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BY: [Signature]

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6 Attorneys for Plaintiffs

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

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

Case No. CV 2003-0399 ✓

Division 1

**JOINT PRETRIAL CONFERENCE
MEMORANDUM IN ACCORDANCE
WITH RULE 16(b),
ARIZ.R.CIV.PROC.**

17 The parties, by and through undersigned counsel, pursuant to Rule 16(b), Ariz.R.Civ.P., hereby
18 submit their Joint Pretrial Conference Memorandum as follows:

- 19 1. **Discovery.**
20 A. Plaintiffs: Depositions of each Plaintiff as well as each Defendant have been taken.
21 Other fact witnesses will be interrogated, as necessary, by interview of counsel.
22 Additionally, the parties have exchanged their initial disclosure statement in accordance
23 with Rule 26.1. It is anticipated that Plaintiffs will pursue other discovery under Rules
24 33, 34 and 36 after the Court has made a ruling on the issue of joinder of all other
25 subdivision property owners, numbering approximately 402.
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B. Defendants: The parties completed substantial discovery in this case already in anticipation of trial in August, 2005. However, following the Court’s granting of Defendants’ Motion for Summary Judgment Re: Agricultural Activities (“**Defendants’ MSJ**”), the Court’s denial of Defendant’s Motion to Join Indispensable Parties Pursuant to Rule 19(a), Ariz R. Civ. P., or in the Alternative, Motion to Dismiss Pursuant to Rule 12(b)(7), Ariz R. Civ. P., for Failure to Join Indispensable Parties (“**Motion to Join**”), Plaintiff’s Appeal of this Court’s ruling on Defendants’ MSJ, Defendants’ Cross-Appeal if this Court’s ruling on the Motion to Join, and the Court of Appeals’ reversal of this Court’s rulings on the foregoing Motions, additional discovery will be necessary. Defendants expect that, given, the Court of Appeals’ ruling that all owners of property in the subject subdivision must be joined and are necessary parties to this case, those property owners will eventually become parties to this case necessitating the taking of additional depositions, the exchange of additional and supplemental disclosure statements, the service of additional written discovery under Rule 33, 34, 36, and 45, Ariz. R. Civ. P., the completion of additional interviews of new fact witnesses and re-interviewing previously identified fact witnesses in light of the significant amount of time that has passed since we originally were prepared for trial.

At this time Defendants are unaware of any pending discover disputes between the parties, but expect that they may and as such those will have be dealt with at the time those disputes develop

2. **Expert Witnesses.**

- A. Plaintiffs: Plaintiffs suggest that expert witnesses be disclosed no later than 120 days before trial.
- B. Defendants: Expert witness shall be disclosed no later than 60 days before trial.

1 **3. Determination or Designation of Experts.**

2 A. Plaintiffs: At this time, Plaintiffs have not made any determination or designation of
3 expert witnesses that it may utilize at the time of trial. Plaintiffs suggest, however, that
4 any expert witnesses to be utilized at trial be disclosed no later than 120 days prior to
5 trial. Plaintiffs contend that Defendants’ previous identification of Sheila Cahill as an
6 expert witness is inappropriate. Plaintiffs dispute that Sheila Cahill’s anticipated
7 testimony can be characterized as “expert testimony” under Rule 702, Ariz.R.Evid., and
8 also dispute that Ms. Cahill qualifies as an expert witness.

9 B. Defendants: Defendants have designated Sheila Cahill as an expert witness. We expect
10 that Plaintiffs will renew their objection to Ms Cahill being called as an expert or even
11 as a lay witness although we believe that this Court has resolved that issue already.

12 **4. Disclosure of Nonexpert Witnesses.**

13 A. Plaintiffs: The parties have each disclosed a number of lay witnesses in their respective
14 disclosure statements. Plaintiffs have filed a motion *in limine* to which Defendants have
15 responded, seeking to preclude a number of lay witnesses Defendants have disclosed
16 from testifying at the time of trial. Plaintiff suggests that nonexpert witnesses be
17 disclosed no later than 75 days before trial.

18 B. Defendants: The parties have each disclosed a number of lay witnesses in their
19 respective disclosure statements. As noted above, the witnesses to be called by
20 Defendants are likely to change as this case moves forward in light of additional
21 discovery and the joinder of additional Defendants given the Court of Appeals’ ruling
22 on the motion to Join. Defendants believe that nonexpert witnesses will be disclosed
23 no later than 75 days before trial.

24 **5. Discovery Disputes.**

25 A. Plaintiffs: Plaintiffs are unaware of any current discovery disputes.

26 B. Defendants: Defendants are unaware of any currently pending discovery disputes.

1 **6. Elimination of Unmeritorious Claims or Defenses.**

2 A. Plaintiffs: Plaintiffs contend that Defendants' position that all property owners in the
3 subdivision are indispensable parties is unmeritorious. The Court of Appeals has
4 affirmed this Court's elimination of Cox's affirmative defenses of laches, unclean hands
5 and estoppel.

6 B. Defendants: Absent the Court's resolution of Plaintiffs' objection to the joinder of all
7 owners of property in the subject subdivision despite the Court of Appeals' ruling on
8 the Motion to Join, Defendants believe all issues with respect to the merits of the claims
9 and defenses asserted in this case have been resolved.

10 **7. Amendment of Pleadings.**

11 A. Plaintiffs: Based on the decision of the appellate court, this Court must determine on
12 remand whether the other property owners subject to the recorded Declaration of
13 Restrictions are indispensable parties. Therefore, if the Court determines that the other
14 landowners are indispensable parties, then amendment of the pleadings will be
15 necessary. If, on the other hand, the Court determines that the other landowners are
16 not indispensable parties, then Plaintiffs do not anticipate any further amendments to
17 the pleadings will be required.

18 B. Defendants: Defendants expect that the pleadings will have to be amended given the
19 ruling of the Court of Appeals on the Motion to Join. Those pleadings will have to be
20 amended to reflect the joinder of all owners of property in the subject subdivision.

21 **8. Identification of Issues of Fact.**

22 A. Plaintiffs: Plaintiffs filed suit for breach of contract requesting declaratory and
23 injunctive relief claiming that Defendants' use of their property in connection with their
24 retail and wholesale nursery business constitutes a violation of the recorded restrictive
25 covenant against commercial or industrial use of the property. Defendants have only
26 one affirmative defense: abandonment. Additionally, Defendants seek joinder of all

1 property owners in the subdivision as indispensable parties. Plaintiffs oppose said
2 joinder of all property owners in the subdivision as unwarranted and not supported in
3 law.

4 B. Defendants: The parties dispute whether the recorded Declaration of Restrictions has
5 been abandoned/waived.

6 9. **Stipulations re Foundation or Admissibility.**

7 A. Plaintiffs: At this juncture, the parties have not had an adequate opportunity to
8 properly discuss any stipulation as to the admissibility of any evidence.

9 B. Defendants: Defendants believe that at the present time such stipulations are premature,
10 especially in light of the fact that the Court has yet to resolve the issue of the joinder
11 of all owners of property in the subject subdivision. Defendants will, however, agree
12 that they will entertain and address any necessary stipulations on or before 20 days
13 before trial.

14 10. **Special Procedures.**

15 A. Plaintiffs: Plaintiffs do not anticipate that any special procedures for management of this
16 case are necessary.

17 B. Defendants: No special procedures for management of this case are necessary.

18 11. **Alternative Dispute Resolution.**

19 A. Plaintiffs: The parties have engaged in mediation on two prior occasions without
20 success. Plaintiffs remain willing to attempt to settle this matter, but cannot do so if
21 Defendants' position is simply that they will not remove their current existing business.

22 B. Defendants: The parties already have participated in two mediations and a settlement
23 conference, none of which were successful. Defendants, however, may be willing to
24 consider some form of ADR following the Court's decision on the issue of joinder of
25 the other owners of property in the subject subdivision.

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- 1 12. **Modification/Suspension of Any Rules.**
- 2 A. Plaintiffs: Plaintiffs do not believe that this case necessitates suspension or modification
- 3 of any rules at this time based upon the current posture of the case.
- 4 B. Defendants: Defendant does not believe this is necessary.
- 5 13. **Rule 26.1 Compliance.**
- 6 A. Plaintiffs: The parties have exchanged their initial disclosure statements, as well as
- 7 supplements thereto, under Rule 26.1, Ariz.R.Civ.P. Plaintiffs suggest that final
- 8 disclosure statements be submitted 30 days prior to trial.
- 9 B. Defendants: See paragraph 1 above. Defendants will agree to full compliance with
- 10 Rule 26.1, Ariz.R.Civ.P., will have been made by the discovery cut-off 30 days prior
- 11 to trial.
- 12 14. **Settlement Conference.**
- 13 A. Plaintiffs: The parties on two occasions have previously attempted mediation of this
- 14 matter without success.
- 15 B. Defendants: See paragraph 11 above.
- 16 15. **Joint Pretrial Statement.**
- 17 A. Plaintiffs: Plaintiffs suggests that Joint Pretrial Statement be filed 15 days prior to trial.
- 18 B. Defendants: Defendants believe that the parties should file a Joint Pretrial Statement
- 19 within ten days of trial.
- 20 16. **Trial Date.**
- 21 A. Plaintiffs: Plaintiffs suggest that this matter be set for the earliest possible trial date on
- 22 the court's calendar as the parties were ready to go to trial prior to the granting of
- 23 summary judgment and appeal and should be in the same position—ready to proceed.
- 24 B. Defendants: Defendants believe, based upon our position that all other property owners
- 25 in the subject subdivision should be joined and the fact that completion of discovery,
- 26

1 both by the present parties and those to be joined, will take some time to complete, that
2 a trial date in the early or late summer, 2008, at the earliest, would be reasonable.

3 17. **Motions in Limine/Dispositive Motions.**

4 A. Plaintiffs: Plaintiffs recommend that any motions *in limine* should be filed no later than
5 10 days before trial. Dispositive motions should be filed no later than 30 days prior to
6 trial.

7 B. Defendants: Defendants believe that any motions *in limine*, if necessary, should be filed
8 no later than 20 days before trial. Dispositive motions should be filed no later than 60
9 days prior to trial.

10 18. **Jury Trial.**

11 A. Plaintiffs: Plaintiffs' action is for declaratory and injunctive relief. Therefore, any jury
12 would be only advisory. Under this circumstance, Plaintiffs do not consider the
13 resources and time necessarily incurred for a jury to be warranted in this case.

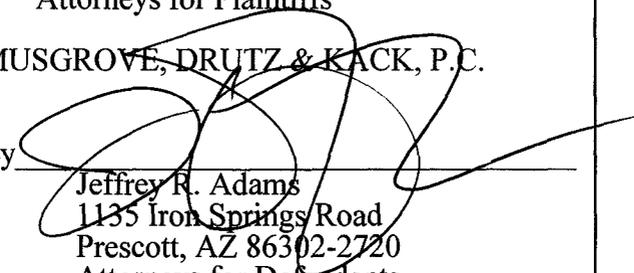
14 B. Defendants: Defendants have requested a jury trial.

15 DATED this 15th day of October, 2007.

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1 Original of the foregoing
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2 with:

3 Clerk, Superior Court of Arizona
Yavapai County
4 Prescott, Arizona

5 A copy hand-delivered this 15th day
of October, 2007 to:

6 Honorable David L. Mackey
7 Division One
Superior Court of Arizona
8 Yavapai County
Prescott, Arizona
9

10 By: 
11 David K. Wilhelmsen

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