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7 Attorneys for Defendants

8 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF YAVAPAI**

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

16 Plaintiffs,

17 v.

18 DONALD COX and CATHERINE COX,)
19 husband and wife,

20 Defendants.

CASE NO. [REDACTED]
[REDACTED]

**RESPONSE TO PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT RE:
WAIVER OF RESTRICTIVE
COVENANT PROHIBITING BUSINESS
AND COMMERCIAL ENTERPRISES**

(Assigned to the Hon. David L. Mackey)
(Oral Argument Requested)

21 Defendants hereby respond to the Motion for Summary Judgment Re: Waiver of Restrictive
22 Covenant Prohibiting Business and Commercial Enterprises ("Plaintiffs' MSJ") and respectfully
23 request that said motion be denied because (i) Plaintiffs have misinterpreted the waiver provision of
24 the Declaration of Restrictions at issue in this case; and (ii) a material question of fact exists regarding
25 whether any provision of the Declaration of Restrictions, including that involving waiver, is enforceable
26 in light of the evidence showing that the Declaration of Restrictions has been abandoned. Therefore,
27 Plaintiffs' MSJ should be denied under the standards enunciated in Rule 56(b) and Orme Schools v.
28 Reeves, 166 Ariz. 301, 802 P.2d 1000 (1990).

This Response is fully supported by the accompanying Memorandum of Points and Authorities;
Defendants Controverting Statement in Response to Plaintiffs' Separate Statement of Facts in Support
of Motion for Summary Judgment ("DCSOF") and Defendants Separate Statement of Facts in Support

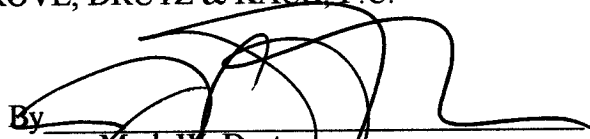
AG **DIV. 1**
OCT - 5 2004

1 of Response to Motion for Summary Judgment (“DSOF”) filed contemporaneous herewith; and the
2 record on file, which shall be incorporated by reference.

3 RESPECTFULLY SUBMITTED this 29 day of September, 2004.

4 MUSGROVE, DRUTZ & KACK, P.C.

5
6 By

7 
8 Mark W. Drutz
9 Jeffrey R. Adams
10 Attorneys for Plaintiffs

11 **MEMORANDUM OF POINTS AND AUTHORITIES**

12 **I. Summary Judgment Standard.**

13 The legal standard for granting or denying summary judgment is well-established. When a party
14 responding to a motion for summary judgment shows evidence creating a genuine issue of fact on the
15 element in question, summary judgment should not be entered. See e.g., Nielson v. Savoy, 105 Ariz.
16 325, 327, 464 P.2d 608 (1970); and Orme School v. Reeves, 166 Ariz. 301, 802 P.2d 1000 (1990).
17 Two additional legal principles likewise require consideration in this case. In evaluating a motion for
18 summary judgment the Court should view the evidence and record in the light most favorable to the
19 non-moving party; evidence of the non-movant is to be believed and all justifiable inferences are to be
20 drawn in the non-movant’s favor. See Sanchez v. City of Tucson, 191 Ariz. 128, 953 P.2d 168
21 (1998). Summary judgment is not appropriate where the Court is required to pass on the credibility
22 of witnesses with differing versions of material facts, weigh the quality of documentary or other
23 evidence or choose among competing or conflicting inferences. See Orme School at 311. In this case,
24 there is a factual dispute the precludes summary judgment. As such, Plaintiffs’ MSJ must be denied.

25 **II. The Factual Dispute Regarding Whether The Restrictive Covenants At Issue In**
26 **This Case Have Been Abandoned Precludes Summary Judgment.**

27 Plaintiffs and Defendants own real property in Coyote Springs Ranch located along and north
28 of Highway 89A in Yavapai County, Arizona. See Plaintiffs’ Separate Statement of Facts in Support
of Motion for Summary Judgment (“PSOF”), ¶¶ 1, 2, 3 and 7; and DCSOF, ¶¶ 1 and 2. This case
involves that certain Declaration of Restrictions that was recorded on June 13, 2004, in the Official

1 Records of Yavapai County, Arizona at Book 416, Page 680 (“**Declaration**”) that purports to burden
2 the portion of Coyote Springs Ranch where Plaintiffs’ and Defendants’ properties are located. See
3 DSOF, ¶ 1. Plaintiffs have sued Defendants seeking to enforce paragraphs 2, 7(e) and 15 of the
4 Declaration against Defendants. Id. In response to Plaintiffs’ lawsuit, Defendants have asserted that
5 Plaintiffs, by their conduct and actions, have waived their right to enforce the Declaration. See DSOF,
6 ¶ 2. In their defense Defendants have also asserted that the Declaration, including paragraph 2 thereof,
7 has been abandoned by the owners of properties purportedly governed by the Declaration. See DSOF,
8 ¶ 3.

9 In Plaintiffs’ MSJ, Plaintiffs have asserted that the Declaration expressly provides that waiver
10 is not a viable defense against their claims. In making their argument, Plaintiffs rely upon paragraph
11 19 of the Declaration, which states:

12 No failure of any other person or party to enforce any of the restrictions,
13 rights, reservations, limitations, covenants and conditions contained
14 herein shall, in any event, be construed or held to be a waiver thereof or
15 consent to any further or succeeding breach or violation thereof.

16 See Plaintiffs’ MSJ and DSOF, ¶ 4. Plaintiffs further have directed the Court’s attention to Burke v.
17 Voicestream Wireless Corp., 422, Ariz. Adv. Rep. 16, 87 P.3d 81 (App. 2004), which stated, in ruling
18 on an non-waiver provision much the same as that recited above, that:

19 Unambiguous provisions in restrictive covenants will generally be
20 enforced according to their terms.... The non-waiver provisions, by its
21 plain language, is intended to prevent a waiver based on prior inaction in
22 enforcing the Restrictions. To hold otherwise would render the non-
23 waiver provision meaningless and violate the expressed intention of the
24 contract among the property owners.

25 Burke at 19.

26 Initially, the non-wavier provision (paragraph 19 of the Declaration) upon which Plaintiffs rely
27 only provides that the Plaintiffs’ failure to regularly enforce paragraph 2 of the Declaration¹ against the
28 Defendants does not subsequently preclude Plaintiffs from seeking to enforce paragraph 2 against the

¹Paragraph 2 of the Declaration provides: 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. See DSOF, ¶ 5.

1 Defendants. However, paragraph 19 does not address a situation, such as our case, where the Plaintiffs
2 have waived the right to enforce paragraph 2 against anyone based upon their prior conduct in allowing
3 other commercial and business activities to be conducted in Coyote Springs Ranch.²

4 Furthermore, in Burke, *supra*, the Court of Appeals held that waiver would be a viable defense
5 against efforts to enforce restrictive covenants where those restrictive covenants have been abandoned:

6 The non-waiver provisions would be ineffective if a complete
7 abandonment of the entire set of Restrictions has occurred. The test for
8 determining a complete abandonment of deed restrictions – in contrast
9 to waiver of a particular set of restrictions – was set forth by our
10 supreme court in Condos v. Home Development Company, 77 Ariz. 129,
11 267 1069 (1954): “[W]hether the restrictions imposed upon the use of
lots in this subdivision have been so thoroughly disregarded as to result
12 in such a change in the area as to destroy the effectiveness of the
13 restrictions, defeat the purposes for which they were imposed and
14 consequently [] amount to an abandonment thereof.” Id. at 133, 267
15 P.2d at 1071.

16 Id. at Burke at 19. As stated above, *supra*, Defendants have asserted that the entire Declaration, not
17 just paragraph 2, has been abandoned. Defendants’ position in this regard is supported by the evidence
18 attached to DSOF, which shows that there has been a complete and total disregard for the Declaration
19 by the owners of properties in Coyote Springs Ranch. See DSOF, ¶ 6 and Exhibits “6” through “13”
20 attached thereto.

21 For example, prior to purchasing the Defendants’ Property, Defendants drove around the
22 portion of Coyote Springs Ranch where their property is located and saw evidence of many types of
23 business and commercial activities that were not residential in nature including a church under
24 construction, a llama farms, alpaca farms, horse breeding, boarding and training facilities, a hay sales
25 facility, properties operated by general contractors, a auto-mechanic shop and numerous properties out
26 of which commercial vehicles are operated. See DSOF, ¶ 6. They likewise saw signs posted on
27 properties in the portion of Coyote Springs Ranch where the Defendants’ Property is located which
28 advertised the sale of various types of goods and services. Id. Based upon their observations of

26 ²Defendants’ activities do not constitute commercial or business activities. Rather, Defendants’
27 tree farm is an agricultural activity, which is evident from the fact that they applied for and obtained
28 an agricultural exemption from Yavapai County, Arizona. See DSOF, ¶ 7.

1 Coyote Springs Ranch and the uses being made of properties in the area by other property owners,
2 Defendants believed that their anticipated use of the Subject Property as a tree farm was permitted.
3 See DSOF, ¶ 6. Thereafter, in January, 2001, Defendants filed an application with Yavapai County
4 for an agricultural exemption for the Subject Property. See DSOF, ¶ 7. The exemption was granted
5 (and is still valid and effective today). Id. Receipt of the exemption led Defendants to believe that their
6 use of their property as a tree farm was allowed. Id.

7 Furthermore, since the Plaintiffs filed their lawsuit on May 16, 2003, in which they alleged that
8 Defendants had violated paragraphs 2, 7(e) and 15 of the Declaration, Defendants have obtained
9 personal knowledge of, and have observed, numerous other commercial businesses being operated in
10 the Coyote Springs subdivision in which the Property is located. See DSOF, ¶ 8. Those businesses
11 and commercial operations are located as depicted on the map attached as Exhibit "1" to the Response
12 to Plaintiffs' Request for the Court's On-Site Inspection of Subject Real Property Subdivision filed on
13 August 11, 2004. See DSOF, ¶ 8. Defendants likewise obtained photographic evidence of business
14 activities being conducted on properties in the portion of Coyote Springs Ranch purportedly governed
15 by the Declaration. Id. Defendants have also obtained documentary evidence supporting their
16 contention that businesses are being conducted on properties in the portion of Coyote Springs Ranch
17 purportedly governed by the Declaration. Id. Defendants have also observed and obtained
18 photographs of numerous properties located in the portion of Coyote Springs Ranch purportedly
19 governed by the Declaration that appear to be in violation of other paragraphs of the Declaration. See
20 DSOF, ¶ 9.

21 To verify the foregoing, a private investigator was hired to investigate potential violations of
22 the Declaration. See DSOF, ¶ 10. In conducting her investigation, the private investigator found that
23 in all of Coyote Springs, only 38 non-vacant properties, or approximately ten percent (10%) of the
24 total properties in Coyote Springs that were viewed, did not appear to have a violation of the
25 Declaration. Id. Thus, approximately 90 percent (90%) of the properties that were investigated in
26 Coyote Springs appeared to violate the Declaration. Id. During her investigation, the private
27 investigator observed numerous apparent violations of paragraphs 6, 7(a), 7(b), 7(c), 7(e), 8, 9, 12, 13
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1 and 16 of the Declaration. See DSOF, ¶ 10. Examples of apparent violations observed by the private
2 investigator included the following:

- 3 Parcel 401-01-042B - The parcel had more than one residence and numerous junk
4 cars on the property in apparent violation of paragraphs 7(e)
5 and 9 of the Declaration.
- 6 Parcel 401-01-036 - This property has a garage but does not have a residential
7 dwelling on it, which is in violation of paragraph 5 of the
8 Declaration.
- 9 Parcel 401-01-012G - The parcel has more than one residence on the property in
10 violation of paragraph 7(e) of the Declaration.
- 11 Parcel 103-01-060F - There are also two large metal trash containers visible at the
12 property, one outside the gate on the road and one inside by
13 the new building they are constructing, in violation of
14 paragraph 16 of the Declaration.
- 15 Parcel 103-01-089A - On this parcel, there is one residence that has been burnt down
16 which is still there, on the south side of the property, while
17 another residence (possibly an apartment house - has
18 numerous doors) is to the northeast of the burnt structure, in
19 violation of paragraph 7(e) of the Declaration.
- 20 Parcel 103-01-107B - This property has two residences and exposed propane tanks
21 next to each one in violation of paragraph 7(e) and 16 of the
22 Declaration.

23 See DSOF, ¶ 10.

24 The private investigator also verified that many business and commercial activities are being
25 conducted in Coyote Springs Ranch in apparent violation of paragraph 2 of the Declaration. Id. In
26 determining the status of any businesses or commercial activities that are being operated on Coyote
27 Springs properties, the private investigator searched the records of the Arizona Secretary of State, the
28 Arizona Corporation Commission, the Arizona Registrar of Contractor, and the Yavapai County
Recorder's Office. Id. The search covered the period from January 1, 1970 to July 20, 2004. Id.
Specific examples of business and commercial activities identified included the following:

- 24 Parcel 401-01-042B - There are several horse trailers on this property, showing
25 "Alvey Racing Diane Darrel Darcey" and "Saunders Racing
26 Stables", along with the extra residences and all of the horses.
- 27 Parcel 103-01-084D - According to the Arizona Secretary of State, Bruce Friss-
28 Pettitt, the owner of the parcel, has an active trademark under
the name of "Round Logo, Red, Navy and Cream Colored

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with All New Again Paintless Dent Removal, Windshield Repair, Interior Repair, Paint Touchup". His address is listed in the corporate records as 8750 E. Faraway Place, in Prescott Valley, which is in Coyote Springs.

Parcel 103-01-078B - Daniel G. Belangeri, the owner, is involved in a lawsuit with Gloria A. Miller as Plaintiff, in the Yavapai County Superior Court case number CV 2003-0851. In this, Gloria Miller states in her complaint that Mr. Belangeri has a mobile home transportation company being operated at the property.

Parcel 401-01-126A&B - Owned by the owners of Wargo Construction, Inc. and Wargo Masonry, Inc. On the records of the Arizona Registrar of Contractors, they are showing a P.O. Box 725, Prescott, Arizona, but use a Prescott Valley phone number, 928-772-3210. However, the property has a block fence around it and the observation of the property demonstrated that it was being used as a storage facility for construction materials, supplies and vehicles.

Parcel 103-01-067F - The owners, Grant and Pamela Griffiths, have a company licensed with the Arizona Registrar of Contractors, and registered with the Arizona Corporation Commission, under the name of New Life Landscapes Inc. The address is listed as 8815 Spurr Lane, Prescott Valley, Arizona, which is the address in Coyote Springs.

Parcel 401-01-037B - The owners, Shawn Timothy Kilduff and Virginia Marie Kilduff, have two licenses with the Registrar of Contractors, and a corporate filing with the Arizona Corporation Commission, under the name of Custom Crete Inc., with their address showing as 9315 E. Spurr Lane, Prescott Valley, Arizona, which is in Coyote Springs.

Parcel 401-01-015C - Owned by Robert Taylor, he is licensed with the Registrar of Contractors, and listed with the Arizona Corporation Commission under the name of R T Contracting Specialists LLC, which appears is being operated at the property. He also owns Parcel 103-01-130E.

Parcel 401-01-015D - One of the owners of the property, Robert K. Gardiner, has a listing with the Arizona Corporation Commission under the name of Valley to Valley Transport, Inc. With the Secretary of State, he has registered the tradename Valley to Valley Transport/Feed, and shows himself as owner at the address of 9690 E. Plum Creek Way, Prescott Valley, which is in Coyote Springs.

Parcel 103-01-065H - William H. Jensen is running a ranching/livestock corporation from this property under the corporate name of Coyote Springs Llama Ranch, Inc.

Parcel 401-01-020E - The owners, Ross Rozendaal and Kara Rozendaal, are members of Dependable Dutchman Excavating, LLC, with the

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address of 9335 E. Turtle Rock Road, Prescott Valley, which is in Coyote Springs. They are listed with the Registrar of Contractors and the Arizona Corporation Commission.

Parcel 401-01-020D - The owners, Leo M. and Marilyn K. Murphy, are also members of Dependable Dutchman Excavating, LLC. There is also a sign at the driveway which shows "Registered Quarter Horses Prescott Valley, AZ".

Parcel 401-01-005Z - Wiley L. Williams, the owner, currently has a corporation listed with the Arizona Corporation Commission, being Northern Arizona Hay, Inc. The domestic address of the corporation is listed as 9575 E. Turtle Rock, Prescott Valley, in Coyote Springs.

Parcel 103-01-133E - Arthur Gustafson, an owner of this property with his wife Debra Gustafson, have a listing with the Registrar of Contractors, Blackhawk Builders Inc., dba Blackhawk Construction. The property has on it plants, pallets, and buckets everywhere. It definitely looks like a nursery.

Parcel 103-01-056F - Leon H. and Noreen N. Vaughan operate "Arizona Alpacas" out of this property and have three active listings with the Secretary of State's Office for a trademark and tradenames.

Parcel 103-01-056B - Michael Glennon and Diane Glennon, have a corporation listed to this address with the Arizona Corporation Commission under the name of Sparrow Lab, Inc.

Parcel 103-01-057F - Jimmy Ray Hoffman and Nancy Ethel Hoffman have a current license with the Registrar of Contractors, under the name of Hoffman Barns, being a dba of Hoffman Building and Barns, Inc. The Arizona Corporation Commission lists the type of business as Contractor, and the corporation is in good standing. There is also a Financing Statement recorded on June 28, 1996, against the Hoffmans, listing the Coyote Springs Road address, covering all equipment, etc., for their business.

Parcel 103-01-123D - The corporate records revealed that Michael T. Alexander and his wife, Kelly J. Alexander, use the address of 7515 Coyote Springs Road, Prescott Valley, for a corporation named Cobra Enterprises, Inc.

Parcel 103-01-073F - This is a church owned by Living Faith Inc. It is obviously a business being conducted.

Parcel 103-01-073D - Michael A. Kelly is currently listed with the Arizona Corporation Commission as the Statutory Agent, and Manager, of Northland Equipment Rental & Service, LLC. The address listed is 8920 Dreamy Draw Way, Prescott Valley, which is in Coyote Springs.

1 See DSOF, ¶ 10. Finally, to further support Defendants' abandonment and waiver defense is the
2 undisputed fact that prior to filing this lawsuit, neither Plaintiffs nor any other owner of property in the
3 portion of Coyote Springs Ranch where Plaintiffs' and Defendants' properties are located have
4 attempted to enforce the Declaration against any other property owner. See DSOF, ¶ 11.

5 At a minimum, Defendants' evidence of existing violations of the Declaration, including
6 paragraph 2, and the total failure of Coyote Springs Ranch property owners in enforcing the
7 Declaration raises a material question of fact on the issue of abandonment precluding summary
8 judgment. This is especially the case because (i) the Court is required to view the evidence and record
9 in the light most favorable to the non-moving party – namely, Defendants; (ii) the evidence of the non-
10 movant – namely, Defendants – is to be believed; and (iii) all justifiable inferences are to be drawn in
11 the the non-movant's – namely, Defendants' – favor. See Sanchez v. City of Tucson, 191 Ariz. 128,
12 953 P.2d 168 (1998); and Hegel v. O'Malley Ins. Co., Inc., 122 Ariz. 52, 593 P.2d 275 (1979). Thus,
13 summary judgment against Defendants is inappropriate and Plaintiffs' MSJ must be denied.

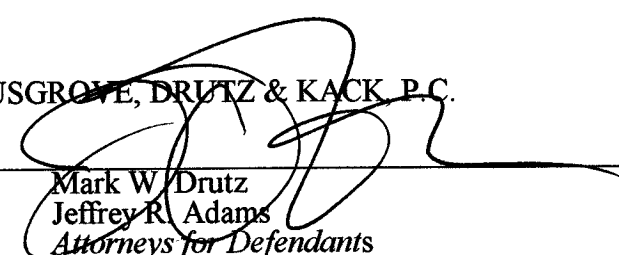
14 **III. Conclusion.**

15 For the foregoing reasons, Defendants respectfully request that Plaintiffs' Motion for Summary
16 Judgment Re: Waiver of Restrictive Covenant Prohibiting Business and Commercial Enterprises be
17 denied as there is a material question of fact concerning the abandonment of the Declaration of
18 Restrictions in its entirety.

19 DATED this 29 day of September, 2004.

20 MUSGROVE, DRUTZ & KACK, P.C.

21 By


22 Mark W. Drutz
23 Jeffrey R. Adams
24 Attorneys for Defendants

25 A copy of the foregoing was
26 hand-delivered this 30 day of
27 September, 2004 to:

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

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