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4 Attorneys for Defendants

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

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

Case No. CV 2003-0399 ✓

Division 1 ✓

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

(Assigned to the Hon. David L. Mackey)

16 Defendants submit the following Comprehensive Pretrial Conference Memorandum pursuant
17 to Rule 16(b), Ariz. R. Civ. P. The time frames set forth in this memorandum are based upon the
18 premise that the trial will occur in May, 2005. Should the actual trial date be set prior to or later than
19 that anticipated date, it will be necessary to reevaluate the deadlines set forth herein. Recognizing that
20 this pleading was supposed to be a joint effort, it is worth noting that the initial draft was
21 prepared by counsel for Plaintiffs after which Defendants added their own comments/inserts/revisions
22 Plaintiffs refused to sign the Comprehensive Pretrial Memorandum following Defendants'
23 comments/inserts/changes. As such, Defendants are left to submit their own Comprehensive Pretrial
24 Memorandum.

25 **1. Discovery**

26 Depositions of each Plaintiff as well as each Defendant have been taken. Plaintiffs have taken
the position that other fact witnesses will be interrogated, as necessary, by interview of counsel.

DIV. 1

OCT 11 2004

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1 Defendants have requested Plaintiffs' stipulation to take the depositions of two lay witnesses, Alfie
2 Ware and Donald Sanders, but that request has been denied. As such, Defendants will file a motion
3 asking leave of Court to take those depositions. Defendants likewise would like to take the depositions
4 of other lay witnesses who are apparently conducting business and commercial activities in Coyote
5 Springs Ranch. A stipulation in this regard likewise has been denied by Plaintiffs. As such, Defendants
6 will file a motion asking leave of Court to take those depositions.

7 The parties have exchanged their initial disclosure statements in accordance with Rule 26.1.
8 It is anticipated that the parties will pursue other discovery under Rules 30, 33, 34 and 36 and will
9 supplement their disclosure statements as necessary.

10 In addition to the dispute concerning additional depositions, several discovery disputes between
11 the parties remain at issue. In particular, Plaintiffs have filed a Motion *in Limine* regarding several lay
12 witnesses and a potential expert witness Defendants seek to have testify at the time of trial. This
13 Motion has been fully briefed although oral argument has not yet occurred. Additionally, Plaintiffs
14 have filed a Motion to Compel Defendants' response to Plaintiffs' Rule 34 request for production of
15 Defendants' tax returns for the prior 5 year period. Defendants will timely respond to the Motion to
16 Compel and, correspondingly, will file a Motion for Protective Order as the Plaintiffs' request for
17 Defendants' tax returns was properly objected to and there is no legal basis upon which to support
18 Plaintiffs' request for said tax returns.

19 **2. Expert Witnesses**

20 The parties agree that expert witnesses shall be disclosed no later than 60 days before trial.
21 Defendants have advised Plaintiffs that they will utilize Sheila Cahill, a licensed private investigator,
22 as an expert who will testify regarding her identification of other business and commercial activities
23 being conducted in Coyote Springs Ranch as well as her identification of the conditions of other
24 properties in Coyote Springs Ranch that appear to be in violation of the Declaration of Restrictions at
25 issue in this case.

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

2 Defendants have stated in response to Plaintiffs' Motion *in Limine* that Sheila Cahill will be
3 disclosed as an expert witness. Plaintiffs dispute that Ms. Cahill's anticipated testimony can be
4 characterized as "expert testimony" under Rule 702, Ariz. R. Evid., as well as dispute that Ms. Cahill
5 qualifies as an expert witness. At this time, Plaintiffs have not made any determination or designation
6 of expert witnesses that they may utilize at the time of trial.

7 **4. Disclosure of Nonexpert Witnesses**

8 The parties have each disclosed a number of lay witnesses in their respective disclosure
9 statements. As noted herein, Plaintiffs' have filed a Motion *in Limine* seeking to preclude a number
10 of lay witnesses Defendants have disclosed from testifying at the time of trial to which Defendants have
11 responded.

12 The parties agree that nonexpert witnesses will be disclosed no later than 75 days before trial.

13 **5. Discovery Disputes**

14 As previously noted, Plaintiffs have filed a Motion *in Limine* and a Motion to Compel. As
15 stated above, *supra*, Defendants intend to seek leave of Court to take several additional depositions
16 in light of Plaintiffs' refusal to stipulate to those depositions.

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

18 Plaintiffs contend that Defendants' defenses of waiver, unclean hands, estoppel, laches and
19 contributory negligence and other tort-based defenses are unmeritorious. Defendants have already
20 responded to Plaintiffs' contention that the defense of waiver lacks merit in the Response to Motion
21 for Summary Judgment. In this regard, Defendants contend that all of their defenses are valid and
22 supported by the law and facts and that Plaintiffs' claims against Defendants is invalid.

23 **7. Amendment of Pleadings**

24 Plaintiffs have taken the position that they do not anticipate that any further amendments of the
25 parties' pleadings will be required. Defendants, however, contend that numerous other Coyote Springs
26 residents are indispensable parties under Rule 19, Ariz. R. Civ. P. Plaintiffs have been asked to amend

1 their First Amended Complaint in this regard. That request has been rejected. As such, Defendants
2 will file a Rule 19 motion seeking to add necessary and indispensable parties.

3 **8. Identification of Issues of Fact**

4 Plaintiffs contend that the Declaration of Restrictions at issue in this case may be enforced
5 against Defendants and that Defendants' defenses are invalid including the defense of abandonment.
6 Defendants contend that the following issues must first be addressed by the trier of fact before the issue
7 of abandonment is addressed:

- 8 (i) what constitutes a business or commercial activity within the context of the Declaration
9 of Restrictions as the term or phrase "business or commercial activity" is not defined in the
10 Declaration of Restrictions; and
11 (ii) whether Defendants are, in fact, are conducting a "business or commercial activity" on
12 their property in Coyote Springs Ranch.

13 Only after the two foregoing issue is resolved will the trier of fact be required to address the issue of
14 whether the Declaration of Restrictions, either in whole or in part, has been abandoned.

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

16 At the present time such stipulations are premature. Defendants agree that the parties will make
17 any necessary stipulations by 20 days before trial.

18 **10. Special Procedures**

19 No special procedures for management of this case are necessary.

20 **11. Alternative Dispute Resolution**

21 Plaintiffs have stated that parties are considering private mediation of this matter. However,
22 Defendants have already participated in two separate mediations during which Plaintiffs were unwilling
23 to consider any resolution other than Defendants' removal of their existing tree farm in which
24 Defendants have invested several hundred thousand dollars. While Defendants would willingly
25 participate in a settlement conference or another mediation, doing so would require Plaintiffs to
26 consider a resolution that would not require the removal of Defendants' existing tree farm.

1 **12. Modification/Suspension of Any Rules**

2 The parties do not believe this is necessary.

3 **13. Rule 26.1 Compliance**

4 The parties have exchanged their initial disclosures statements under Ariz. R. Civ. P. 26.1. The
5 parties agree that they shall supplement their disclosures on a seasonable basis as required under the
6 Rule. The parties agree that full compliance with Ariz. R. Civ. P. 26.1 will have been made by the
7 discovery cut-off 30 days prior to trial.

8 **14. Settlement Conference**

9 The parties on two occasions have previously attempted mediation of this matter. It is
10 Plaintiffs' position that they do not believe a settlement conference is necessary and that none is
11 requested. Defendants, however, are willing to participate in, and believe that, a settlement conference
12 before either this Court or another Superior Court Judge would be beneficial.

13 **15. Joint Pretrial Statement**

14 The parties agree a Joint Pretrial Statement should be filed within ten days of trial.

15 **16. Trial Date**

16 Plaintiffs contend that a March 2005 trial date would be suitable. Defendants advise the Court
17 that Mr. Adams (i) already has a trial scheduled for March, 2005, in another division and (ii) has
18 planned and paid for a vacation during his childrens' spring break during March, 2005. Mr. Drutz has
19 two (2) jury trials scheduled in April, 2005. The foregoing will prevent scheduling a trial date in March
20 or April, 2005, and therefore, Defendants suggest a trial date in May, 2005 or later.

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

22 Defendants agree that any other Motions *in Limine*, if necessary, should be filed no later than
23 20 days before trial. Dispositive motions should be filed no later than 60 days prior to trial.

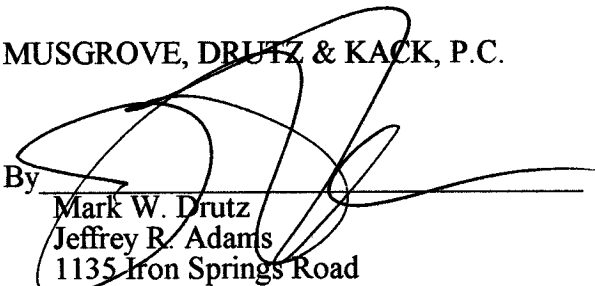
24 **18. Jury Trial**

25 Plaintiffs action is for declaratory and injunctive relief. It is Defendants position that the
26 Declaration of Restrictions has been abandoned. Defendants filed a Demand for Jury Trial on May 4,

1 2004, to which Plaintiffs did not object. While Plaintiffs have taken the position that a jury would be
2 only advisory, the issue of whether the jury will be only advisory will have to be briefed for the Court
3 before any determination is made.

4 DATED this 6 day of October, 2004.

MUSGROVE, DRUTZ & KACK, P.C.

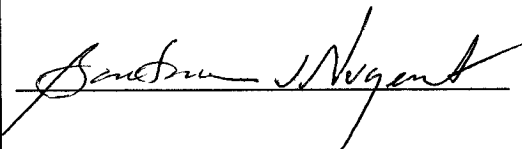
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7 By 
8 Mark W. Drutz
9 Jeffrey R. Adams
10 1135 Iron Springs Road
11 Prescott, Arizona 86305
12 Attorneys for Defendants

10 A copy of the foregoing
11 was hand-delivered this
12 6th day of October, 2004 to:

13 Honorable David L. Mackey
14 Yavapai County Superior Court
15 Division 1
16 Yavapai County Courthouse
17 Prescott, Arizona 86301

15 and a copy was hand-delivered this
16 6th day of October, 2004 to:

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