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10 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

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

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

18 Plaintiffs,

19 v.

20 DONALD COX and CATHERINE COX,  
21 husband and wife, et al., et ux.,

22 Defendants.

Case No. CV 2003-0399

Division No. 6

**MOTION TO STRIKE AND IN LIMINE**

(Assigned to the Hon. Kenton Jones)

(Oral argument requested)

23 Pursuant to Rules 26.1(a)(8)-(9) and (b)(2), and Rule 37(c)(1), Ariz. R. Civ. P.,  
24 Defendants, by and through undersigned counsel, hereby move to strike the videos attached to the  
25 Affidavit of John Cundiff attached as Exhibit "2" to Plaintiffs' December 28, 2012, Statement of  
26 Facts ("PSOF") in Support of their Motion for Summary Judgment ("MSJ") and likewise move *in*  
27 *limine* to preclude Plaintiffs from introducing said videos into evidence in this case or from using  
28 them for any purpose during the trial of this matter. The subject videos were never previously

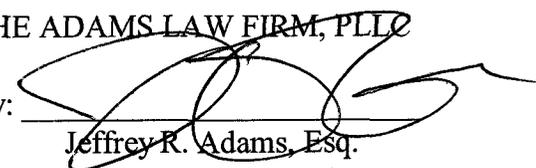
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1 disclosed notwithstanding the fact that they were taken nearly six months ago in June and July, 2012.  
2 Further, Plaintiffs likewise have failed to lay proper foundation for the videos. Defendants also ask  
3 that the Court strike the affidavit of John Cundiff filed with the PSOF in support of their MSJ and  
4 move *in limine* to preclude Mr. Cundiff from testifying about said videos. As the videos themselves  
5 reflect, they were not taken by Mr. Cundiff; nor was he present when they were taken. The videos  
6 make no reference to any particular lot or lots within the subject subdivision and Mr. Cundiff's  
7 affidavit itself lacks any sort of foundation. Accordingly, the videos along with Mr. Cundiff's  
8 affidavit must be stricken and not considered by the Court in ruling on Plaintiffs' MSJ. Further, the  
9 Court must preclude the videos and Mr. Cundiff's affidavit or any testimony premised thereon at trial  
10 as both the videos and Mr. Cundiff's affidavit were untimely disclosed. This Motion is supported  
11 by the accompanying Memorandum of Points and Authorities.  
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13  
14

15 Respectfully submitted this \_\_\_ day of January, 2013.

16 THE ADAMS LAW FIRM, PLLC

17 By: 

18 Jeffrey R. Adams, Esq.

19 Attorneys for Defendants

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I. Plaintiffs' DVD Recordings And Mr. Cundiff's Affidavit Were Untimely**  
22 **Disclosed And Must Be Stricken And Not Considered By The Court Or The**  
23 **Trier Of Fact.**

24 Rule 26.1, Ariz. R. Civ. P., which importantly is entitled "**Prompt** Disclosure of  
25 Information", requires that parties disclose to their opponent all tangible evidence as well as all  
26 electronically stored information that a party intends to use during trial, which presumably would  
27 include video recorded information. See Rule 26.1(a)(9). Disclosure must occur "in no event more  
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1 than thirty (30) days after the information is revealed to or discovered by the disclosing party.” See  
2 Rule 26.1(b)(2).

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4 The design and purpose of the foregoing disclosure Rules are to provide parties “a reasonable  
5 opportunity to prepare for trial or settlement.” *Zimmerman v. Shakman*, 204 Ariz. 231, 235 ¶ 13, 62  
6 P.3d 976, 980 (App.2003). As set forth in *Bryan v. Riddel*, 178 Ariz. 472, 476, 875 P.2d 131, 136  
7 (1994), a party’s disclosures are “the primary vehicle by which the parties are informed of their  
8 opponent’s case” and those disclosures “should fairly expose the facts and issues to be litigated.”  
9  
10 Thus, with respect to Mr. Conlin’s affidavit and the videos attached thereto, fair disclosure required  
11 the actual and timely disclosure of the same so as to enable Defendants to conduct reasonable  
12 discovery of their own and to prepare for the use of the same by Plaintiffs be it through motion  
13 practice or trial.

14  
15 The penalty for the failure to timely provide the required disclosures is set forth in Rule  
16 37(c)(1), which states: “A party who fails to timely disclose information required by Rule 26.1 shall  
17 not, unless such failure is harmless, be permitted to use as evidence at trial, at a hearing, or on a  
18 motion, the information or witness not disclosed, except by leave of court for good cause shown.”  
19 Pursuant to Rule 37(c)(3), Ariz. R. Civ. P., if a party fails to comply with their obligation to disclose  
20 information or documentation timely, it is not permitted to use that information at trial absent  
21 specific extenuating circumstances. See *Englert v. Carondelet Health Network*, 199 Ariz. 21, 25,  
22 13 P.3d 763, 767 (Ct.App. 2000); see also, *Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz.  
23 181, 3 P.3d 1101 (Ct.App. 2000). “The purpose of the mandatory exclusionary sanction is to put  
24 ‘teeth’ into the disclosure requirements of Rule 26.1(a),’ and to deter parties from practicing  
25 ‘litigation by ambush’...” *Allstate Ins. Co. v. O’Toole*, 182 Ariz. 284, 896 P.2d 254 (1995)  
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1 (commenting on former Rule 26.1(c), Ariz. R. Civ. P.) *quoting Bryan*. On this point, the Court in  
2 *Zimmerman v. Shakman*, 204 Ariz. 231, 62 P.3d 976 (Ct.App. 2003), stated:

3  
4 [I]f a trial is set and imminent, the possibility of prejudice [from  
5 untimely disclosures] increases. In such a case the trial judge  
6 possesses considerable latitude in determining whether good cause  
7 has been shown for late disclosure. If there is no good cause, barring  
the introduction of evidence not previously disclosed may be a  
reasonable sanction.

8 *Zimmerman*, 204 Ariz. at 236, 62 P.3d at 981.

9  
10 With the foregoing in mind we turn to the subject of this Motion – namely, Mr. Cundiff’s  
11 affidavit and the videos attached thereto. To state that Defendants have been frustrated by how  
12 protracted this case has become would be a monumental understatement. At every turn Plaintiffs  
13 have sought to delay matters. Notwithstanding those efforts, the Court finally set schedule for this  
14 case establishing discovery and dispositive motion cut-off for December 28, 2012 and for trial to  
15 commence on April 16, 2012.

16  
17 Not surprisingly, on the very last day to file dispositive motions Plaintiffs filed the instant  
18 Motion for Summary Judgment and their supporting Statement of Facts (“PSOF”). Attached to the  
19 PSOF were two items that are the subject of this Motion – namely, an affidavit from John Cundiff  
20 and three dvd recordings that were attached to Mr. Conlin’s affidavit. As a review of the time and  
21 date stamp for the dvd recordings, they were made on June 9, 2012 (disc 1), June 10, 2012 (disc 2),  
22 and July 5, 2012 (disc 3). Given the foregoing recording dates, pursuant to Rule 26.1(b)(2), Ariz.  
23 R. Civ. P., Plaintiffs had until (i) July 9, 2012, to disclose the June 9, 2012, dvd recording, (ii) July  
24 10, 2012, to disclose the June 10, 2012, dvd recording and (iii) August 4, 2012, to disclose the July  
25 5, 2012, dvd recording. However, at no time between June 9, 2012, and December 28, 2012, did  
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1 Plaintiffs ever disclose the foregoing dvd recordings. Accordingly, Plaintiffs' disclosure of the same  
2 by including them with PSOF filed together with their MSJ was untimely.

3  
4 This is not a situation involving a minor timing delay of some rather innocuous item of  
5 limited evidentiary value. Rather, this is a situation where Plaintiffs delayed disclosure of the only  
6 support for their pending MSJ until the discovery deadline has come and gone. In failing to timely  
7 disclose the dvd recordings along with Mr. Cundiff's affidavit, Plaintiffs prevented Defendants from  
8 conducting any discovery of any kind as a result of receipt of the same. That is the case because the  
9 discovery cut-off coincided with Plaintiffs' disclosure in the PSOF. Candidly, for Plaintiffs to sit  
10 on the dvds and Mr. Cundiff's affidavit seems extremely calculated and it cannot be a coincidence  
11 that their disclosure occurred on the very last day for discovery notwithstanding the fact that  
12 Plaintiffs were in possession of the dvds since they were made in June and July, 2012. Quite frankly,  
13 the Plaintiffs' timing of disclosure together with the filing of the PSOF and MSJ on the last day for  
14 discovery and filing dispositive motions represents precisely the type of gamesmanship Rule 26.1  
15 was designed and intended to prevent. And while it is rather common for parties in civil litigation  
16 to occasionally provide disclosures a few days or even a couple of weeks beyond the 30-day deadline  
17 set forth in Rule 26(b)(2), Ariz. R. Civ. P., and which is tolerated by the Court, Plaintiffs' failure to  
18 disclose the same for upwards of six months cannot be tolerated under any circumstances and there  
19 is no valid excuse for Plaintiffs' tardiness that they may attempt to offer.

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24 Trial by ambush is not fair advocacy, and the burden is on each party to comply with Rule  
25 26.1 rather than blame the opposing party for that party's perceived failure to smoke out their  
26 opposition's evidence. Based upon the foregoing Rules, this Court must strike and not consider  
27 the subject dvds in ruling on Plaintiffs' MSJ. The Court also must preclude Plaintiffs from using  
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1 the dvds or Mr. Cundiff's affidavit that discusses the same during trial. Finally, given Plaintiffs'  
2 lack of compliance with Rule 26.1, Defendants should be reimbursed their attorneys' fees, costs  
3 and expenses incurred in having to prepare and file this Motion.  
4

5 **II. The Subject DVDs And Mr. Cundiff's Affidavit Lack Necessary Foundation**  
6 **And Must Be Stricken And Not Considered By The Court Or The Trier Of**  
7 **Fact.**

8 "The basic principles which govern the admissibility of still pictures, govern the  
9 admissibility of motion pictures, and they are not admissible unless the person offering the  
10 pictures show they are a true reproduction of the scenes photographed, and are properly  
11 authenticated according to the rules of evidence." *Powell v. Indus. Comm'n*, 4 Ariz.App. 172,  
12 180, 418 P.2d 602, 610 (Ct.App. 1966). Furthermore, as held in *Bledsoe v. Salt River Valley*  
13 *Water Users' Ass'n*, 179 Ariz. 469, 880 P.2d 689 (Ct.App. 1994), video recordings as evidence  
14 may be admitted and considered by the Court only when appropriate foundation has been  
15 established and the opposing party has been given an opportunity to cross-examine the presenting  
16 witness about them. *Bledsoe* at 179 Ariz. at 472, 418 P.2d at 692 *citing* Ariz.R.Evid. 702-705,  
17 17 A.R.S.; and Morris K. Udall *et al.*, Arizona Practice: Law of Evidence §§ 22-26 (3d ed.  
18 1991).  
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21 Applying the foregoing law to the subject dvds and Mr. Cundiff's affidavit requires that  
22 the Court (i) strike the same from the PSOF and that the Court not consider the same in ruling on  
23 Plaintiffs' MSJ and (ii) preclude Plaintiffs from presenting the same to the trier of fact during  
24 trial. What is noticeably absent from the dvds is that the unidentified person holding the video  
25 camera or the other passenger in the vehicle at the time the videos were taken (who we know to  
26 be a gentleman by the name of Alfie Ware) is that neither person identifies any particular lot(s)  
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1 being videoed from which to determine whether what is being filmed is actually within the subject  
2 subdivision. Further, while the dvds do a relatively good job of depicting roads, they show very  
3 little of what is or is not on or within any of the properties shown. The videos and commentary  
4 from the individuals involved in the video taping also fail to identify any property boundaries or  
5 lot lines and provide no names of any property owners either. Thus, Mr. Cundiff does not have  
6 any personal knowledge upon which to base his opinions premised upon the videos as set forth  
7 in his affidavit. Finally, in light of Plaintiffs' untimely disclosure of both the dvds and Mr.  
8 Cundiff's affidavit and the discovery cut-off date, Defendants have been denied the opportunity  
9 to cross-examine either those people actually involved in taking the videos or Mr. Cundiff and his  
10 involvement or knowledge of the same for purposes of challenging Mr. Cundiff's assertions and  
11 opinions or the foundation for the same.  
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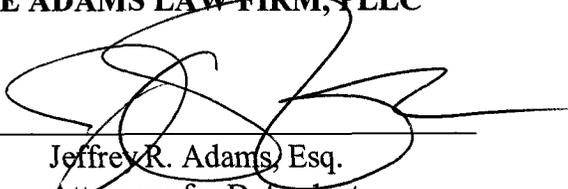
15       Turning to Mr. Cundiff's statements in his affidavit concerning nine-acre parcels, nothing  
16 in his affidavit reflects any effort he undertook to reach his conclusions. By way of example, his  
17 affidavit lacks any statement reflecting that he performed any sort of title search and review the  
18 legal descriptions to reach the conclusion that all of the lots within the subject subdivision met  
19 with the nine-acre minimum set forth in the subject subdivision. His affidavit likewise does not  
20 reflect that he himself conducted any measurements of the lots within the subject subdivision from  
21 which to determine the acreage of said lots. And his affidavit does not reflect that he reviewed  
22 any lot surveys to reach his determination or that he hired a registered land surveyor to do so.  
23 Accordingly, Mr. Cundiff's affidavit is completely lacking in foundation from which to conclude  
24 that all of the lots within the subject subdivision are compliant with the acreage minimums.  
25 Rather, Mr. Cundiff's affidavit represents a mere factual and legal conclusion and nothing more  
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1 and must be stricken. *See Villas at Hidden Lakes Condos Ass'n v. Geupel Constr. Co.*, 174 Ariz.  
2 72, 82, 847 P.2d 117, 127 (Ct.App.1992) (finding that an association failed to establish a prima  
3 facie case entitling it to summary judgment because its supporting affidavit did not provide  
4 foundation for the affiant's personal knowledge and conclusions, nor did it demonstrate his  
5 familiarity with the person who prepared the affidavit exhibits or the manner in which they were  
6 prepared); *Chess v. Pima County*, 126 Ariz. 233, 235, 613 P.2d 1289, 1291 (Ct.App.1980) (an  
7 affidavit does not comply with the rule when "it contains conclusions and fails to show that the  
8 affiant is competent to testify to the matters stated therein").  
9  
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11 Based upon the foregoing, Plaintiffs have failed to establish the necessary foundation for  
12 both the DVDs and Mr. Cundiff's affidavit to be admissible and, thus, worthy of consideration by  
13 this Court. Accordingly, both should be stricken from the PSOF and not considered by the Court  
14 in ruling on Plaintiffs' MSJ. Further, the Court should preclude their use during trial. Finally,  
15 given the deficiencies of the DVDs and Mr. Cundiff's affidavit and the Plaintiffs' lack of  
16 compliance with Rule 26.1, Defendants should be reimbursed their attorneys' fees, costs and  
17 expenses incurred in having to prepare and file this Motion.  
18  
19

20 Respectfully submitted this 22 day of January, 2013.

21 **THE ADAMS LAW FIRM, PLLC**

22  
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26 / / /  
27 / / /  
28

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