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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  
18 **Plaintiffs,**  
  
19 v.  
20  
21 DONALD COX and CATHERINE COX,  
22 husband and wife,  
23  
24 **Defendants.**

Case No. CV 2003-0399

Division No. 1

**DEFENDANTS' PROPOSED JURY INSTRUCTIONS**

(Assigned to the Honorable David L. Mackey)

25 Defendants, by and through undersigned counsel and pursuant to Rule 51, Ariz. R. Civ. P.,  
26 hereby requests that the Court give the RAJI (CIVIL) 3d Instructions indicated by a mark on this  
27 Request, and any additional/special instructions that are submitted with this Request:

**STANDARD**

- 28 1. Duty of Jurors ..... X
- 29 2. Evidence ..... X
- 30 3. Rulings of the Court ..... X
- 31 4. Arguments of Counsel ..... X
- 32 5. Stipulations ..... X

1	6	Credibility of Witnesses .....	X
2	7.	Expert Witness .....	—
3	8.	Impeachment With Felony Conviction .....	X
4			
5	9.	Burden of Proof (More Probably True) .....	X
6		<b>[Add the following language to this standard instruction: “This burden of proof is</b>	
7		commonly known as ‘preponderance of the evidence’”].	
8	10.	Burden of Proof (Clear and Convincing) .....	—
9	11.	Corporate Party .....	
10		[Replace word "Corporation" with word "Trust"]	
11			
12	12.	Respondent Superior Liability .....	—
13	13.	Impasse in Jury Deliberations (if the jury reaches an impasse only) .....	X
14	14.	Excused Alternate Jurors .....	X
15	15.	Closing Instruction .....	X

CONTRACT

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18	1.	Burden of Proof .....	X
19	2.	Claims and Elements .....	X

(with modification as follows: I will give you detailed instructions of law later in these instructions. But I will now give you a statement of each claim in the case, and a statement of what has to be proved on each claim. Plaintiffs claim that Defendants breached a contract. On this claim, Plaintiffs must prove there was an enforceable contract with Defendants and all property owners in the subdivision of real property that is in dispute in this case and that Defendants breached that contract. Defendants claims that there was no enforceable contract with Plaintiffs and has argued that even if the contract is enforceable, they have not breached the contract. Defendants must prove these defenses.)

1	3.	Definition and Formation of Contract .....	<u>X</u>
2		(with the following modifications: A contract is an agreement between two or more persons or	
3		entities. To find that the parties had a contract, you must find that they each intended to be bound	
4		by the agreement and that intention was known to the other party.)	
5			
6	4.	Offer .....	—
7	5.	Revocation of Offer .....	—
8	6.	Acceptance .....	<u>X</u>
9		(with the following modifications: For a binding contract to exist, it must be accepted by the parties	
10		to be bound. An acceptance is an expression of agreement to the terms of the contract. You must	
11		determine, based upon a preponderance of the evidence presented during trial, whether Defendants	
12		accepted the terms of a contract with Plaintiffs. If they did not, you must find in favor of Defendants.	
13		; if they did, you must determine whether Defendants breached a contract with Plaintiffs.)	
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15	7.	Consideration .....	<u>X</u>
16		(with the following modification: For a binding contract to exist, consideration must be given by the	
17		parties to the contract. Consideration is a benefit received, or something given up or exchanged, as	
18		agreed upon between the parties. You must determine, based upon a preponderance of the evidence	
19		presented during trial, whether the Plaintiffs and Defendants exchanged consideration. If they did	
20		not, you must find in favor of Defendants; if they did, you must determine whether Defendants	
21		breached a contract with Plaintiffs.)	
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23			
24	8.	Contract Modification .....	—
25	9.	Failure of Consideration .....	<u>X</u>
26	10.	Substantial Performance .....	—
27	11.	Failure of Condition .....	—
28	12.	Waiver of Condition .....	—

1	13.	Waiver .....	<u>X</u>
2	14.	Anticipatory Breach .....	—
3	15.	Third-Party Beneficiary .....	—
4	16.	Good Faith and Fair Dealing .....	—
5	17.	Measure of Direct Damages .....	—
6	18.	Consequential Damages .....	—
7	19.	Damages for Lost Profits .....	—
8	20.	Measure of Damages (Sale of Land) .....	—
9	21.	Measure of Damages (Purchase of Land) .....	—
10	22.	Measure of Damages (Breach of Warranty) .....	—
11	23.	Mitigation of Damages .....	—
12	24.	Quantum Meriut .....	—
13	25.	Whether a Standardized Terms is Part of the Agreement .....	—
14	26.	Determining Intent of the Parties .....	—
15	27.	Construction Against Party Choosing the Words .....	<u>X</u>
16	28.	Promissory Estoppel .....	—
17	29.	Impracticability .....	—
18	30.	Duress .....	—
19	31.	Definition of Option .....	—
20	32.	Exercising Option .....	—
21	33.	Lease Termination .....	—
22	34.	Damages for Breach or Termination of Lease .....	—
23	35.	Mitigation of Damages for Past Rent .....	—
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In addition to the foregoing, Defendants further request the additional instructions that follow:

**THE PARTIES**

The Plaintiff sin this matter are JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife; BECKY NASH, a married woman dealing with her separate property; KENNETH PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page Trust. The Defendants in this matter are DONALD COX and CATHERINE COX, husband and wife.

SOURCE: Amended Complaint; Answer to Amended Complaint

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**SUBJECT PROPERTY**

This case involves a portion of a subdivision of real property commonly known as Coyote Springs Ranch which is located north of Arizona Highway 89A in Prescott Valley, Arizona. Plaintiffs and Defendants each own real property located in the portion of Coyote Springs Ranch at issue in this case.

Source: Amended Complaint; Answer to Amended Complaint

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**RESTRICTIVE COVENANTS – GENERALLY**

Every owner of real property has the right to impose regulations on the manner in which his property shall be used and occupied in the future. Such regulations are considered restrictive covenants. Restrictive covenants constitute a contract between the subdivision's property owners as a whole and individual lot owners. The general rule governing restrictive covenants is that they run with the title to the land they burden and they generally will be enforced according to their terms. The law in Arizona provides that the words in a restrictive covenant must be given their ordinary meaning. Restrictive covenants are not favored in the law and doubts and ambiguities regarding their existence and enforcement are to be resolved against the restriction.

Source: Murphey v. Gray, 84 Ariz. 299, 327 P.2d 751 (1958); Ahwatukee Custom Estates Mgmt. Ass'n, Inc. v. Turner, 196 Ariz. 631, 634, 2 P.3d 1276, 1279 (Ct. App.2000); Pinetop Lakes Ass'n v. Hatch, 135 Ariz. 196, 659 P.2d 1341 (Ct. App. 1983); Duffy v. Sunburst Farms East Mut. Water & Agr. Co., Inc., 124 Ariz. 413, 417, 604 P.2d 1124 (1979); Lacer v. Navajo County, 141 Ariz. 396, 687 P.2d 404 (Ct. App. 1983).

**RESTRICTIVE COVENANTS AT ISSUE AND PLAINTIFFS' CLAIMS**

The portion of Coyote Springs Ranch where Plaintiffs' and Defendants' properties are located are allegedly governed by a document entitled "Declaration of Restrictions", which is a set of restrictive covenants and the contract that is at issue in this case. The Declaration of Restrictions at issue in this case was prepared by the former owner of the real property now owned by Plaintiffs and Defendants and was recorded on June 13, 1974, in the Official Records of Yavapai County, Arizona at Book 416, Page 680.

Plaintiffs filed this lawsuit seeking to enforce against Defendants Paragraphs 2, 7(e) and 15 of the Declaration of Restrictions.

(i) Paragraph 2 of the Declaration of Restrictions states: "No trade, business, profession or any other type of commercial or industrial activity shall be initiated or maintained within said property or any portion thereof."

(ii) Paragraph 7(e) of the Declaration of Restrictions at issue states: "No structure whatsoever other than one single family dwelling or mobile home, as herein provided, together with a private garage for not more than three (3) cars, a guest house, service quarters and necessary out buildings shall be erected, placed or permitted to remain on the property."

(iii) Paragraph 15 of the Declaration of Restrictions at issue states: "No outside toilet or other sanitary conveniences or facilities shall be erected or maintained on the premises."

Plaintiffs have the burden of proving that Defendants have violated the foregoing provisions of the Declaration of Restrictions. If Plaintiffs do not prove that Defendants have violated the foregoing provisions of the Declaration of Restrictions, you must rule in favor of Defendants.

Source: Complaint

**DEFENDANTS' AFFIRMATIVE DEFENSES – ABANDONMENT AND WAIVER**

The law in Arizona has long provided that after frequent violations of the restrictive covenants have been permitted, then the restrictive covenants will be considered abandoned and no longer enforceable. If restrictive covenants have been abandoned, property owners seeking to enforce them will be deemed to have waived their right of enforcement. A party to a contract may waive the other party's duty to perform. "Performance" refers to what a party agreed to do as his part of the contract. Waiver is either the express, voluntary, and intentional relinquishment of a known right, or it is conduct that is inconsistent with an intent to assert the right. By accepting performance known to be deficient, a party has waived the right to reject the contract on the basis the basis of that performance.

If Plaintiffs and the other owners of property in Coyote Springs Ranch have permitted frequent violations of the Declaration of Restrictions, then (i) the Declaration of Restrictions will be deemed abandoned, (ii) Plaintiffs will be deemed to have waived their right to enforce any provision of the Declaration of Restrictions and (iii) Defendants are not obligated to comply with any provision of the Declaration of Restrictions. Defendants have the burden of proving, based upon a preponderance of the evidence presented during trial, that the Declaration of Restrictions has been abandoned and waived.

If, based upon a preponderance of the evidence presented during trial, you determine that Plaintiffs and/or the other owners of property in Coyote Springs Ranch have permitted frequent violations of the Declaration of Restrictions, you must find that the Declaration of Restrictions is ambiguous and that Plaintiffs have waived their right to enforce the Declaration of Restrictions. If, based upon a preponderance of the evidence presented during trial, you determine that Plaintiffs and the other owners of property in Coyote Springs Ranch have not permitted frequent violations of the

1 Declaration of Restrictions, you must find that the Declaration of Restrictions has not been  
2 abandoned and that Plaintiffs have not waived their right to enforce the Declaration of Restrictions.

3 You must then determine whether the Declaration of Restrictions is otherwise enforceable.  
4

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6 Source: O'Malley v. Central Methodist Church, 67 Ariz. 245, 257, 194 P.2d 444, 452-53 (1948);  
7 Burke v. Voicestream Wireless Corp., 207 Ariz 393, 87 P.3d 81 (App. 1 2004) (citing Condos v.  
8 Home Development Co., 77 Ariz. 129, 267 P.2d 1069 (1954); RAJI (4<sup>th</sup> ed.) at 143.  
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**DEFENDANTS' AFFIRMATIVE DEFENSES – VAGUENESS AND AMBIGUITY**

As stated above, restrictive covenants are not favored in the law and doubts and ambiguities regarding their existence and enforcement are to be resolved against the restriction. Restrictive covenants are to be strictly construed against persons seeking to enforce them and any ambiguities or doubts as to their effect should be resolved in favor of the free use and enjoyment of the property and against restrictions. The person seeking to enforce an ambiguous or vague restrictive covenant has the burden of proving that it applies to the particular facts; he must show that, despite the ambiguous language, both the intent of the parties and the purpose of the restriction are clear.

If you determine that the Declaration of Restrictions have not been abandoned and waived, you must determine whether Defendants have violated the provisions of that document.

The first provision you must address is Paragraph 2. In response to Plaintiffs' allegation that the Defendants have violated Paragraph 2 of the Declaration of Restrictions, Defendants have asserted that Paragraph 2 is vague and ambiguous and therefore cannot be enforced against the Defendants. You must determine whether Paragraph 2 of the Declaration of Restrictions is vague or ambiguous based upon the ordinary meaning of the words and phrases used in that restrictive covenant and the evidence presented during trial.

If, based upon a preponderance of the evidence presented during trial, you determine that Paragraph 2 of the Declaration of Restrictions is vague or ambiguous, you must rule that Paragraph 2 may not be enforced against Defendants.

If, based upon a preponderance of the evidence presented during trial, you find that Paragraph 2 is neither vague nor ambiguous, you must determine whether Defendants use of their property violates Paragraph 2 of the Declaration of Restrictions if you determine it is enforceable.

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Source: Lacer v. Navajo County, 141 Ariz. 396, 687 P.2d 404 (Ct. App. 1983); Duffy v. Sunburst Farms East Mut. Water & Agr. Co., Inc., 124 Ariz. 413, 417, 604 P.2d 1124 (1979) (quoting Grossman v. Hatley, 21 Ariz.App. 581, 522 P.2d 46 (1974)); Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974).

**DEFENDANTS' AFFIRMATIVE DEFENSES – DEFENDANTS DO NOT ENGAGE IN ANY ACTIVITY ON THEIR PROPERTY THAT FALLS WITHIN THE SCOPE OF PARAGRAPH 2 OF THE DECLARATION OF RESTRICTIONS**

If you determine that the Declaration of Restrictions have not been abandoned and waived, and you have determined that Paragraph 2 of the Declaration of Restrictions is neither vague nor ambiguous, you must determine whether Defendants use of their property violates Paragraph 2 of the Declaration of Restrictions. Defendants have asserted that Paragraph 2 of the Declaration of Restrictions does not prohibit their use of their property. You must determine whether Defendants' use of their property is disallowed by Paragraph 2 of the Declaration. As you were previously instructed, the law in Arizona provides that the words in a restrictive covenant must be given their ordinary meaning. For this purpose, you shall use ordinary definitions of the terms, such as those from Webster's New World Dictionary (3<sup>rd</sup> Collegiate Ed.), to define the terms of Paragraph 2 of the Declaration of Restrictions.

Webster's New World Dictionary defines the term "business" as follows:

1 one's work, occupation, or profession 2 a special task, duty or function 3 rightful concern or responsibility [no one's business but his own] 4 a matter, affair, activity, etc [the business of packing for a trip] 5 the buying and selling of commodities and services; commerce; trade 6 a commercial or industrial establishment; store, factory, etc. 7 the trade or patronage of customers 8 commercial practice or policy 9 a bit of action in a drama, as pouring a drink, intended to establish character, take up a pause in dialogue, etc.

defines the term "commercial" as:

1 of or connected with commerce or trade 2 of or having to do with stores, office buildings, etc. [commercial property] 3 of a lower grade, or for use in large quantities in industry [commercial sulfuric acid] 4 a) made, done, or operating primarily for profit b) designed to have wide popular appeal 5 offering training in business skills, methods, etc. 6 Radio TV paid for by sponsors

and defines the term "commerce" as:

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

4           You must determine whether the Paragraph 2 of the Declaration of Restrictions, given the  
5           ordinary meaning of its words and phrases, prohibits the type of activity conducted by Defendants  
6           on their property. If, based upon the definitions provided above and upon a preponderance of the  
7           evidence presented during trial, you find that Defendants' use of their property is not prohibited by  
8           Paragraph 2 of the Declaration of Restrictions, you must rule in favor of Defendants and against  
9           Plaintiffs on Plaintiffs' allegation that Defendants have violated Paragraph 2 of the Declaration of  
10          Restrictions. If, based upon the definitions provided above and upon a preponderance of the  
11          evidence presented during trial, you find that Defendants' use of their property is prohibited by  
12          Paragraph 2 of the Declaration of Restrictions, you must rule in favor of Plaintiffs on their claim that  
13          Defendants have violated Paragraph 2 of the Declaration of Restrictions.  
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18          Source: Duffy v. Sunburst Farms East Mut. Water & Agr. Co., Inc., 124 Ariz. 413, 416, 604 P.2d  
19          1124 (1979); Webster's New World Dictionary at 189 (3<sup>rd</sup> College Ed. 1988)

**DEFENDANTS HAVE NOT VIOLATED PARAGRAPHS 7(E) OR 15 OF THE  
DECLARATION OF RESTRICTIONS.**

As stated above, in addition to alleging that Defendants have violated Paragraph 2 of the Declaration of Restrictions, Plaintiffs have alleged that Defendants have violated Paragraphs 7(e) and 15 of the Declaration of Restrictions. If you determine that the Declaration of Restrictions have not been abandoned and waived, you must determine whether Defendants have violated Paragraphs 7(e) and 15 of the Declaration of Restrictions.

Paragraph 7(e) of the Declaration of Restrictions at issue states: "No structure whatsoever other than one single family dwelling or mobile home, as herein provided, together with a private garage for not more than three (3) cars, a guest house, service quarters and necessary out buildings shall be erected, placed or permitted to remain on the property." Paragraph 15 of the Declaration of Restrictions at issue states: "No outside toilet or other sanitary conveniences or facilities shall be erected or maintained on the premises." Plaintiffs have the burden of proving that Defendants have violated the foregoing provisions of the Declaration of Restrictions. If, based upon the evidence presented during trial, you determine that Defendants have not violated Paragraphs 7(e) or 15 of the Declaration of Restrictions, you must find in favor of Defendants on Plaintiffs' allegations regarding those provisions.

If, based upon a preponderance of the evidence presented during trial, you determine that Defendants have not violated Paragraphs 7(e) or 15 of the Declaration of Restrictions, you must find in favor of Defendants on Plaintiffs' allegations regarding those provisions. If, based upon a preponderance of the evidence presented during trial, you determine that Defendants have violated Paragraphs 7(e) or 15 of the Declaration of Restrictions, you must find in favor of Plaintiffs on Plaintiffs' allegations regarding those provisions.

1 Source: Complaint  
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**DEFENDANTS' AFFIRMATIVE DEFENSES – EQUITABLE ESTOPPEL**

A claim for equitable estoppel arises when one by his acts, representations or omissions intentionally or through culpable negligence induces another to believe and have confidence in certain material facts and the other justifiably relies and acts on such belief causing him injury or prejudice. In this case, you must determine, based upon the preponderance of the evidence in this case, whether the property owners in the portion of Coyote Springs Ranch where the Defendants' property is located, by their acts, intentionally or through culpable negligence, induced Defendants or any other similarly situated Coyote Springs Ranch property owner to believe that they did not have to comply with the Declaration of Restrictions rendering it unenforceable and thereby causing Defendants or any other similarly situated Coyote Springs Ranch property owner to rely upon their belief. Negligence is the doing of something which a party is under a legal obligation not to do or the failure to do something which he is under an obligation to do.

If you determine, based upon the preponderance of the evidence in this case, that the property owners in the portion of Coyote Springs Ranch where the Defendants' property is located, by their acts, intentionally or through culpable negligence, induced Defendants or any other similarly situated Coyote Springs Ranch property owner to believe that they did not have to comply with the Declaration of Restrictions rendering it unenforceable and thereby causing Defendants to rely upon their belief, you must find that the Plaintiffs may not enforce the Declaration of Restrictions against Defendants. If you determine, based upon the preponderance of the evidence in this case, that the property owners in the portion of Coyote Springs Ranch where the Defendants' property is located, by their acts, intentionally or through culpable negligence, did not induce Defendants to believe that they did not have to comply with the Declaration of Restrictions, you must find that the Plaintiffs may

1 enforce the Declaration of Restrictions against Defendants. You then must find that the Defendants  
2 have violated the Declaration of Restrictions.

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Source: St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co., 154 Ariz. 307, 742 P.2d 808  
(1987); In re Trigg's Estate, 102 Ariz. 140, 426 P.2d 637 (1967); So. Pac. R. Co. of Mexico v.  
Gonzalez, 48 Ariz. 260, 61 P.2d 377 (1936); Terry v. Lincscott Hotel Corp., 3 Ariz.App. 330, 617  
P.2d 56 (1980).

**DEFENDANTS' AFFIRMATIVE DEFENSES – LACHES**

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3 A person must exercise diligence and avoid unreasonable delay in pursuing a claim, the  
4 enforcement of which would prejudice another party. In this case, you must determine, based upon  
5 the preponderance of the evidence in this case, whether the property owners in the portion of Coyote  
6 Springs Ranch where the Defendants' property is located, have failed to exercise diligence and  
7 avoided unreasonable delay in enforcing the Declaration of Restrictions against other property  
8 owners, including Defendants, to those property owners' prejudice. If you make the foregoing  
9 determination, based upon the preponderance of the evidence in this case, you must find that the  
10 Declaration of Restrictions is unenforceable. If you do not make the foregoing determination, you  
11 must determine whether Defendants have violated the Declaration of Restrictions.  
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15 Source: Barr v. Petzhold, 77 Ariz. 399, 406, 273 P.2d 161 (1954), and Sotomayor v. Burns, 199  
16 Ariz. 81, 82-83, 13 P.3d 1198 (2000).  
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**DEFENDANTS' AFFIRMATIVE DEFENSES – UNCLEAN HANDS**

Ordinarily, an owner of property in a planned subdivision who has violated restrictive covenants cannot enforce the restrictive covenants against others. You must find, based upon a preponderance of evidence during trial, whether owners of properties in the subdivision where Defendants' property is located, including Plaintiffs, have violated the Declaration of Restrictions. If so, the Declaration of Restrictions is unenforceable. If not, you must determine whether the Defendants have violated the Declaration of Restrictions.

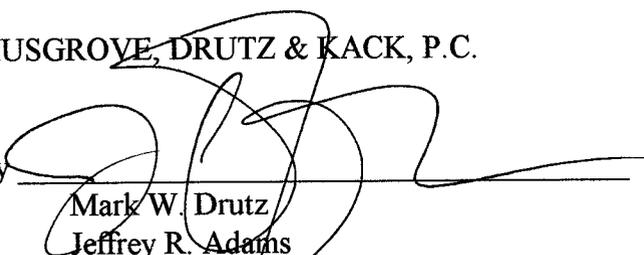
Source: 20 AmJur2d Covenants, § 276 at 695; 20 AmJur2d Covenants, § 284 at 704; Restatement of Property §§ 550 and 560; Atwood v. Walter, 714 N.E.2d 165 (Mass. 1999), 42 Am.Jur. Proof of Facts 3<sup>rd</sup> at 463, Circumstances Establishing Equitable Defense to Breach of Restrictive Covenant.

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RESPECTFULLY SUBMITTED this 22 day of July, 2005.

MUSGROVE, DRUTZ & KACK, P.C.

By



Mark W. Drutz  
Jeffrey R. Adams  
Sharon Sargent-Flack  
Attorneys for Defendants

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

Honorable David L. Mackey  
Yavapai County Superior Court  
Division 1  
Yavapai County Courthouse  
Prescott, Arizona 86301

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