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1 Mark W. Drutz, #006772  
2 Jeffrey R. Adams, #018959  
3 Sharon Sargent-Flack, #021590  
4 **MUSGROVE, DRUTZ & KACK, P.C.**  
5 1135 Iron Springs Road  
6 Prescott, Arizona 86305  
7 (928) 445-5935

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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

**DEFENDANTS' PRETRIAL STATEMENT**

(Assigned to the Honorable David L. Mackey)

22 Defendants timely file this separate Pretrial Statement, notwithstanding Defense counsel's  
23 rebuffed efforts to enter into a timely Joint Pretrial Statement with Plaintiffs. Defendants were  
24 afforded only four and one-half hours to review Plaintiffs' proposed Statement prior to Plaintiffs'  
25 filing. Defendants provide a brief statement of the factual background surrounding the circumstances  
26 leading up to filing a separate statement.

1 On Friday, July 15, 2005, Defendants' counsel Flack telephoned Plaintiffs' Counsel Kirk to  
2 confer regarding the status of the Joint Pretrial Statement, and was transferred by Ms. Kirk to a legal  
3 secretary, Cindy. Upon inquiry as to whether Plaintiffs would provide the first draft as is customary,  
4 Cindy advised that it would be provided by Wednesday of the following week. Attorney Flack advised  
5 that Plaintiffs' office would be contacted the following week for an update of Plaintiffs' efforts in this  
6 regard.  
7

8 On Tuesday, July 19, Cindy and Defendants' counsel's secretary spoke, at which time Cindy  
9 advised that the Statement would be hand delivered later on that day. A short time later, on the same  
10 date, Defendants' counsel's legal secretary called to request that the Statement be transmitted via e-  
11 mail in an electronic format, for greater ease of supplementation and editing. No objections were  
12 made to e-mailing the Statement. By Wednesday afternoon, having received no Statement, Defendants'  
13 counsel transmitted written correspondence requesting it be promptly e-mailed. Defendants finally did  
14 receive the Statement, at 4:25 p.m. on Wednesday, July 20.  
15

16 The following morning, July 21, during Defendants' counsel review and supplementation of the  
17 proposed Statement, Plaintiffs' counsel transmitted written communication that "if I do not receive it  
18 in the next hour, I will be forced to file our portion of the joint pre-trial statement as you will not have  
19 afforded our office sufficient time to review and formulate objections . . . ." That morning, at 11:55  
20 a.m., approximately 4 and ½ business hours after Defendants' counsel received the Statement, Plaintiffs  
21 filed their Statement, but did not provide a copy to Defendants. Defendants' counsel had no reasonable  
22 opportunity to convey their suggested revisions to Plaintiffs prior to their Statement being filed.  
23  
24  
25  
26

1 Defendants were able to obtain a copy of Plaintiffs' Statement from the Court Clerk on Friday morning,  
2 shortly after 8:00 a.m., and now submit their Pretrial Statement, accordingly.

3 Defendants' counsel attempted to avoid running into timing issues in seeking to discuss the  
4 Joint Pretrial Statement a week before it was due, with the understanding that Plaintiffs' counsel were  
5 to initiate it.  
6

7 As this Court is aware, pursuant to 16(d), Arizona Rules of Civil Procedure, states:

8 Upon the initiative of counsel for plaintiff, counsel who will try the case  
9 and who are authorized to make binding stipulations shall confer and  
10 prepare a written pretrial statement, signed by each counsel, to be filed  
11 by the plaintiff within the time set by the court in the particular case, or  
12 by the applicable Local Rules of Practice, or if no time is set, then not  
less than five judicial days prior to the date of trial.

13 Defendants used their best efforts to confer with Plaintiffs but unfortunately it was not reciprocated.  
14 Therefore, Defendants submit their *separate* Pretrial Statement, containing all of the input required  
15 from Defendants under Rule 16(d), Ariz. R. Civ. P.  
16

17 **I. UNCONTESTED FACTS DEEMED MATERIAL**

18 Defendants disagree and contest those facts deemed uncontested by Plaintiffs in their Pretrial  
19 Statement and submit the following material facts as facts Defendants believe should be and are  
20 uncontested:  
21

22 A. Plaintiffs and Defendants are all owners of real property located in that portion of  
23 Coyote Springs Ranch, Yavapai County, Arizona.

24 B. This case involves a certain Declaration of Restrictions that was recorded June 13, 1974  
25 in the Official Records of Yavapai County, Arizona at Book 416, Page 680 ("**Declaration**").  
26

1 C. Plaintiffs have sued Defendants seeking to enforce paragraphs 2, 7(e), and 15 of the  
2 Declaration against Defendants. Paragraph 2 of the Declaration states: "No trade, business, profession  
3 or any other type of commercial or industrial activity shall be initiated or maintained within said  
4 property or any portion thereof." Paragraph 7(e) of the Declaration at issue states: "No structure  
5 whatsoever other than one single family dwelling or mobile home, as herein provided, together with  
6 a private garage for not more than three (3) cars, a guest house, service quarters and necessary out  
7 buildings shall be erected, placed or permitted to remain on the property." Paragraph 15 of the  
8 Declaration at issue states: "No outside toilet or other sanitary conveniences or facilities shall be  
9 erected or maintained on the premises."  
10  
11

12 D. The Declaration does not define the following terms and phrases:

- 13 1. "trade";
- 14 2. "business";
- 15 3. "profession"; and
- 16 4. "commercial or industrial activity".

17  
18 E. Since approximately 2000, Defendants Cox began the development of their property  
19 ("Subject Property"). In August 2000, Defendants Coxes began making vertical and subterranean  
20 improvements to the Subject Property. Since the year 2000, Defendants openly and notoriously  
21 constructed improvements to the Subject Property that have included constructing a driveway; drilling  
22 a well, establishing electricity and placing thereon a mobile home that has since been replaced by a  
23 manufactured home in which Defendants reside; establishing and installing an automatic drip-irrigation  
24  
25  
26

1 system, tree lines, support posts and cables along the tree lines; placing perimeter trees around the  
2 property; construction of a pump-house and meter for the well; construction of boundary fencing  
3 around the perimeter of the Subject Property; construction of a tack room and corrals; and substantial  
4 grading of the Subject Property.  
5

6 The majority of substantive improvements to the Subject Property were completed in early  
7 2002, which coincided with Defendants' first use of the Subject Property as a tree farm. Defendants  
8 have invested approximately \$500,000.00 improving the Subject Property. Trees and shrubs grown  
9 on the Subject Property are relocated to Defendants wholesale business, Prescott Valley Growers  
10 located on Viewpoint Drive in Prescott Valley, Arizona, and their retail business, Prescott Valley  
11 Nursery located on Highway 69, Prescott Valley, Arizona. No sales activities of any kind occur on the  
12 Subject Property. Defendants admit that they, together with their two sons (Alan and James) are in  
13 partnership for the operation of Prescott Valley Growers.  
14  
15

16 F. Plaintiffs observed Defendants' improvement and use of the Subject Property each time  
17 they traveled along Coyote Springs Road between 2000 and May, 2003, when they filed their lawsuit.  
18

19 G. Defendants Cox applied for and obtained an agricultural use exemption from Yavapai  
20 County pertaining to their use of the subject land that remains valid today.

21 H. Prior to filing their lawsuit on May 16, 2003, Plaintiffs admit they made no effort to  
22 enforce the Declaration against the Defendants or any other Coyote Springs Ranch property owner.  
23 Plaintiffs have admitted that they are unaware of any other property owner in the portion of Coyote  
24  
25  
26

1 Springs Ranch that has ever sought to enforce the Declaration against any other property owner in  
2 Coyote Springs Ranch.

3 I. Prior to filing this lawsuit, Plaintiffs never had a personal or telephonic conversation  
4 with Defendants advising them that they believed the use of the Subject Property violated any  
5 restrictive covenant.  
6

7 J. All of the Plaintiffs acquired their land prior to the Coxes' acquisition of the Subject  
8 Property, prior to the time the Coxes began improving the Subject Property and prior to the time the  
9 Coxes began their use of the Subject Property.  
10

11 K. Plaintiffs Page and Cundiff have admitted that they have installed and continued to  
12 maintain above-ground water tanks on their respective properties despite the mandates of Paragraph  
13 16 of the Declaration, which states:  
14

15 All garbage or trash containers, oil tanks, bottled gas tanks and other such  
16 facilities must be underground or placed in an enclosed area so as not to be  
17 visible from the adjoining properties.  
18

19 H. Plaintiffs Page and Nash also have patronized and fostered the business of at least one  
20 Coyote Springs Ranch property owner prior to filing their lawsuit seeking to enforce Paragraph 2 of  
21 the Declaration against Defendants, having had their personal and/or business vehicles repaired by  
22 Coyote Curt's Auto Repair located in Coyote Springs Ranch. Plaintiff Kenneth Page admits that  
23 repairing cars in exchange for payment is considered a business.  
24  
25  
26

1 M. Plaintiffs have admitted that they attended a meeting at a church located in Coyote  
2 Springs Ranch in 2003 to discuss Defendants' use of the Subject Property. Plaintiffs have admitted  
3 that the church is not a residence and that it violates the Declaration.  
4

5 **II. CONTESTED ISSUES OF FACT AND LAW OF DEFENDANTS.**

6 Defendants disagree and contest those issues of fact and law identified by Plaintiffs in their  
7 Pretrial Statement and submit the following as what Defendants believe should be and are contested:  
8

9 A Whether Defendants had actual notice of the Declaration prior to their purchase of the  
10 Subject Property.

11 B. Whether Defendants knew, prior to and after their purchase, development and use of  
12 the Subject Property, whether the Declaration was enforceable.  
13

14 C. Whether the Declaration is enforceable either in whole or in part due to abandonment,  
15 waiver, vagueness, ambiguity, estoppel, laches and unclean hands.

16 D. Whether Defendants' use of their property for agricultural activities violates Paragraph  
17 2 of the Declaration.

18 E. Whether Defendants' improvements of the Subject Property constitute violations of  
19 Paragraphs 7(e) and 15 of the Declaration.  
20

21 Defendants affirmatively state that the statement of uncontested and contested issues of fact  
22 and law is not intended to be an exhaustive list of every fact, or inference drawn therefrom, or legal  
23 issue that may be presented or argued at time of trial in this matter.  
24  
25  
26

1 **III. FACTS DEFENDANTS BELIEVE ARE CONTESTED BY PLAINTIFFS**

2 A. Whether the portion of Coyote Springs Ranch where the Subject Property and  
3 Plaintiffs' properties are located is governed by the Declaration.  
4

5 B. Whether, Defendants had actual or constructive notice of the Declaration at the time  
6 of their purchase of the Subject Property.

7 C. Whether the Declaration of Restrictions is unenforceable due to abandonment, waiver,  
8 vagueness, ambiguity, estoppel, laches and unclean hands.  
9

10 D. Whether Defendants' conduct on the Subject Property has continued "unabated" since  
11 approximately 2000, and whether Defendants have increased the inventory of trees since the year  
12 2000.  
13

14 E. Whether Defendants have evidenced an intent to develop another approximate 10-acre  
15 parcel of land they own in Coyote Springs Ranch for the same use and purpose.

16 F. Whether Defendants' use of the Subject Property is a business.

17 G. Whether the activities on the Subject Property constitute a partnership asset owned by  
18 Prescott Valley Growers.  
19

20 H. Whether Defendants' home and a portable sanitary facility constitute violations of the  
21 Declaration of Restrictions  
22

23 **IV. OTHER ISSUES OF FACT AND LAW DEEMED MATERIAL BY PLAINTIFF**

24 Pursuant to Plaintiffs' Pretrial Statement, they have set forth the following:

25 A. Whether the non-waiver provision in the Declaration is enforceable.  
26

1 **V. OTHER ISSUES OF FACT AND LAW DEEMED MATERIAL BY DEFENDANTS.**

2 **A. DEFENDANTS' POSITION**

3 Defendants' position is that the Declaration of Restrictions is unenforceable in its entirety.  
4  
5 Specifically, Defendant' contend that (i) the Declaration of Restrictions have been abandoned, and (ii)  
6 the Declaration of Restrictions is unenforceable due to estoppel, laches and unclean hands. Defendants  
7 further content that Plaintiffs have waived their right to enforce the Declaration of Restrictions.  
8 Defendants' also assert that Paragraph 2 of the Declaration of Restrictions is vague and ambiguous  
9 and therefore cannot be enforced against the Defendants. Finally, Defendants assert that their use of  
10 their property is confined strictly to residential and agricultural activity, and therefore does not violate  
11 Paragraph 2 of the Declaration of Restrictions as the Declaration of Restrictions does not prohibit  
12 agricultural activities. Defendants also assert that, in the event the Declaration has not been abandoned  
13 and remains enforceable, they are in compliance with Paragraphs 7(e) and 15.  
14  
15

16 **1. THE COYOTE SPRINGS RANCH DECLARATION HAS BEEN**  
17 **ABANDONED, WHICH OPERATES AS A WAIVER OF PLAINTIFFS'**  
18 **RIGHT TO ENFORCE THE DECLARATION AS AGAINST**  
19 **DEFENDANTS**

20 Defendants have taken the position that because frequent violations of the Declaration have  
21 been permitted since the Declaration was recorded, and because no owner of property in the portion  
22 of Coyote Springs Ranch where the Subject Property is located has ever sought to enforce the  
23 Declaration from its recording and until Plaintiffs filed their lawsuit, the Declaration has been  
24 abandoned. See O'Malley v. Central Methodist Church, 67 Ariz. 245, 257, 194 P.2d 444, 452-53  
25 (1948). Consequently, Plaintiffs have waived their right to enforce the Declaration. See Burke v.  
26

1 Voicestream Wireless Corp., 422 Ariz. Adv. Rep. 16, 87 P.3d 81 (App. 2004). In Burke, the Arizona  
2 Court of Appeals held that waiver would be a viable defense against efforts to enforce restrictive  
3 covenants where those restrictive covenants have been abandoned. Id. at 19. Defendants believe that  
4 their position is amply supported by the scores of documented violations throughout Coyote Springs  
5 Ranch and witnesses who will testify that they conduct commercial activity within Coyote Springs  
6 Ranch.  
7

8           The rule of abandonment dovetails with the cornerstone, fundamental principle of free use and  
9 enjoyment of one's property. That is, restrictive covenants are not favored in the law and doubts and  
10 ambiguities regarding their existence and enforcement are to be resolved against the restriction. Lacer  
11 v. Navajo County, 141 Ariz. 396, 404, 687 P.2d 404, 412 (Ct. App. 1983) citing Duffy v. Sunburst  
12 Farms East Mut. Water & Agri. Co., Inc., 124 Ariz. 413, 604 P.2d 1124 (1979). In response to  
13 Plaintiffs' lawsuit, Defendants claim that Paragraph 2 of the Declaration is vague and ambiguous. Nor  
14 does it contain a prohibition against agricultural activities which is the type of activity engaged in by  
15 Defendants on the Subject Property.  
16

17           Defendants will present evidence and testimony showing that a vast majority of the property  
18 owners have disregarded and failed to comply with various provisions of the Declaration. The patently  
19 non-residential character of many of the properties within Coyote Springs frustrate the original  
20 purposes of the Declaration, assuming that the original purposes were to preclude business activity  
21 within Coyote Springs. Decker v. Hendricks, 97 Ariz. 36, 41, 396 P.2d 612 (1964); see also, affidavit  
22  
23  
24  
25  
26

1 of R. Conlin on file with the Court. Thus, circumstances have changed such that the Declaration has  
2 been abandoned and may not be enforced

3  
4 As stated above, restrictive covenants are to be strictly construed against persons seeking to  
5 enforce them and any ambiguities or doubts as to their effect should be resolved in favor of the free  
6 use and enjoyment of the property and against restrictions. R & R Realty Co. v. Weinstein, 422 P.2d  
7 148, 1966 Ariz. App. LEXIS 528 (App. 1966) (intent must be mutual). If presented with a persuasive  
8 reason why the Declaration has been abandoned -- that is, the non-waiver provision cannot be enforced  
9 -- the factfinder has the authority to determine that a non-waiver provision is ineffective and declare  
10 the Declaration abandoned. Burke, 207 Ariz. at 398-99, 87 P.3d at 86-87; see also Arizona Biltmore  
11 Estates Assoc. v. Tezak, 177 Ariz. 447, 449, 868 P.2d 1030, 1032 (App. 1993).

12  
13  
14 **2. THE DECLARATION OF RESTRICTIONS AT BEST ARE VAGUE**  
15 **AND AMBIGUOUS AS TO THE INTERPRETATION OF WHAT**  
**CONSTITUTES A BUSINESS ACTIVITY**

16 The rule governing restrictive covenants is that they will be enforced according to their terms.  
17 See Duffy v. Sunburst Farms East Mut. Water & Agr. Co., Inc., 124 Ariz. 413, 417, 604 P.2d 1124  
18 (1979). "The words in a restrictive covenant must be given their ordinary meaning." Id. at 416.  
19 Based on the foregoing law, if a particular activity or use of property governed by restrictive covenants  
20 is not expressly prohibited, it will be deemed permissible.

21  
22 Paragraph 2 of the Declaration of Restrictions ("**Declaration**") states:

23  
24 No trade, business, profession or any other type of commercial or  
25 industrial activity shall be initiated or maintained within said property  
26 or any portion thereof.

1 The Declaration does not define the terms and phrases in paragraph 2 – namely, “trade”, “business”,  
2 and “profession”, and the phrase “commercial or industrial activity”. Nor does Paragraph 2 of the  
3 Declaration include agricultural activities in the enumeration of activities that are prohibited.  
4 Moreover, the Declaration does not describe those types of activities that fall within the scope of the  
5 terms “trade”, “business”, and “profession”, and the phrase “commercial or industrial activity”.  
6

7 At their depositions, Plaintiffs could not agree on the interpretation of Paragraph 2. Plaintiffs  
8 were unable to define what constitutes a business or commercial activity, during deposition testimony.  
9 Defendants maintain that Plaintiffs’ inability to provide any clarity with regard to the meaning of  
10 Paragraph 2 demonstrates their ambiguity. Creating further ambiguity, Mr. Robert Conlin, the original  
11 grantor of Coyote Springs Ranch, attests that the Declaration was not intended to prohibit home-based  
12 business offices and advertising of the same to the public. However, the Declarations state no such  
13 exception.  
14  
15

16 Defendants’ maintain that the only way to possibly give meaning to any of these terms and  
17 phrases is to look outside the document itself. Consequently, what constitutes a “trade”, “business”,  
18 or “profession”, along with the phrase “commercial or industrial activity” in paragraph 2 of the  
19 Declaration, are be determined according to their ordinary meaning. Duffy 124 Ariz. at 416.  
20

21 According to the Webster’s New World Dictionary, the term “business” is defined as follows:

22 1 one’s work, occupation, or profession 2 a special task, duty or  
23 function 3 rightful concern or responsibility [no one’s business but his  
24 own] 4 a matter, affair, activity, etc [the business of packing for a trip]  
25 5 the buying and selling of commodities and services; commerce; trade  
26 6 a commercial or industrial establishment; store, factory, etc. 7 the  
trade or patronage of customers 8 commercial practice or policy 9 a bit

1 of action in a drama, as pouring a drink, intended to establish character,  
2 take up a pause in dialogue, etc.

3 Webster's New World Dictionary at p. 189 (3<sup>rd</sup> College Ed. 1988). The term "commercial" is defined  
4 as:

5 1 of or connected with commerce or trade 2 of or having to do with  
6 stores, office buildings, etc. [commercial property] 3 of a lower grade,  
7 or for use in large quantities in industry [commercial sulfuric acid] 4 a)  
8 made, done, or operating primarily for profit b) designed to have wide  
9 popular appeal 5 offering training in business skills, methods, etc. 6  
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10 Id. at 280. The term "commerce" is defined as:

11 1 the buying and selling of goods, esp. when done on a large scale  
12 between cities, states or countries; trade 2 social intercourse 3 [Rare]  
13 sexual intercourse.

14 Id. Applying the foregoing ordinary meanings to the Defendants' activities on their property leads  
15 to the conclusion that there is no infraction of paragraph 2 of the Declaration.<sup>1</sup> Alternatively, any  
16 ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of  
17 the property and against restrictions, as stated above.

18  
19 3. **DEFENDANTS' USE THEIR PROPERTY IS ONLY FOR**  
20 **RESIDENTIAL AND AGRICULTURAL PURPOSES, WHICH IS NOT**  
**IN VIOLATION OF THE DECLARATION**

21 Plaintiffs filed this lawsuit seeking to enforce against Defendants Paragraph 2 of the  
22 Declaration. Paragraph 2 states: "No trade, business, profession or any other type of commercial or  
23

24 \_\_\_\_\_  
25 <sup>1</sup>Defendants' agricultural activities also do not fall within the definitions of "trade", "profession"  
26 or "industrial activity".

1 industrial activity shall be initiated or maintained within said property or any portion thereof.”  
2 Defendants’ use of their Coyote Springs Ranch property is limited to living there and cultivating their  
3 young trees. They transact no business on their property and no money exchanges hands. There is  
4 no buying or selling of goods or services on their property. Defendants have constructed no  
5 commercial buildings on their property and they conduct no industrial operations thereon. Thus, by  
6 definition, the activity on Defendants’ property does not fall within the activities proscribed by the  
7 Declaration and is permitted. This conclusion is supported by the undisputed fact that Yavapai County  
8 has characterized Defendants’ use of their property as agricultural and has granted them an agricultural  
9 exemption for assessment purposes.  
10  
11

12 The term “agriculture” is defined in Webster’s Dictionary as “the science and art of farming;  
13 work of cultivating the soil, producing crops, and raising livestock”. *Id.* at 26. Such a definition is  
14 not included within the definitions of the terms “trade”, “business”, and “profession”, or the phrase  
15 “commercial or industrial activity”. *Id.* at 26, 189, 280. Defendants’ use of their property for  
16 agricultural purposes is not prohibited, either expressly or impliedly, by Paragraph 2 of the Declaration.  
17  
18

19 4. **DEFENDANTS ARE IN COMPLIANCE WITH PARAGRAPHS 7(e)**  
20 **AND 15 OF THE DECLARATION**

21 Assuming for the sake of argument that the Declaration has not been abandoned and Plaintiffs  
22 have not waived their right to enforce it, Defendants assert that they are in compliance with Paragraphs  
23 7(e) and 15. Defendants assert that, in terms of structures, there is only one residential structure on  
24 the subject property, a mobile home. Defendants also have one pump house to screen the well  
25  
26

1 equipment, one horse corral, and one tack room. All of Defendants' sanitary facilities are indoors or  
2 screened from view. Defendants are in compliance with the Declaration.

3  
4 **VI. PLAINTIFFS' WITNESSES.**

5 Plaintiffs have advised us that they intend to call the following witnesses at trial:

- 6 1. Plaintiffs John and Barbara Cundiff; Becky Nash; and, Kenneth and Kathryn Page.
- 7 2. Defendants Donald and Catherine Cox.
- 8 3. Waneta Offerman
- 9 4. Robert Launders, Esq.
- 10 5. Doug Reynolds.
- 11 6. Donald James.
- 12 7. Robert D. Conlin.
- 13 8. Representative of Yavapai County Planning & Zoning.
- 14 9. Steven Stein, CPA.
- 15 10. Dan Sanders.
- 16 11. Alan Cox.
- 17 12. David ("Dusty") Eiker.
- 18 13. James Cox.
- 19 20 14. All witnesses necessary to establish foundation for any exhibit introduced at time of  
21 trial, if necessary, including but not limited to, any agent or custodian of records for  
22 Realex Management, LLC, Capital Title Agency, Realty Executives, Yavapai County.  
23  
24  
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1  
2           Plaintiffs reserve the right to call any witness listed by Defendants, without waiving any  
3 objection Defendants may make to the introduction by Defendants of that or any other witness  
4 Defendants may call at time of trial.  
5

6           Plaintiffs further reserve the right to call any witness necessary for rebuttal or impeachment  
7 purposes as trial progresses.  
8

9           Defendants object to Plaintiffs calling the following witnesses from the list above:  
10 Representative of Yavapai County Planning & Zoning, Steven Stein, CPA, and Alan Cox. Defendants  
11 have already filed Motions *in Limine* regarding the foregoing witnesses which have yet to be ruled  
12 upon by the Court. Defendants reserve the right to object to Plaintiffs' witnesses testifying or  
13 testimony beyond the scope of the disclosures served pursuant to Rule 26.1, Ariz. R. Civ. P.  
14

15 **VII. DEFENDANTS' WITNESSES**

- 16           1.     Catherine Cox  
17           2.     Donald Cox  
18           3.     James Cox  
19           4.     Dennis J. Booth  
20           5.     Robert J. Lauanders  
21           6.     Laura Lamberson  
22           7.     Mike Wargo  
23           8.     Christin L. Bowra  
24  
25  
26

- 1 9. Mychel Westra
- 2 10. Sheila Cahill
- 3 11. Jim Savoini
- 4 12. Beau Boisvert
- 5 13. Wendy Dittbrenner
- 6 14. Charles A. Hildebrant
- 7 15. Joe Pearson
- 8 16. Frank Lamberson
- 9 17. Dr. Nichols
- 10 18. John Hough
- 11 19. Noreen Vaughn
- 12 20. Kenneth Yarbrough
- 13 21. William W. Furbee
- 14 22. Patricia Hocken
- 15 23. Curtis D. Kincheloe
- 16 24. Edward C. Woodworth
- 17 25. Jefferson Van Der Meersche
- 18 26. Mark Williams
- 19 27. John Hatfield
- 20 28. Wiley L. Williams
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- 1 29. Karen Wargo
- 2 30. Jeff Westra
- 3
- 4 31. Bill Jensen
- 5 32. Grant L. Griffiths
- 6 33. Kevin S. Eikleberry
- 7 34. Beverly Strissel
- 8 35. Larry Kirby
- 9
- 10 36. Al McRoberts
- 11 37. Robert Taylor
- 12 38. Karrie Decker
- 13 39. Brent Boling
- 14 40. Sue Stoks
- 15 41. Edward V. Carlin
- 16 42. Patricia M. Norbury
- 17 43. Eugene Morton
- 18 44. Robert D. Conlin
- 19
- 20
- 21 45. All witnesses necessary to establish foundation for any exhibit introduced at time of
- 22 trial, if necessary.
- 23
- 24
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- 26

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

4  
5 Additionally, Defendants reserve the right to call any witness necessary for rebuttal or  
6 impeachment purposes as trial progresses.

7 **VIII. PLAINTIFF'S TRIAL EXHIBITS**

8 Plaintiffs have advised that their trial exhibits will include the following:

- 9
- 10 1. Certified copy of Cundiff Joint Tenancy Deed, dated April 2, 1992, recorded in book  
11 2475, page 174.
  - 12 2. Certified copy of Nash Warranty Deed dated August 21, 2000, recorded in book 3778,  
13 pages 627-629.
  - 14 3. Certified copy of Nash Warranty Deed dated October 29, 2001, recorded in book  
15 3875, pages 538-539.
  - 16 4. Certified copy of Page Warranty Deed dated March 14, 2001, recorded in book 3820,  
17 pages 227-330.
  - 18 5. Certified copy of Cox Warranty Deed dated April 21, 1998, recorded in book 3568,  
19 pages 863-865.
  - 20 6. Certified copy of Declaration of Restrictions, dated June 13, 1974, recorded in book  
21 910, pages 680-682.
  - 22  
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- 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. \*\*

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- 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 on the subject property for all years that Defendants have maintained inventory on the subject property.
- 21. Documents pertaining to any and all improvements, structures, or developments made on the subject property from 1998 to present.
- 22. Copy of Defendants Cox application for well drilling filed with the Arizona Department of Water Resources, June 13, 2000.
- 23. Documents pertaining to all machinery, equipment, fixtures, supplies, tools and the like maintained or used in any fashion on the subject property from 2000 to present.
- 24. Employee records for Prescott Valley Growers pertaining to Defendants wholesale, retail and Coyote Springs Ranch property for 2000 through 2004. \*\*
- 25. Copy of Robert Launders' deposition transcript, *Smith v. McRoberts, et al.*, Yavapai County Superior Court Case No. CV 2000-0472.

1           26. Any pleading, motion, judgment filed in *Smith v. McRoberts, et al.*, Yavapai County  
2                           Superior Court Case No. CV 2000-0472 which this Court may take judicial notice  
3                           of.##  
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5           27. Sheila Cahill affidavit, CV 2003-0399, September 29, 2004.

6           Plaintiffs reserve the right to introduce any pleading, motion, exhibit attached to any pleading  
7 or motion, and any response to discovery filed or disclosed by Defendants.  
8

9           Plaintiffs further reserve the right to introduce any exhibit listed by Defendants in this joint pre-  
10 trial statement, notwithstanding any objection Plaintiffs may raise against the introduction of the  
11 exhibit. Furthermore, Plaintiffs' use of any exhibit listed by Defendants herein shall not be deemed a  
12 waiver of any objection by Plaintiffs to any other exhibit listed or introduced at time of trial by  
13 Defendants.  
14

15 **IX. DEFENDANT'S OBJECTIONS TO PLAINTIFF'S EXHIBITS.**

16           Defendants object to the exhibits noted above with a “#” on the basis that they were not  
17 disclosed and have yet to be produced. Those documents are currently the subject of a Motion *in*  
18 *Limine* which this Court has yet to rule upon. Defendants object to the exhibits noted above with a  
19 “\*\*\*” as Plaintiffs have not identified sufficiently or with any precision which documents of these  
20 groups of documents they intend to utilize during the trial from the files/documents they have  
21 identified. Therefore, assert as objections all objections available under the Arizona Rules of Evidence  
22 including lack of relevancy, lack of foundation, hearsay, cumulative evidence, or are not the best  
23 evidence. Defendants object to the exhibits noted above with a “\*\*\*\*” as some of the exhibits identified  
24  
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1 go beyond the scope of discovery ordered in this case and therefore they constitute private,  
2 confidential information that Plaintiffs may not adduce during trial. Defendants object to the Plaintiffs  
3 exhibits denoted above with “##” due to failure to disclose, lack of relevancy, lack of foundation,  
4 hearsay, cumulative evidence, or are not the best evidence including without limitation those objections  
5 available pursuant to Rule 26.1 and the Arizona Rules of Evidence.

7 **X. DEFENDANT’S TRIAL EXHIBITS**

- 8 1. Declaration of Restrictions at issue in this case.
- 9 2. Depositions of all Parties.
- 10 3. Assessor Parcel Maps filed together with Defendants’ Responses to Motions for  
11 Summary Judgment and the Response to Motion for Site Inspection.
- 12 4. Affidavit of Sheila M. Cahill and photographs attached thereto;
- 13 5. Photographs of Coyote Springs Ranch properties sorted by parcel numbers depicting  
14 violations of the Declaration of Restrictions including those with related business cards, Lonesome  
15 Valley Newsletter advertisements, telephone book advertisements and advertising flyers as previously  
16 disclosed.  
17 6. Spreadsheet prepared by Defendants documenting their observations of violations of  
18 the Declaration attached to Defendants’ Response to Motion for Site Inspection;
- 19 7. Articles regarding Coyote Springs Ranch from the August, 2003 through August, 2004  
20 editions of the Lonesome Valley Newsletter;
- 21 8. 2<sup>nd</sup> Chance Mobile Home Transport Co. voided check and invoice from same;
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- 1           9.     Advertisement for Sure-Wood Forest Trees located in Coyote Springs Ranch,
- 2           10.    Agricultural Land Use Application;
- 3           11.    Documents pertaining to any and all improvements, structures, or developments made
- 4           on the Subject Property from 1998 to present;
- 5
- 6           12.    Correspondence from Karrie Decker;
- 7           13.    Correspondence from Mike and Karen Wargo;
- 8           14.    Correspondence from Frank and Laura Lamberson;
- 9           15.    Correspondence from Larry Kirby;
- 10          16.    Correspondence from RT Contracting Specialists, LLC;
- 11          17.    Correspondence from Christin Bowra, Jeff Westra and Mychel Westra;
- 12          18.    Correspondence from Robert Taylor;
- 13          19.    Correspondence from Charles A. Hildebrant;
- 14          20.    Correspondence from Noreen Vaughan;
- 15          21.    Correspondence from Kathleen Wickman;
- 16          22.    Correspondence from Grant L. Griffiths, Owner of New Life Landscapes, Inc.;
- 17          23.    Correspondence from William and Linda Furbee;
- 18          24.    Affidavits (2) of Curtis Kincheloe;
- 19          25.    Check from Defendant Nash to Curtis Kincheloe;
- 20          26.    Invoices related to work on vehicles by Curtis Kincheloe;
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1           27. Telephone directory for Johnson Landscape & Property Maintenance business being  
2 operated at 8700 Morrow Way, Prescott Valley, Arizona;

3           28. Photos dated January 18, 2005 of Richie Trucking, Parcel # 401-01-028 D;

4           29. Articles of Incorporation - Arizona Business Corporation for International Business  
5 English and Software Training, Inc.;

6           30. The Daily Courier article from May 30, 2005;

7           31. Correspondence from Ed Woodworth;

8           32. Correspondence from Sue Stoks;

9           33. Deposition of Robert J. Lauanders taken on March 20, 2001, together with all exhibits  
10 attached thereto, in Rodney G. Smith and Jill L. Smith v. Al F. McRoberts and Joann McRoberts, et  
11 al., Yavapai County Superior Court Case No. CV 2000-0472;

12           34. Webster's New World Dictionary (3<sup>rd</sup> College Ed. 1988).

13           Defendants may put some or all of the foregoing exhibits on an overhead and/or Defendants  
14 reserve the right to introduce any pleading, motion, exhibit attached to any pleading or motion, and  
15 any response to discovery filed or disclosed by Plaintiffs.

16           Defendants further reserve the right to introduce any exhibit listed by Plaintiffs in their Pretrial  
17 Statement, notwithstanding any objection Defendants may raise against the introduction of the exhibit.  
18 Furthermore, Defendants' use of any exhibit listed by Plaintiffs herein shall not be deemed a waiver  
19 of any objection by Defendants to any other exhibit listed or introduced at time of trial by Plaintiffs.

1 **XI. PLAINTIFF'S OBJECTIONS TO DEFENDANT'S EXHIBITS.**

2 None have yet been asserted and Plaintiffs have reserved their right to object to Defendants'  
3 exhibits in their Pretrial Statement.  
4

5 **XII. DEPOSITION TESTIMONY TO BE OFFERED BY PLAINTIFFS.**

6 Plaintiffs reserve the right to utilize any parties' deposition transcript, including exhibits  
7 attached to any deposition transcript, in this proceeding as may be necessary during the course of trial.  
8 Plaintiffs' reservation of this right does not operate as a waiver of any objection Plaintiffs may have  
9 against Defendants' use of any deposition transcript, including any exhibit attached thereto, of any  
10 party or witness during trial in this case.  
11

12 **XIII. DEPOSITION TESTIMONY TO BE OFFERED BY DEFENDANTS.**

13 The following depositions have been taken in this case and Defendants Cox reserve the right  
14 to utilize any or all of each deposition, including exhibits, at trial:  
15

- 16 1. John B. Cundiff;
- 17 2. Barbara C. Cundiff;
- 18 3. Becky Nash;
- 19 4. Kenneth Page;
- 20 5. Kathryn Page;
- 21 6. Donald Cox;
- 22 7. Catherine Cox; and
- 23 8. Robert J. Launders, Esq.
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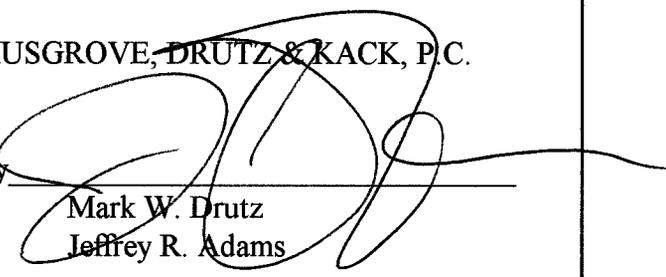
1 Defendants' reservation of this right does not operate as a waiver of any objection against  
2 Plaintiffs' use of any deposition transcript, including any exhibit attached thereto, of any party or  
3 witness during trial in this case.  
4

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

6 Defendants hereby certify that all exhibits listed have been exchanged or been made available  
7 to all other parties for inspection and copying.

8 RESPECTFULLY SUBMITTED this 22 day of July, 2005.

9  
10 MUSGROVE, DRUTZ & KACK, P.C.

11  
12 By 

13 Mark W. Drutz  
14 Jeffrey R. Adams

15 ORIGINAL of the foregoing filed  
16 this 22 day of July, 2005 with:

17 Clerk of the Court  
18 Yavapai County Superior Court  
19 Yavapai County Courthouse  
20 Prescott, Arizona 86301

21 Copy mailed this 22 day  
22 of July, 2005 to:

23 Honorable David L. Mackey  
24 Division One  
25 Yavapai County Superior Court  
26 Prescott, Arizona 86301

1 David K. Wilhelmsen, Esq.  
2 Marguerite M. Kirk, Esq.  
3 Favour, Moore & Wilhelmsen, P.A.  
4 1580 Plaza West Drive  
5 Post Office Box 1391  
6 Prescott, Arizona 86302-1391  
7 *Attorneys for Plaintiffs*

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