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1 Mark W. Drutz, Esq., # 006772
Jeffrey R. Adams, #018959
2 **MUSGROVE, DRUTZ & KACK, P.C.**
1135 Iron Springs Road
3 Prescott, Arizona 86305
(928) 445-5935

FILED
J. L. ...
DEPUTY CLERK

4 Attorneys for Defendants
5

6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
7 **IN AND FOR THE COUNTY OF YAVAPAI**

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

11 Plaintiffs,

12 v.

13 DONALD COX and CATHERINE COX,)
14 husband and wife,)

15 Defendants.
16

**RESPONSE TO PLAINTIFFS' MOTION
TO COMPEL AND DEFENDANTS'
MOTION FOR PROTECTIVE ORDER**

(Assigned to the Honorable David L.
Mackey)

(Oral argument requested)

17 Defendants hereby respond to Plaintiffs' Motion to Compel the production of Defendants' tax
18 returns and move the Court for a Protective Order precluding Plaintiffs from obtaining Defendants'
19 tax returns. This motion is supported by the following memorandum of points and authorities, as well
20 as the entire record on file herein.

21 Respectfully submitted this 12 day of October, 2004.

22
23 MUSGROVE, DRUTZ & KACK, P.C.

24
25 By *[Signature]*
26 Mark W. Drutz
Jeffrey R. Adams
Attorneys for Defendants

27 **DIV. 1**

28 OCT 1 2004

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Legal Argument.**

3 In this case, Plaintiffs are utilizing discovery for an improper purpose – namely, to ascertain
4 Defendants’ financial condition where their financial condition is not at issue. It is clearly the law in
5 Arizona that a party may not discover its adversaries’ financial condition where it is not a relevant
6 issue in the case. In this case, what is at issue is whether the Declaration of Restrictions that purports
7 to govern Defendants’ property located in Coyote Springs Ranch (“**Subject Property**”) is enforceable
8 either in whole or in part. Nonetheless, on July 1, 2004, Plaintiffs propounded upon Defendants a
9 request for production of documents, demanding, *inter alia*, Defendants’ tax returns and tax schedules
10 dating back to 1998. See Plaintiffs’ Request for Production of Documents and Things attached hereto
11 as Exhibit “1”. Defendants properly objected to that request as follows:

12 Defendants object to this request finding it to be overly broad, vague,
13 ambiguous and overburdening. Plaintiffs’ fail to indicate if they want
14 Defendants’ individual tax returns or partnership tax returns.
15 Furthermore, the request is overly broad as it would result in the
16 production of documentation that has no relevance to the issues in this
17 lawsuit and is not likely to lead to the discovery of admissible evidence
as required by Rule 26 (b)(1), Ariz. R. Civ. P. Further, “[p]ersonal
financial records and income tax returns are not discoverable unless the
party seeking discovery can demonstrate that the information is
indispensable to his or her case and cannot be obtained elsewhere.” 27
C.J.S. Discovery § 86 (1999) (citations omitted).

18 See Plaintiffs’ Request for Production of Documents and Things and Responses Thereto attached as
19 Exhibit “2”.

20 Following the foregoing response to the discovery sought, Plaintiffs sent the letter attached as
21 Exhibit “3” again demanding the tax returns. Therein, Plaintiffs argued that the production of the
22 Defendants’ tax returns, both individual and partnership despite no such specification is made in their
23 request, is necessary because obtaining information regarding how Defendants use their property in
24 Coyote Springs Ranch is impossible to obtain elsewhere. Id. However, the information sought by
25 Plaintiffs is available elsewhere. For example, Defendants have already produced to Plaintiffs all of
26 their documentation, receipts and billing statements for improvements made to the property, complete
27 employee records, inventory and maintenance records, and equipment purchase and maintenance
28

1 records for all three of the Defendants' properties – Prescott Valley Nursery located at 6195 E.
2 Highway 69, Prescott Valley Growers located at Prescott Valley, Arizona, 6750 North Robert Road,
3 Prescott Valley, Arizona and the Subject Property. What that documentation reveals is that absolutely
4 no business or commercial activities are taking place on the Subject Property, which is entirely
5 consistent with Mrs. Cox's deposition testimony and statements in her affidavit that no business
6 transactions are ever conducted on the Subject Property. See Exhibit "4", deposition transcript of
7 Catherine Cox, at 20:13-17; 69:2-3; 78:16-22; and Mrs. Cox's affidavit attached hereto as Exhibit "5"
8 at ¶¶ 5-7 (without the exhibits attached which were provided to the Court with her original affidavit
9 in connection with the Response to Motion for Summary Judgment). At no time have Plaintiffs
10 produced a shred of evidence to controvert or dispute the foregoing. Instead, Plaintiffs have elected
11 to engage in a fishing expedition because they are dissatisfied with the foregoing undisputed fact.

12 The fact is, Plaintiffs' request for six years of tax returns is vague, overly broad, is
13 unreasonable and irrelevant and is not likely to lead to discoverable evidence. Plaintiffs' request is
14 vague in that Plaintiffs do not make any effort to specify which tax returns are sought, be they personal
15 or partnership. Further, Plaintiffs want Defendants' tax returns since 1998 knowing full well that
16 Defendants did not begin development of the Subject Property until 2000 and that the Subject Property
17 is owned by Defendants in their individual capacities and not in the name of any partnership or other
18 business or commercial enterprise. Even if Plaintiffs were entitled to some of Defendants tax
19 information, their request is not sufficiently limited to only those items of their tax returns or related
20 schedules that relate specifically to the Subject Property. Furthermore, evidence regarding
21 Defendants' use of the Subject Property is available elsewhere and has already been provided to
22 Plaintiffs. Thus, the production of tax returns has no relevance to the issues in this lawsuit and is not
23 likely to lead to the discovery of admissible evidence. Finally, Plaintiffs have failed to show that
24 production of Defendants' income tax returns are "indispensable to [their] case and cannot be obtained
25 elsewhere." 27 C.J.S. Discovery § 86 (1999) (citations omitted) (emphasis added).

26 Because Plaintiffs have failed to justify their right to, or need for, the requested tax returns, the
27 request must be denied and Defendants' Motion for Protective Order granted. Doing otherwise would
28

1 permit Plaintiffs to ignore Rule 26(c), Ariz. R. Civ. P., which precludes a party from using discovery
2 as a means to burden, embarrass or annoy the opposing party. Plaintiffs should not be entitled to
3 discover Defendants' financial condition in an effort to manufacture a factual case where none exists,
4 or to utilize discovery to generate a claim for punitive damages, as no such claim has been raised by
5 Plaintiffs in their pleadings. The Plaintiffs' claims lie in equitable relief and as such the Plaintiffs
6 have neither pled nor suffered economic damages. Plaintiffs' request for the disclosure of all
7 individual and partnership tax returns therefore serves no useful purpose other than harassment and
8 a demand for information that bears no factual relevance to this case. The Motion to Compel should
9 be denied and the Motion for Protective Order should be granted accordingly.

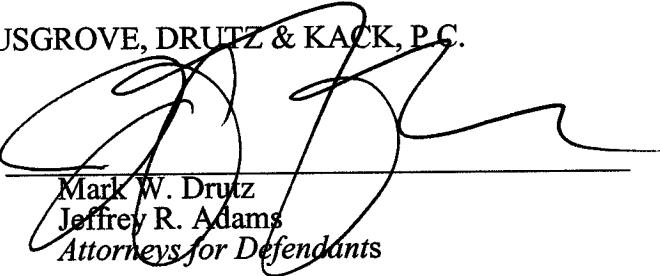
10 **III. Conclusion**

11 Based on the foregoing, it is clear that Plaintiffs have failed to sufficiently articulate a legal
12 basis upon which to establish that they are entitled to Defendants' financial statements, especially
13 given that their request is vague, overly broad, irrelevant, and not likely to lead to discoverable
14 evidence. Furthermore, the information sought is available from other sources, which have been
15 provided already, which reveal that no business or commercial activities are taking place on the
16 Subject Property, a fact Plaintiffs dislike but one they cannot dispute. Thus, the Plaintiffs' Motion to
17 Compel must be denied and the Motion for Protective Order granted. Furthermore, as Defendants
18 properly objected to the request for production, it is clear that their objection was not made in bad faith
19 nor was the objection made to thwart permissible discovery. In this regard, the specific reasons for
20 the objection were articulated with relevant legal support cited. Yet despite the sound legal authority
21 supporting Defendants' objection, Plaintiffs persisted in their unreasonable and legally deficient
22 demand for production without articulating how or why the discovery they sought cannot be obtained
23 elsewhere or why it is indispensable to their case, which are required before disclosure of tax returns
24 will be mandated. Therefore, Plaintiffs' request for sanctions is inappropriate and must be denied just
25 as their request for the tax returns.

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Dated this 12 day of October, 2004.

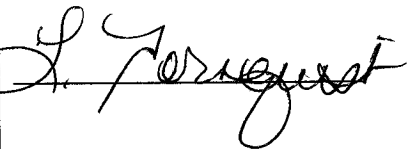
MUSGROVE, DRUTZ & KACK, P.C.

By 
Mark W. Drutz
Jeffrey R. Adams
Attorneys for Defendants

A COPY of the foregoing mailed
this 12~~th~~ day of October, 2004 to:

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

David K. Wilhelmsen
Marguerite M. Kirk
FAVOUR, MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
Prescott, Arizona 86302-1391
Attorneys for Plaintiffs

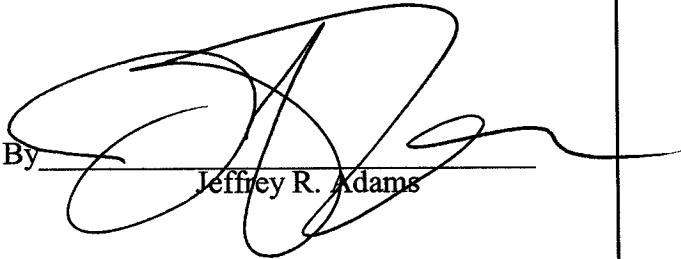


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**SEPARATE CERTIFICATE OF COUNSEL
PURSUANT TO RULES 26(g) AND 37 (A)(2)(C), ARIZ. R. CIV. P.**

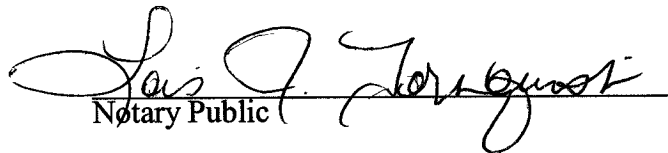
Undersigned counsel, pursuant to Rules 26(g) and 37(a)(2)(C), Ariz.R.Civ.P. hereby certifies that after personal consultation and good faith efforts to do so, counsel has been unable to satisfactorily resolve the matter.

DATED this 12 day of October, 2004.

By 
Jeffrey R. Adams

STATE OF ARIZONA)
County of Yavapai)ss.

SUBSCRIBED AND SWORN to before me this 12th day of October, 2004, by JEFFREY R. ADAMS.


Notary Public

My Commission Expires:
9/19/05



1 FAVOUR, MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
2 Prescott, AZ 86302-1391
928/445-2444
3 Fax: 928/7710450
David K. Wilhelmsen, 007112
4 Marguerite A. Kirk, 018054

5 Attorneys for Plaintiffs

6 IN THE SUPERIOR COURT OF ARIZONA

7 COUNTY OF YAVAPAI

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

11 Plaintiffs,)

12 vs.)

13 DONALD COX and CATHERINE COX,)
14 husband and wife,)

15 Defendants.)

No. CV 2003-0399

Division 3

**PLAINTIFFS' REQUEST FOR
PRODUCTION OF DOCUMENTS
AND THINGS**

16
17 TO: **Defendants Donald Cox and Catherine Cox, and their attorney:**

18 Jeffrey Adams
MUSGROVE, DRUTZ & KACK, P.C.
19 1135 Iron Springs Road
20 Prescott, Arizona 86302

21 Pursuant to Ariz.R.Civ.P. 34(a) you are requested to furnish for inspection and copying within
22 forty (40) days of the date hereof, in the offices of FAVOUR, MOORE & WILHELMSSEN, P.A., 1580
23 Plaza West Drive, Prescott, Arizona, the following described documents.

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INSTRUCTIONS AND DEFINITIONS

- A. In providing the documents described below, you are requested to furnish all documents known or available to you, regardless of whether these documents are possessed by you or by your attorneys, agents, investigators or other representatives.
- B. If any of these documents cannot be produced in full, produce to the extent possible, specifying and stating your reasons for your inability to produce the remainder and stating whatever information, knowledge or belief you have concerning the substance of the contents of such unproduced documents.
- C. This request is intended to be continuing, requiring you to produce whatever documents responsive to this request you become aware of or subsequently obtain.
- D. As used herein, the term "document" means every writing and record of every type and description in the possession, custody or control of the plaintiff, including, but not limited to, correspondence, memoranda, handwritten notes, computer printouts, tapes and records of all types, minutes of Director's meetings, studies, books, pamphlets, schedules, pictures and voice recordings and every other device or medium on which or through which information of any type is transmitted, recorded or preserved. The term "document" also means a copy where the original is not in the possession or control of the defendants and every copy of a document where such copy is not an identical duplicate of the original.
- E. "You" or "your" as used herein refer to the Defendants or any agents or representatives thereof.

DOCUMENTS TO BE PRODUCED

- 1. A copy of the title insurance policy issued to you for the property located at 7325 North Coyote Springs Road, Prescott Valley, Arizona (hereinafter referred to as the "Subject Property").
- 2. Copies of all estimates, bills, receipts for payment, construction applications, construction permits issued, approvals requested and/or received by any local, state or federal government agency (including but not limited to Yavapai County Planning and Zoning Commission) and the like, pertaining to any and all improvements, structures, or developments, of any kind or type whatsoever, made by you on the Subject Property from 1998 to present.

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3. Copies of Defendants' income tax returns, including all schedules, from 1998 to present.
4. Copies of all employee records that evidence the employee's job title, job position, hours of work, and location of work, of any type or nature and however maintained, for your businesses Prescott Valley Growers and Prescott Valley Nursery, and for the Subject Property, from 2000 to present.
5. Copies of any and all applications for, and/or business licenses issued by, any local, state or federal government agency for your businesses located at:
 - (A) 6195 E. Highway 69, Prescott Valley, Arizona
 - (B) 6750 North Robert Road, Prescott Valley, Arizona;as well as for,
 - (C) 7325 N. Coyote Springs Road, Prescott Valley, Arizona
6. Copies of all documents evidencing all inventory maintained for all plants, shrubs, flowers, trees, or any other inventory of any nature or type, however kept or maintained, for the Subject Property from 2000 to present.
7. Copies of all documents pertaining to all machinery, equipment, fixtures, supplies, tools, and the like, maintained or used in any fashion on the Subject Property from 2000 to present.
8. Copies of all applications, correspondence, notes, memorandum of meetings, permits, and documents sent to, or received from, any local, state or federal government agency (including, but not limited to, Yavapai County Development Services Land Use Unit) regarding your use of, or conduct occurring on, the Subject Property.

DATED this 1st day of July, 2004.

FAVOUR, MOORE & WILHELMSSEN, P.A.

By Marguerite Kirk
David K. Wilhelmsen
Marguerite Kirk
Attorney for Plaintiffs

///
///

1 Original and a copy hand-delivered
2 this 1st day of July, 2004 to:

3 Jeffrey Adams
4 MUSGROVE, DRUTZ & KACK, P.C.
5 1135 Iron Springs Road
6 Prescott, Arizona 86302
7 Attorneys for Defendants

8 By Marguerite Kirk
9 Marguerite Kirk

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1 Mark W. Drutz, Esq., # 006772
Jeffrey R. Adams, #018959
2 MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
3 Prescott, Arizona 86305
(928) 445-5935

4 Attorneys for Defendants
5

6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

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

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

11 Plaintiffs,

12 v.

13 DONALD COX and CATHERINE COX,)
14 husband and wife,)

15 Defendants.
16

CASE NO. CV 2003-0399

DIVISION 1

**PLAINTIFFS' REQUEST FOR
PRODUCTION OF DOCUMENTS AND
THINGS**

And Responses Thereto

17 TO: **Defendants Donald Cox and Catherine Cox, and their attorney:**

18 Jeffrey Adams
19 MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
20 Prescott, Arizona 86302

21 Pursuant to Ariz.R.Civ.P.34(a) you are requested to furnish for inspection and copying within
22 forty (40) days of the date hereof, in the offices of FAVOUR, MOORE & WILHELMSSEN, P.A., 1580
23 Plaza West Drive, Prescott, Arizona, the following described documents.

24 **INSTRUCTIONS AND DEFINITIONS**

- 25 A. In providing the documents described below, you are requested to furnish all documents
26 known or available to you, regardless of whether these documents are possessed by you or by
27 your attorneys, agents, investigators or other representatives.
- 28 B. If any of these documents cannot be produced in full, produce to the extent possible,
specifying and stating your reasons for your inability to produce the remainder and stating

1 whatever information, knowledge or belief you have concerning the substance of the contents
2 of such unproduced documents.

3 C. This request is intended to be continuing, requiring you to produce whatever documents
4 responsive to this request you become aware of or subsequently obtain.

5 D. As used herein, the term "document" means every writing and record of every type and
6 description in the possession, custody or control of the plaintiff, including, but not limited to,
7 correspondence, memoranda, handwritten notes, computer printouts, tapes and records of all
8 types, minutes of Director's meetings, studies, books, pamphlets, schedules, pictures and voice
9 recordings and every other device or medium on which or through which information of any
10 type is transmitted, recorded or preserved. The term "document" also means a copy where
11 the original is not in the possession or control of the defendants and every copy of a document
12 where such copy is not an identical duplicate of the original.

13 E. "You" or "your" as used herein refer to the Defendants or any agents or representatives
14 thereof.

15 DOCUMENTS TO BE PRODUCED

16 1. **A copy of the title insurance policy issued to you for the property located at 7325 North
17 Coyote Springs Road, Prescott Valley, Arizona (hereinafter referred to as the "Subject
18 Property").**

19 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit 4.

20 2. **Copies of all estimates, bills, receipts for payment, construction applications,
21 construction permits issued, approvals requested and/or received by any local, state or
22 federal government agency (including but not limited to Yavapai County Planning and
23 Zoning Commission) and the like, pertaining to any and all improvements, structures,
24 or developments, of any kind or type whatsoever, made by you on the Subject Property
25 from 1998 to present.**

26 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit 9.

27 3. **Copies of Defendants' income tax returns, including all schedules, from 1998 to present.**

28 Defendants object to this request finding it to be overly broad, vague, ambiguous and
overburdening. Plaintiffs' fail to indicate if they want Defendants' individual tax returns or
partnership tax returns. Furthermore, the request is overly broad as it would result in the production
of documentation that has no relevance to the issues in this lawsuit and is not likely to lead to the
discovery of admissible evidence as required by Rule 26 (b)(1), Ariz. R. Civ. P. Further, "[p]ersonal
financial records and income tax returns are not discoverable unless the party seeking discovery can
demonstrate that the information is indispensable to his or her case and cannot be obtained
elsewhere." 27 C.J.S. Discovery § 86 (1999) (citations omitted). Because Plaintiffs have failed to

1 justify its right or need for the requested tax returns, in the absence of obtaining information from
2 other sources or that it is indispensable, they will not be provided.

3
4 **4. Copies of all employee records that evidence the employee's job title, job position, hours
5 of work, and location of work, of any type or nature and however maintained, for your
6 businesses Prescott Valley Growers and Prescott Valley Nursery, and for the Subject
7 Property, from 2000 to present.**

8 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit numbers 13 through 17.

9 **5. Copies of any and all applications for, and/or business licenses issued by, any local, state
10 or federal government agency for your businesses located at:**

11 **A. 6195 E. Highway 69, Prescott Valley, Arizona;**

12 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit number 6.

13 **B. 6750 North Robert Road, Prescott Valley, Arizona; as well
14 as for,**

15 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit number 5.

16 **C. 7325 N. Coyote Springs Road, Prescott Valley, Arizona**

17 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit number 7.

18 **6. Copies of all documents evidencing all inventory maintained for all plants, shrubs,
19 flowers, trees, or any other inventory of any nature or type, however kept or maintained,
20 for the Subject Property from 2000 to present.**

21 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit number 8.

22 **7. Copies of all documents pertaining to all machinery, equipment, fixtures, supplies, tools,
23 and the like, maintained or used in any fashion on the Subject Property from 2000 to
24 present.**

25 See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit number 10.

26 **8. Copies of all applications, correspondence, notes, memorandum of meetings, permits,
27 and documents sent to, or received from, any local, state or federal government agency
28 (including, but not limited to, Yavapai County Development Services Land Use Unit)
regarding your use of, or conduct occurring on, the Subject Property.**

See Defendants' Initial Rule 26.1 Disclosure Statement, Exhibit 7.

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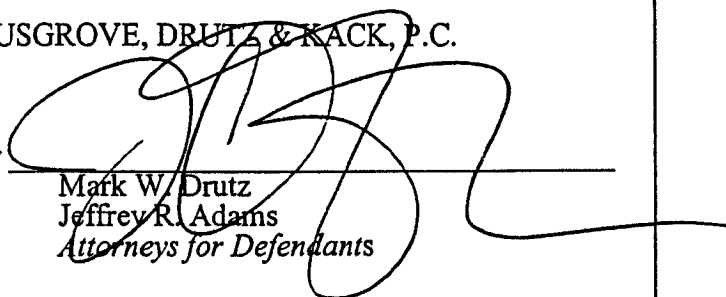
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DATED this 30 day of August, 2004.

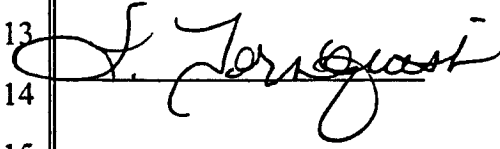
MUSGROVE, DRUTZ & KACK, P.C.

By


Mark W. Drutz
Jeffrey R. Adams
Attorneys for Defendants

Original and one copy of the foregoing was
hand-delivered this 30th day of
August, 2004 to:

David K. Wilhelmsen
Marguerite M. Kirk
FAVOUR, MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
Prescott, Arizona 86302-1391
Attorneys for Plaintiffs



The Law Firm of

Favour Moore & Wilhelmsen, P.A.

Marguerite Kirk

1580 Plaza West Drive
Post Office Box 1391
Prescott, Arizona 86302

Telephone (928) 445-2444
Facsimile (928) 771-0450
MargueriteKirk@cableone.net

August 31, 2004
File No. 10641.001

via Facsimile & U.S. Mail

Jeffrey Adams
MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
Prescott, Arizona 86305


*Re: Cundiff, et al. v. Cox – Yavapai County Cause No. CV 2003-0399
Defendants' Response to Request for Production of Documents*

Dear Jeff:

On behalf of your clients', you objected to our request for copies of Defendants' tax returns, including schedules, from 1998 to present. *Request for Production No. 3*. Catherine Cox testified that she, her husband, and her sons have a "partnership" concerning their nursery operations, including the nursery enterprise located in Coyote Springs Ranch. Your clients' tax returns, as well as partnership returns for those years, are therefore highly relevant to their defense that they are not operating a "business" on the subject property. Clearly, it is impossible to obtain information from any other source as to how your clients treat their partnership assets for tax purposes, as returns are filed under penalty of perjury. Additionally, these tax returns – both individual and partnership returns – will provide relevant information regarding the partnership assets, its volume of business, and the like.

Therefore, please provide your clients' individual and partnership tax returns for the years 1998 to present in accordance with the request for production.

Very truly yours,


Marguerite Kirk
For the Firm

SUPERIOR COURT

YAVAPAI COUNTY, ARIZONA

DEPOSITION OF:

CATHERINE COX

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

Plaintiffs,)

vs.)

Case No. CV 2003-0399

DONALD COX and CATHERINE COX)
husband and wife,)

Defendants,)

PURSUANT TO NOTICE, the deposition of CATHERINE COX, called for examination by Counsel for the Plaintiffs, was taken at the offices of FAVOUR, MOORE & WILHELMSSEN, 1580 Plaza West Drive, Prescott, Arizona, beginning at the approximate hour of 9:58 a.m., on Tuesday, June 22, 2004, before Ashlee Mangum, Certified Court Reporter #50612, a Registered Professional Reporter, within and for the State of Arizona.

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, Arizona 86301
928.776.1169

1 Viewpoint Drive and your facility in Coyote Springs?

2 MR. ADAMS: Object to the form of the
3 question. You can --

4 Q. (Continued by MS. KIRK:) Let me back up. Just
5 so you know, ma'am, from time to time when your attorney
6 objects, you can go ahead and answer the question as
7 posed unless he instructs you not to answer. Okay?

8 A. Okay.

9 Q. Are there greenhouses on the Coyote Springs
10 property?

11 A. There are not. The difference between that
12 facility and the one on Viewpoint --

13 Q. The difference between -- I didn't catch that.

14 A. The difference between Coyote Springs and
15 Viewpoint Drive is that no business occurs in Coyote
16 Springs. There are no sales and no transactions there,
17 whatsoever. It is not open to the public.

18 Q. Your Viewpoint Drive property is open to the
19 public?

20 A. It is open to wholesalers.

21 Q. Are you then -- Is your business then a seller to
22 wholesalers?

23 A. Which one?

24 MR. ADAMS: Object to the form.

25 Q. (Continued by MS. KIRK:) Is your business and --

1 always intended to be a growing yard and it always has
2 been. No sales or business transactions have ever taken
3 place there.

4 Q. When you say no sales or business transactions
5 have taken place at the Coyote Springs property, is that
6 because the trees that are there are not paid for by
7 Prescott Valley Growers when moved to the wholesale
8 location or retail location?

9 MR. ADAMS: Object to the form.

10 Q. (Continued by MS. KIRK:) Okay. Let me back up.
11 When I had asked you about your partnership earlier and
12 you said it was with your son -- pardon me -- with your
13 two sons and your husband?

14 A. Yes.

15 Q. And I asked you what were the assets of that
16 partnership. Do you recall that question? Well do you
17 recall your answer was it was just the Coyote Springs
18 property?

19 A. I didn't say that.

20 Q. Okay. If I misspoke, I apologize. The Coyote --
21 The partnership that you have, what are the assets of
22 that partnership?

23 A. I really don't understand what you mean here.

24 Q. Okay. Do you understand what an asset is when I
25 use that term?

1 drive huge semi trucks as an independent contractor, but
2 park that vehicle on their property in Coyote Springs.
3 I consider them to be businesses. There are other
4 nurseries in Coyote Springs.

5 There is a Christmas tree farm that advertises
6 Christmas trees for sale at Christmas time. You can go
7 there and cut your own tree and pay for it on that
8 property. I have talked to the lady that owns that
9 property. There is another nursery out there that
10 advertises in the phone book and the newspaper. You can
11 go to that property and buy barrels, for one thing, half
12 barrels to plant plants in. How do I identify
13 businesses in Coyote Springs?

14 Q. Can I ask you another question?

15 A. Okay.

16 Q. How would you identify a business operation in
17 general terms?

18 A. One that buys and sells on the property. A
19 business would be to me where you buy and sell on that
20 property. That to me is considered commerce and we
21 don't do that in Coyote Springs. We have no commerce,
22 no business.

23 Q. So if you are going back to my hypothetical about
24 the self-employed person, about the office space in his
25 home, but he does all his business at his customers, is

1 Mark W. Drutz, #006772
2 Jeffrey R. Adams, #018959
3 **MUSGROVE, DRUTZ & KACK, P.C.**
4 1135 Iron Springs Road
5 Prescott, Arizona 86305
6 (928) 445-5935

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;)
12 ELIZABETH NASH, a married woman)
13 dealing with her separate property;)
14 KENNETH PAGE and KATHRYN)
PAGE, as Trustee of the Kenneth Page)
and Catherine Page Trust,)

15 Plaintiffs,)

16 v.)

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

19 Defendants.)
20)
21)

CASE NO. CV 2003-0399

DIVISION 1

AFFIDAVIT OF CATHERINE COX

(Assigned to the Honorable David L. Mackey)

22
23 STATE OF ARIZONA)
24 County of Yavapai) ss.
25)

26 CATHERINE COX, having been duly sworn upon his oath, deposes and states as follows:
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1. I am over eighteen (18) years of age and have personal knowledge of the matters set forth herein.

2. I have personal knowledge of, or am otherwise competent to testify as to, each and every fact set forth in this Affidavit.

3. I currently own real property located in Coyote Springs Ranch at 7325 N. Coyote Springs Road, Prescott Valley, Arizona ("Subject Property") that was purchased in April, 1998.

4. I am one of the named Defendants in the action captioned above.

5. Beginning in the year 2000, my husband and I began making improvements to the Subject Property for purposes of using it as a tree farm on which trees and shrubs were to be grown and which were to be relocated at various times to our retail and wholesale business locations on Highway 69 and Viewpoint Drive.

6. Since the year 2000, my husband and I constructed improvements to the Subject Property that have included constructing a driveway, drilling a well, establishing electricity and placing thereon a mobile home, establishing and installing irrigation lines and tree lines, support posts and cables along the tree lines, planting boundary trees, construction of a pump-house and meter for the well, construction of boundary fencing, construction of a tack room and corrals and substantial grading of the Subject Property. The majority of improvements to the Subject Property were completed in 2002, which coincided with our first use of the Subject Property as a tree farm. Not including the inventory of trees for the tree farm, the Defendants' cost of the Subject Property, improvements constructed thereon and equipment purchased for use at the Subject Property have cost Defendants

1 approximately Five Hundred Fifteen Thousand Six Hundred Six Dollars and Seventy-Two Cents
2 (\$515,606.72).

3
4 7. At no time have my husband or I ever transacted any business, sales or commercial
5 activities on the Subject Property. To the contrary, no money has ever changed hands on the Subject
6 Property in connection with our use of the Subject Property. The only locations where my husband
7 and I transact any business, sales or commercial activities is at Prescott Valley Nursery located at 6195
8 East Highway 69, Prescott Valley, Arizona and at Prescott Valley Growers located at 6750 North
9 Viewpoint Drive, Prescott Valley, Arizona.

10
11 8. Prior to purchasing the Subject Property, my husband and I drove around the portion
12 of Coyote Springs Ranch where the Subject Property is located and saw evidence of many types of
13 business and commercial activities that were not residential in nature including a church under
14 construction, a llama farms, alpaca farms, horse breeding, boarding and training facilities, a hay sales
15 facility, properties operated by general contractors, a auto-mechanic shop and numerous properties out
16 of which commercial vehicles are operated. We likewise saw signs posted on properties in the portion
17 of Coyote Springs Ranch where the Subject Property is located which advertised the sale of various
18 types of goods and services.

19
20
21 9. Based upon our observations of Coyote Springs Ranch and the uses being made of
22 properties in the area by other property owners, we believed that our anticipated use of the Subject
23 Property as a tree farm was permissible.

24
25 10. In January, 2001, my husband and I filed an application with Yavapai County for an
26 agricultural exemption for the Subject Property. The exemption was granted (and is still valid and
27

1 effective today). Receipt of the exemption led my husband and I to believe that our use of the Subject
2 Property as a tree farm was allowed.

3
4 11. Since Plaintiffs filed their Complaint, I obtained personal knowledge of, and have
5 observed, numerous other commercial businesses being operated in the Coyote Springs subdivision in
6 which the Property is located. Those businesses and commercial operations are located as depicted
7 on the map attached as Exhibit "1" to the Response to Plaintiffs' Request for the Court's On-Site
8 Inspection of Subject Real Property Subdivision filed on August 11, 2004.

9
10 12. Many of the business and commercial activities I have observed that are being
11 conducted in Coyote Springs Ranch are depicted and described on several of the photographs attached
12 as Exhibit "1". The photographs and the documentation depicted with some of the photographs
13 attached as Exhibit "1" contain references to the parcel numbers for the properties depicted and were
14 verified by my husband and me.

15
16 13. On May 16, 2003, Plaintiffs filed their Complaint against my husband and me in the
17 above-captioned matter. On March 18, 2004, Plaintiffs amended the Complaint and filed their First
18 Amended Complaint in which they have alleged that my husband and I have violated paragraphs 2, 7(e)
19 and 15 of the Declaration of Restrictions that were recorded on June 13, 2004, in the Official Records
20 of Yavapai County, Arizona at Book 416, Page 680 ("**Declaration**").

21
22 14. Since Plaintiffs filed their Complaint, my husband and I have observed those properties
23 located in the portion of Coyote Springs Ranch purportedly governed by the Declaration that are
24 depicted in the photographs attached hereto as Exhibit "2" and which appear to be in violation of those
25 paragraphs of the Declaration referenced on the photographs. I attest that as of the date of this
26
27

1 Affidavit, that the properties depicted on the photographs attached as Exhibit "2" are in the conditions
2 shown in those photographs.

3 AFFIANT FURTHER SAITH NOT.
4

5 DATED this 29th day of September, 2004.
6

7 Catherine Cox
8 CATHERINE COX, AFFIANT

9
10 SUBSCRIBED AND SWORN TO BEFORE me this 29th day of September, 2004, by
11 CATHERINE COX.

12 Lois J. Tornquist
13 Notary Public

14 9/19/05

