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JEANNE HICKS, CLERK

BY: *[Signature]*

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7 Attorneys for Plaintiffs

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

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

16 Plaintiffs,

17 vs.

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

20 Defendants.)

Ca ~~CV 2003-0399~~

Division 1

**PLAINTIFFS' REPLY TO
DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO
COMPEL DEFENDANTS'
PRODUCTION OF TAX RETURNS**

(Oral Argument Requested)

21 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Kathryn Page, by and
22 through undersigned counsel, hereby reply to Defendants' objections to Plaintiffs' motion to this Court
23 for an order pursuant to Rule 37(a), Ariz.R.Civ.Proc., compelling Defendants Donald and Catherine
24 Cox to disclose information and documents requested by Plaintiffs pursuant to Rule 34,
25 Ariz.R.Civ.Proc.; for Plaintiffs' attorney's fees and costs incurred in bringing this motion; and, for
26 such other relief as the Court deems just and equitable.

This reply is supported by the following memorandum of points and authorities, as well as the
entire record in this proceeding.

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1 RESPECTFULLY SUBMITTED this 21st day of October, 2004.

2 FAVOUR MOORE & WILHELMSSEN, P.A.

3
4 By: Marguerite Kirk
5 David K. Wilhelmsen
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6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. Defendants' Mischaracterize and Mislead the Court as to the Issue**
8 **Presented in this Litigation and Plaintiffs' Discovery Requests**

9 Incredibly, Defendants' counsel blatantly mischaracterizes to this Court the issue in this case.
10 This case involves Defendants Cox's use of their property as a commercial or business enterprise and
11 other violations of the recorded Declaration of Restrictions. *Cundiff, et al. v. Cox, First Amended*
12 *Complaint, CV 2003-0399, March 18, 2004*. The issue is *not* whether the recorded Declaration of
13 Restrictions is enforceable; rather, that is Defendants' defense to their violation of the covenants.

14 Equally misleading is Defendants' counsel's bald assertion that Plaintiffs' request for
15 production is principally "to ascertain Defendants' financial condition where their financial condition
16 is not at issue." *Defendants' Response to Motion to Compel, at lines 3-4, p.2*. As clearly set forth in
17 Plaintiffs' motion to compel, the request for production of Defendants' tax returns for the prior 5 year
18 period (1998 to 2003) provides relevant and material evidence of prior statements made by Defendants
19 under oath regarding the characterization and treatment of the subject property and all improvements
20 thereon. *Plaintiffs' Motion to Compel, pp.4-5*. Even if Defendants did not improve the land until
21 2000, the land from the time of purchase was admittedly a partnership asset. Hence, the
22 characterization and treatment of the land itself, as well as the improvements, inventory, equipment
23 and similar items by Defendants on their verified tax returns is highly material evidence on the issue
24 of whether Defendants are operating a business enterprise in violation of the recorded covenants.

25 Obviously, this critical evidence cannot be obtained from any other source. Defendants
26 contend that they have disclosed bills for the cost of improvements. However, this documentation

1 does not establish *how* Defendants have characterized their property and improvements in *prior*
2 *statements made under oath and penalty of perjury* to the U.S. Treasury Department. Defendants in
3 a conclusory manner simply state that such evidence is available elsewhere, but fail to state where
4 such comparable evidence could be obtained. *Defendants' Response to Motion to Compel, at lines 20-*
5 *22, p.3.* Regardless of how Defendant Catherine Cox may self-servingly state now in an affidavit
6 crafted solely for this litigation that "no business transactions are ever conducted on the Subject
7 Property," this does not in and of itself support Defendants conclusion that as a matter of law their
8 activities on the property are not in violation of the recorded covenants. The absurdity of Defendants
9 argument is readily apparent.

10 Defendant Catherine Cox admitted during her deposition that the property is used in
11 connection with a partnership she and her husband have with their sons. The purpose of the
12 partnership is a nursery enterprise. Plaintiffs are thus entitled to obtain Defendants' tax returns for the
13 prior five-year period to determine how Defendants have characterized and treated their property in
14 statements made under oath prior to their recent statements during litigation that they are not operating
15 a business.

16 II. Conclusion

17 Therefore, Plaintiffs respectfully request that this Court enter its order requiring Defendants
18 to produce full and complete copies of their income tax returns from 1998 to present as requested in
19 Plaintiffs' discovery. Plaintiffs also request that this Court award them their attorney's fees incurred
20 in attempting to resolve this discovery dispute with Defendants' counsel, and in the bringing of this
21 motion to compel.

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DATED this 21st day of October, 2004.

FAVOUR MOORE & WILHELMSSEN, P.A.

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Original of the foregoing filed
this 21st day of October, 2004
with:

Clerk, Superior Court of Arizona
Yavapai County
Prescott, Arizona

A copy hand-delivered this 21st day
of October, 2004 to:

Honorable David L. Mackey
Division One
Superior Court of Arizona
Yavapai County
Prescott, Arizona

and, a copy mailed this 21st day
of October, 2004 to:

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