request for Court's On-Site Inspection,
- 12 previously provided).
- 13 13. Copy of file maintained by Yavapai County Land Use Development Services regarding
- 14 Defendants' application for an agricultural-use tax exemption on the subject property.
- 15 14. Affidavit of Robert D. Conlin, dated November 4, 2004.
- 16 15. Aerial photographs of the Coyote Springs Ranch subdivision and Defendants' property
- 17 located in Coyote Springs Ranch for years 2000 and 2004.
- 18 16. Documentation compiled by Plaintiffs regarding property owners Defendants have
- 19 alleged are operating business in Coyote Springs Ranch.
- 20 17. Prescott Valley Growers Partnership federal and state tax returns for 2000, 2001, 2002,
- 21 2003 and 2004.
- 22 18. Individual federal and state income tax returns for Defendants Cox for 1998 through
- 23 2003.
- 24 19. Underlying documentation and financial records for partnership tax returns if ordered
- 25 produced by the Court.
- 26 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



1 Q. You mentioned that you were the owner of Prescott
2 Valley Growers. Is your husband also an owner?

3 A. Yes, he is.

4 Q. Are there any other owners?

5 A. Two of my sons are also owners. My son Alan and
6 my son Jimmy.

7 Q. Where do Alan and Jimmy reside?

8 A. Alan resides in Prescott and Jimmy resides at the
9 wholesale yard.

10 Q. Have you ever been a party to a litigation
11 before, other than this case? Have you ever sued or
12 been sued?

13 A. We are involved in a lawsuit, a different one at
14 this time.

15 Q. Okay. Are you the plaintiff or the defendant?

16 A. I am the defendant.

17 Q. And who is the plaintiff?

18 A. Mile High Rock.

19 Q. What is the nature of that suit?

20 A. Money.

21 Q. Is it a breach of contract? Is it a negligence
22 claim? Can you tell me a little bit about it?

23 A. It is a failure to pay for product.

24 Q. Do you recall when that suit was filed?

25 A. Possibly in February of 2004.

1 Q. On the property that you own there?

2 A. Yes.

3 Q. What type of business entity is Prescott Valley
4 Growers?

5 A. It is a partnership.

6 Q. Okay. Is there a written partnership agreement?

7 A. No. There is not.

8 Q. Just a verbal agreement between you, your husband
9 and your two sons?

10 A. It is an undocumented agreement.

11 Q. Meaning it is oral?

12 A. Yes.

13 Q. Okay. What is -- What are the terms of that
14 agreement? Let me break it down for you. How much do
15 you own in the business?

16 A. Myself?

17 Q. Yes.

18 A. Forty-five percent.

19 Q. How much does your husband own?

20 A. Forty-five percent.

21 Q. How much does your son Alan own?

22 A. Five percent.

23 Q. And Jimmy, the other five?

24 A. Yes.

25 Q. Do you share in the profits and losses on that

1 A. In the office.

2 Q. Which office, ma'am?

3 A. The office on Viewpoint.

4 Q. Who maintains those records?

5 A. Normally the foreman of the yard.

6 Q. Do you ever maintain those?

7 A. No.

8 Q. Your husband?

9 A. No. I said it's the foreman of the yard. His
10 name is Dusty.

11 Q. What is Dusty's last name?

12 A. Eiker, E-I-K-E-R.

13 Q. How long has he worked for you?

14 A. Over two years. No. Let me see here. He
15 started -- Yes. He started in January of 2002. So he
16 has been with us almost two and a half years.

17 Q. Has he worked at the Coyote Springs property?

18 A. Yes.

19 Q. Throughout that time?

20 A. Yes.

21 Q. Is that a full-time position for him?

22 A. Yes.

23 Q. What does he do?

24 A. He was in charge of installing the water lines
25 and he is in charge of all the trees, taking care of

1 them.

2 Q. Does he have any help?

3 A. He has two helpers, maybe three.

4 Q. And those people assist him with maintaining the
5 trees?

6 A. Yes, they do.

7 Q. Are those full-time employees, those two or three
8 people?

9 A. Yes, they are.

10 Q. Do they always work at the Coyote Springs
11 property?

12 A. Yes, they do.

13 Q. Any other employees at the Coyote Springs
14 property?

15 A. No.

16 Q. The two or three additional helpers that Dusty
17 has, how long have they been working at the Coyote
18 Springs property?

19 A. I don't really know.

20 Q. Okay. Do you keep employment records?

21 A. Yes.

22 Q. For those individuals?

23 A. We do.

24 Q. Have you ever had part-time, seasonal help?

25 A. Occasionally we do.

1 bucket with a tree in it has to have at least one inch
2 in caliber before it can be sold. Those are rules that
3 are -- Those are rules of the Arizona Nursery
4 Association. Certain size containers have to have
5 certain size product in them.

6 Q. Do you operate under the rules of the Arizona
7 Nursery Association?

8 A. We are members of the Arizona Nursery Association
9 and we have to abide by the rules of the Department of
10 Agriculture.

11 Q. Do your income tax returns reflect the
12 partnership that you have with your husband and your
13 sons?

14 A. Yes, they do.

15 Q. Do you have copies of those income tax returns
16 for the last five years?

17 A. I probably do.

18 Q. If you didn't, would your accountant, if you had
19 an accountant?

20 A. I have an accountant.

21 Q. Would that individual have those records?

22 A. If I don't have them, he does.

23 Q. And who is your accountant, ma'am?

24 A. His name is Steven Stein.

25 Q. Is he local?

1 property?

2 A. At one time Dusty was in a travel trailer on that
3 property for two or three months, I think. That was
4 while he was getting a divorce.

5 Q. Is that why he was on the property, because he
6 was getting a divorce? Do you know?

7 A. Yes.

8 Q. And do you recall when that was, approximate
9 year?

10 A. It was in 2002.

11 MS. KIRK: Okay. We'll take a break for
12 lunch.

13 (Whereupon, deposition exhibits one through three are
14 marked.)

15 (Whereupon, a recess was taken from 11:52 a.m. to
16 1:13 p.m., at which time a lunch break was had.)

17 Q. (Continued by MS. KIRK:) During the lunch hour
18 break, ma'am, did you review any documents?

19 A. I did not.

20 Q. When was the first time that you ever saw the
21 Declarations of Restrictions that pertained to the
22 Coyote Springs Ranch Subdivision?

23 A. Sometime in 2001.

24 Q. Do you recall who provided those to you?

25 A. Waneta Offerman, the realtor.



MUSGROVE, DRUTZ & KACK, P.C.

ATTORNEYS AT LAW

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JOHN G. MULL
JEFFREY R. ADAMS
CATHY L. KNAPP

March 7, 2005

File No. 9449-1

VIA HAND DELIVERY

David K. Wilhelmsen
FAVOUR MOORE & WILHELMSSEN, P.A.
1580 Plaza West Drive
Prescott, Arizona 86305

RE: *Cundiff v. Cox*
Yavapai County Superior Court Cause No. CV 2003-0399

Dear Dave:

Pursuant to your letter dated March 3, 2005 and the order by the Court on January 31, 2005, enclosed please find the state and federal tax returns for the years 1998 through 2003. We have not received the tax returns yet for the tax year 2004 as they have not yet been prepared. Upon receipt, we will provide them to you.

Please call with any questions, comments or concerns regarding the foregoing.

Sincerely,

MUSGROVE, DRUTZ & KACK, P.C.

By: _____

Jeffrey R. Adams, Esq.

JRA/jf
Enclosures

Cc: Donald & Catherine Cox (letter only)

The Law Firm of

Favour Moore & Wilhelmsen, P.A.

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March 8, 2005
File No. 10641.001

via Facsimile & U.S. Mail

Jeffrey Adams
MUSGROVE, DRUTZ & KACK, P.C.
Post Office Box 2720
Prescott, Arizona 86302-2720

Re: Cundiff, et al. v. Cox – Yavapai County Cause No. CV 2003-0399

Dear Jeff:

We are in receipt of your clients' income tax returns for 1998 to 2003. As you are undoubtedly aware, the Court specifically ordered that your clients' returns include all schedules. However, each income tax return for 1998 through 2003 specifically omitted your clients' K-1 forms, although the tax returns indicate that an overwhelming amount of your clients' income was attributable to partnership income. Additionally, the income tax returns provide list the occupation of each of your clients' as "managing partners."

This correspondence is to demand that your clients' immediately comply with the Court's orders. If we do not receive your clients' complete income tax returns with all attached schedules, notably schedule K-1, by March 15, 2005, we will have no option but to again file an appropriate motion with the Court and request our clients' attorney's fees.

Very truly yours,



David K. Wilhelmsen
For the Firm

cc: Kenneth and Kathryn Page
John and Barbara Cundiff

MUSGROVE DRUTZ & KACK
MAR 10 2005

RECEIVED

MUSGROVE, DRUTZ & KACK, P.C.

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April 18, 2005

File No. 9449-1

VIA HAND DELIVERY

David K. Wilhelmsen
FAVOUR MOORE & WILHELMSSEN, P.A.
1580 Plaza West Drive
Prescott, Arizona 86305

RE: *Cundiff v. Cox*
Yavapai County Superior Court Cause No. CV 2003-0399
Tax Returns and K-1s

Dear Dave:

Pursuant to your request, enclosed please find the K-1s and our clients' 2004 tax return. As should be obvious from the date stamp on the front of each item, we only received these documents from our clients last Friday. Be advised that we did not and do not believe that we had any obligation to provide the K-1s as you have concluded because you did not request partnership tax returns or any partnership tax forms in your request for production. Rather, you simply requested our clients' personal income tax returns.

Nonetheless, rather than filing an objection to your request for the K-1s and then having to respond to a subsequent request for production, we simply were going to provide those to you upon our receipt. And as noted in the previous paragraph, they were only received Friday, April 15, 2005.

Based on the foregoing, we believe that we have been diligent in responding to your request. As your office is already aware, I was on vacation from March 12-20. Our clients were on vacation between March 23 and the beginning of April. Consequently, between my vacation and subsequently that of our clients, we responded to your request in a very timely manner. We believe that a simple telephone call to us regarding the status of our response to your request for K-1s would have eliminated the need for you to file your Motion to Compel. We therefore request that you withdraw your Motion to Compel. If not, we will simply respond with the explanation set forth above. However, we hope and expect that no response to your motion will be necessary. If it is, your actions certainly call into question whether your clients' request for a settlement conference was made in

David K. Wilhelmsen, Esq.

Apr 18, 2005

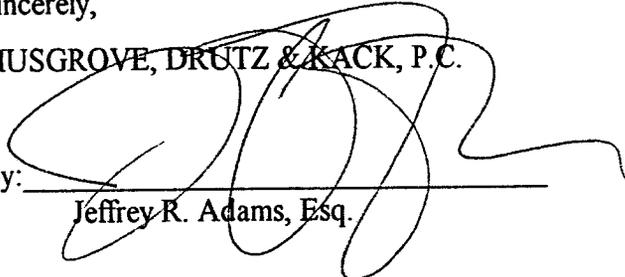
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good faith and gives us some cause for concern regarding whether that process will be productive. We certainly hope that your clients are going to participate in that proceeding in good faith with the idea that this matter could be settled without the need for a trial.

Please call with any questions, comments or concerns regarding the foregoing.

Sincerely,

MUSGROVE, DRUTZ & KACK, P.C.

By: 

Jeffrey R. Adams, Esq.

JRA/jf

Enclosures

Cc: Donald & Catherine Cox