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

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

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

17 Plaintiffs,)

18 v.)

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

21 Defendants.)
22)
23)
24)
25)
26)
27)

CASE NO. CV 2003-0399

DIVISION 1

**RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY
JUDGMENT RE: DEFENDANTS'
VIOLATIONS OF RESTRICTIVE
COVENANTS; AFFIRMATIVE
DEFENSES OF ESTOPPEL, LACHES
AND UNCLEAN HANDS**

(Oral Argument Requested)

Defendants Donald and Catherine Cox submit their Response in Opposition to Plaintiffs' Motion for Summary Judgment Re: Defendants' Violations of Restrictive Covenants; Affirmative Defenses of Estoppel, Laches and Unclean Hands ("Plaintiffs' Motion") and urge that the Plaintiffs' Motion lacks merit and denial of summary judgment is appropriate as contrary to the allegation made

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by Plaintiffs, Plaintiffs are not entitled to judgment as a matter of law as material questions of fact exist regarding the viability of Defendants' affirmative defenses of estoppel, laches and unclean hands.

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2 While Plaintiffs attempt to steer this Court away from factual circumstances suggesting that the
3 Declaration of Restrictions at issue in this case (hereinafter "**Declaration**" or "**CC&Rs**") have not
4 been abandoned, this is contrary to the fundamental changes found to have taken place in Coyote
5 Springs Ranch ("**Coyote Springs**"), evidence of which already has been presented to this Court. This
6 Court to ignore affidavits the facts showing evidence of abandonment including an abundance of
7 written evidence delivered by the Coxes fellow Coyote Springs property owners, site visit inspections
8 conducted by a licensed investigator, and deposition testimony concerning the non-residential activity
9 taking place within Coyote Springs. To the contrary, that evidence alone creates a significant question
10 of fact placing into question the enforceability of the Declaration as well creating a question of fact
11 concerning Defendants' affirmative defenses. Example of the evidence operating against Plaintiffs'
12 positions includes Defendant Catherine Cox's averrements and testimony that many of the Coyote
13 Springs property owners are engaging in myriad for-profit business operations. Those businesses in
14 Coyote Springs include everything from racing stables to automotive repair shops. A site inspection
15 by a private investigator confirms these observations.

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20 Even the original grantor, Robert Conlin, attests that the CC&Rs were not intended to preclude
21 home-based business offices and advertising the same to the public despite the fact that his recent
22 revelation of his intent in creating the Declaration is nowhere to be found in the Declaration itself
23 creating a significant question of fact surrounding the patent ambiguity of the Declaration itself.
24 Further, many Coyote Springs property owners support the Coxes' cultivation of their property for
25 agricultural purposes and have voiced support for the Defendants' use of their property.
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1 From a fundamental standpoint, Plaintiffs' own conduct brings into question their legal standing
2 to bring their claims based upon their own unclean hands. The facts presented with this Response
3 Motion demonstrate that Plaintiffs Becky Nash and the Pages have patronized a automotive repair
4 business located and operated in Coyote Springs called Coyote Curt's Automotive Repair for the
5 maintenance and repair of their corporate owned automobiles operated by the Pages' company,
6 "Quality Bumper". (See Exhibits "1" and "2", attached to Defendants' Separate Statement of Facts
7 ("DSOF")). Those Plaintiffs' patronizing of Coyote Curt's Auto Repair has been ongoing since 1999
8 and continues today. (*Id.*). Equity demands that by coming to this Court with unclean hands –
9 namely engaging in the very type of conduct they claim Defendants engage in – mandates that they
10 be estopped from pursuing their claims against the Defendants. More fundamentally, Plaintiffs' current
11 and historical willingness to patronize businesses being operated in Coyote Springs constitutes a tacit
12 admission that the Declaration has been abandoned. At a minimum, their conduct itself creates a
13 question of fact warranting denial of their motion for summary judgment. On this point, the well-
14 known maxim "what's sauce for the goose is sauce for the gander", cited in *Amerco v. Shoen*, 184
15 Ariz. 150, 164, 907 P.2d 536, 550 (App. 1 1995), certainly applies in this case.

18 With respect to Defendants' affirmative defenses of equitable estoppel and laches, the facts
19 demonstrate that only *after* the Defendants made improvements to their property and began using that
20 property as a tree farm did Plaintiffs bring their lawsuit. The foregoing fact is material in that Plaintiffs
21 had an opportunity to view Defendants activities and use of their property for approximately two years
22 before they first took any action against Defendants. And that action was not commenced until after
23 Defendants invested more than a half-million dollars in their development of their property. Supporting
24 the foregoing is Plaintiffs' admissions during their depositions that they observed Defendants'
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improvements and use of their property over a long period of time during which they did nothing.

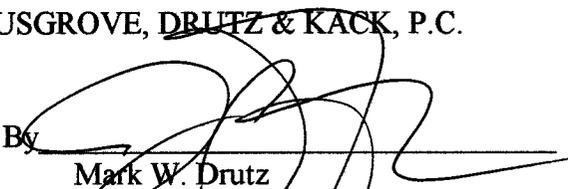
1 Neither the law nor public policy favors Plaintiffs' approach and in this case, summary judgment is
2 therefore inappropriate.

3 In short, at a minimum material facts remain in dispute that are germane to Defendants'
4 affirmative defenses. Further, the inferences to be drawn from the undisputed facts in this case,
5 including (1) the validity of the CC&Rs, in light of the fundamental changes that have occurred within
6 Coyote Springs, (2) what Plaintiffs knew about the Coxes' property improvements, when they knew
7 it, and their failure to communicate their objections to the Coxes during the time while Defendants'
8 activities were ongoing, (3) Plaintiffs' implicit acknowledgment, through their own conduct, as to the
9 impuissance of the CC&Rs, and (4) the initial grantor's intent concerning the types of businesses that
10 are allowed by the CC&Rs despite the lack of any such provisions in the CC&Rs itself mandate denial
11 of summary judgment.
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14 This Response Motion is fully supported by the attached Memorandum of Points and
15 Authorities fully incorporated herewith and (i) Defendants' Controverting Statement in Response to
16 Plaintiffs' Separate Statement of Facts in Support of Motion for Summary Judgment and (ii)
17 Defendants' Separate Statement of Facts in Support of Response to Motion for Summary Judgment
18 ("DSOF") filed contemporaneously herewith.
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21 RESPECTFULLY SUBMITTED this 11 day of January, 2005.

22 MUSGROVE, DRUTZ & KACK, P.C.

23
24 By 

25 Mark W. Drutz
26 Jeffrey R. Adams
27 Sharon Sargent-Flack
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

1 **I. CERTAIN FACTS IN THIS MATTER AND, IN THE ALTERNATIVE, THE**
2 **INFERENCES TO BE DRAWN FROM SUCH FACTS, ARE IN CONFLICT,**
3 **PRECLUDING SUMMARY JUDGMENT FOR PLAINTIFFS.**

4 The Court is required to review the matters of record in the light most favorable to the party
5 opposing a summary judgment motion, here, the Coxes. *Hohokam Irr. & Drainage District v. Ariz.*
6 *Public Service*, 204 Ariz. 394, 64 P.3d 836 (2003). If there is any genuine issue as to a material fact
7 to be resolved, or any doubt as to whether such a material factual issue is present, the Motion should
8 be denied. *Gatecliff v. Great Republic Life Insurance Company*, 170 Ariz. 34, 821 P.2d 725 (1991).
9 A genuine dispute as to conflicting inferences to be drawn from the facts likewise precludes an award
10 of summary judgment. *Executive Towers v. Leonard*, 7 Ariz. App. 331, 439 P.2d 303 (1968).

11 Because “everything depends upon the history of the titles, covenants referred to, and the
12 intent of the parties viewed in the light of surrounding circumstances and conditions, a statement of
13 the salient facts is necessary to a proper understanding of the precise questions” posed by the parties.
14 See *O’Malley v. Central Methodist Church*, 67 Ariz. 245, 247, 194 P.2d 444, 446 (1948). Plaintiffs
15 have the initial burden of establishing that there are no genuine issues of material fact. See *Mast v.*
16 *Standard Oil Company of California*, 140 Ariz. 1, 680 P.2d 137 (1984). Plaintiffs have failed in that
17 regard.

18 Defendants are the owners of property located in Coyote Springs Ranch at 7325 N. Coyote
19 Springs Road, Prescott Valley, Arizona (“**Subject Property**”) that they purchased in April 1998.
20 (DSOF ¶ 1). In August 2000, the Coxes began making vertical and subterranean improvements to their
21 property in Coyote Springs to use it as a tree farm. Specifically, the Defendants intended merely to
22 grow trees and shrubs on their property and to relocate them at various times to Defendants’ retail and
23 24 25 26 27

1 wholesale business locations on Highway 69 and Viewpoint Drive. (DSOF ¶ 2). Defendants
2 commenced with the development of their property in 2000. That development included constructing
3 a driveway, drilling a well, establishing electricity and placing thereon a mobile home, which has since
4 been replaced by a manufactured home, establishing and installing an automatic drip-irrigation system
5 and tree lines, support posts and cables along the tree lines, placing perimeter trees around the
6 property, construction of a pump-house and meter for the well, construction of boundary fencing,
7 construction of a tack room and corrals and substantial grading of their property. (DSOF ¶ 3). The
8 majority of improvements were completed in early 2002, which coincided with Defendants' first use
9 of their property as a tree farm. (DSOF ¶ 4). Not including the inventory of trees for the tree farm,
10 the Defendants' improvements and equipment purchased for use at their property since 2000 cost
11 approximately Five Hundred Fifteen Thousand Six Hundred Six Dollars and Seventy-Two Cents
12 (\$515,606.72). (DSOF ¶ 5).
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14 Prior to purchasing their property, the Coxes drove around the Coyote Springs Ranch area
15 and saw evidence of many examples of non-residential improvements and activity, including:
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- 17 (1) a church;
- 18 (2) llama farms;
- 19 (3) alpaca farms;
- 20 (4) horse breeding;
- 21 (5) boarding and training facilities;
- 22 (6) a hay sales facility;
- 23 (7) a general contractor's warehouse;
- 24 (8) a shipping company;
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(9) a Christmas tree farm; and

(9) numerous commercial vehicles.

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2 (DSOF ¶ 6). Given these observations, the Coxes believed that the area was not strictly residential.

3 (DSOF ¶ 7). The Coxes do not recall seeing the Declaration prior to their purchase of their property.

4 (DSOF ¶ 8). Based upon their observations of Coyote Springs Ranch and the uses being made of
5 properties in the area by other property owners, they had no reason to believe that their anticipated use
6 of their property as a tree farm was not permitted. (DSOF ¶ 9)

8 Not relying merely on their observations of Coyote Springs, in January, 2001, the Coxes filed
9 an application with Yavapai County Development Services to obtain an agricultural exemption for their
10 use of their property. (DSOF ¶ 10). Yavapai County granted the exemption (which remains valid and
11 effective), leading the Coxes to believe that their use of their property as a tree farm was allowed.

12 (DSOF ¶ 11). In the spring of 2001, Bob Launders, an attorney who resides in the Coyote Springs
13 Ranch regarding their proposed use of their property, met with the Coxes at his office. (DSOF ¶ 12).

14 During that meeting, Mr. Launders advised the Coxes that there should be no problems with their use
15 of the property as long as their neighbors had no objection. (DSOF ¶ 13). Relying on Mr. Launders'
16 advice, the Coxes discussed the proposed tree farm with their neighbors who owned property in the
17 portion of Coyote Springs Ranch where the Subject Property is located. (DSOF ¶ 14). Those people
18 consented to, and registered approval of, Defendants' expected use of their property, which again led
19 the Coxes to believe that they could use the Subject Property as a tree farm. (DSOF ¶ 15).

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23 Importantly, during this period of time – namely the Defendants inspections of Coyote
24 Springs through the development of their property and their use of their property from 2000 through
25 the spring of 2003, Plaintiffs registered no objection to Defendants' activities or use of their property;

nor did they take any enforcement action against the Defendants. Rather, the first time Plaintiffs took any action against Defendants was with the filing of their lawsuit on May 16, 2003. (DSOF ¶ 16). In point of fact, prior to filing this lawsuit Plaintiffs never even had a personal or telephonic conversation with Defendants advising them that they believed the use of the Subject Property violated any restrictive covenant. (DSOF ¶ 17). This was the case despite the fact that all Plaintiffs acquired their land prior to the Coxes, had the opportunity to observe the Coxes' improvements over the course of a year and a half during which time they each regularly drove on Coyote Springs Road, which runs in front of the Defendants' property, between 2000 and May, 2003. (DSOF ¶¶ 18-20).

Interestingly, Plaintiffs met at a church (which obviously is not a residence yet is located within Coyote Springs) just prior to filing the lawsuit to discuss other property owners' violations of the Declaration. (DSOF ¶ 21). Yet despite that meeting, Plaintiffs made no effort to advise the Coxes that they believed they violated the Declaration. (DSOF ¶ 22). Further, while Plaintiffs have claimed poverty as the basis for failing to object to Defendants' use of the Subject Property sooner, that argument fails because their lawsuit is being bank-rolled by another individual, namely Alfie Ware. (DSOF ¶¶ 23-25).

Further, an investigation of the Coyote Springs Ranch subdivision has revealed that few property owners have complied with the Declaration. (DSOF ¶ 26) The CC&R violations are broad-based and include violations of virtually every restrictive covenant set forth in the Declaration, including numerous violations of the provision dealing with business and commercial activities that have existed, in many cases, for decades. (DSOF ¶ 27) Plaintiffs are included amongst those in violation of the Declaration of Restrictions. (DSOF ¶ 28).

1 It is undisputed that Plaintiffs have installed and continue to maintain above-ground water
2 tanks on their property in violation of ¶ 16 of the Declaration (*Id.*). Further, Plaintiffs admit to
3 attending a meeting in 2003 at a Church located within Coyote Springs Ranch to discuss violations by
4 other property owners, including ostensibly the Coxes, admit that a Church is not a residence and admit
5 that the Church violates the Declaration. (DSOF ¶ 29). As another important and material example
6 of the conflict in this case, Plaintiffs Page and Nash have solicited automotive repair services since at
7 least 1999 from Coyote Curt's Auto Repair, located in Coyote Springs; that activity has continued into
8 this year. (DSOF ¶ 30). Thus, the Plaintiffs have committed the very violation of the Declaration of
9 which they now complain. (*Id.*)

11 It is also undisputed that the Declaration has gone largely unenforced by Coyote Springs
12 property owners including Plaintiffs despite the an abundance of violations. (DSOF ¶ 31). Such
13 conduct by Plaintiffs and other similarly situated property owners constitutes acquiescence, which
14 renders Plaintiffs' current action selective and discriminatory enforcement. (*Id.*)

16 Adding to the conflict of material facts in this case is the fact that many property owners
17 support the Coxes' tree farm. (DSOF ¶ 32). In fact, many owners have expressed their *written*
18 support and offers to defray legal costs associated with this frivolous lawsuit. (DSOF ¶ 33). Not only
19 do factual circumstances exist for barring Plaintiffs' claims on the equitable bases of laches, equitable
20 estoppel and unclean hands, as set forth above, the CC&Rs themselves provide for abandonment by
21 this Court:

23 The foregoing restrictions and covenants run with
24 the land and shall be binding upon all parties and all
25 persons claiming through them until June 1, 994, at
26 which time said covenants and restrictions shall be
27 automatically extended for successive periods of ten

(10) years, or so long thereafter as may be now or hereafter permitted by law.

1 (DSOF ¶ 34).

2 Furthermore, the CC&Rs also arguably permit agricultural activity. On this point, it is
3 noteworthy that the Declaration preclude commercial or business activities only, although it does not
4 define such activities or give examples of what is included within the scope of the Declaration: "No
5 trade, business, profession or any other type of commercial or industrial activity...". (DSOF ¶ 35). The
6 Coxes' activity, on the other hand, is purely agricultural; the operate no office at their property, invite
7 no members of the public to their property, and conduct no transactions on their property. (DSOF
8 ¶36). The drip irrigation and fertilization system is fully automated, requiring a minimal number of
9 employees – two to three – at any one time. (DSOF ¶ 36). Hence, the Coxes' tree farm is no different
10 than a private estate having a grounds-keeping crew tend to the landscaping. (DSOF ¶ 37).

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14 Based on the sheer volume of violations, especially those numerous violations of the
15 prohibition of business and commercial activities, at a minimum, a material dispute of facts exists
16 concerning the issue of whether the Declaration has been abandoned by the owners of properties in
17 Coyote Springs Ranch. (*See* DSOF, *supra*). Furthermore, Plaintiffs' conduct between 2000 and the
18 date of filing their lawsuit creates a question of fact material to the affirmative defense of laches and
19 equitable estoppel. Their conduct likewise is material to the issue of whether they have standing to
20 bring suit given their apparent unclean hands. Summary judgment therefore is inappropriate.
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II. THE FUNDAMENTAL CHARACTER OF COYOTE SPRINGS, AT MINIMUM, CALLS INTO DISPUTE THE ENFORCEABILITY OF THE CC&Rs.

A. The CC&Rs Have Been Abandoned; in the Alternative, the CC&Rs Leave Room for Interpretation That Permits The Coxes' Agricultural Activity.

Plaintiffs contend that the CC&Rs are unambiguous and, therefore, enforceable as a matter of law. Even assuming for the sake of argument that no ambiguity exists, Plaintiffs continue to overlook at least two critical reasons for denying summary judgment.

1. The CC&Rs Have Been Abandoned and No Longer Are Enforceable.

The Arizona Supreme Court recognizes circumstances in which CC&Rs are abandoned:

Whether the restrictions imposed upon the use of lots in this subdivision have been so thoroughly disregarded as to result in such a change in the area as to destroy the effectiveness of the restrictions, defeat the purposes for which they were imposed and consequently [] amount to an abandonment thereof. *Id.* at 133, 267 P.2d at 1071.

Burke v. Voicestream Wireless Corp., 207 Ariz. 393, 87 P.3d 81 (App. 1 2004) (citing to *Condos v. Home Development Company*, 77 Ariz. 129, 267 P.2d 1069 (1954) [internal quotations omitted]. "Where the restrictions are not universal, or after frequent violations of the restrictions have been permitted, then the neighborhood scheme will be considered abandoned." *O'Malley v. Central Methodist Church*, 67 Ariz. 245, 257, 194 P.2d 444, 452-53 (citing *Scull v. Eilenberg*, 94 N.J.Eq. 759, 121 A. 789 (****) (citing *De Gray v. Monmouth Beach Club House Company*, 50 N.J.Eq. 329, 24 A. 388 (****)). In Arizona, the court may not enforce the terms of restrictive covenants where "the changes in the surrounding areas are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions." *Murphy v. Gray*, 84 Ariz. 299, 327 P.2d 751 (1958); *Lacer v. Navajo County*, 141 Ariz. 396, 404, 687 P.2d 404, 412 (App. 1 1983).

1 The doctrine of changed circumstances has been said to relieve against the enforcement of
2 covenant "if conditions have so changed since the making of the promise as to make it impossible
3 longer to secure in a substantial degree the benefits to be secured by the performance of the promise."
4 *Lacer*, 141 Ariz. 396, 404, 687 P.2d 404, 412 (citing 5 Powell on Real Property § 679 [2] at p. 60-
5 131 (1980)). Restrictions also are subject to reasonable time limitations. *Lacer*, 141 Ariz. at 403-404,
6 687 P.2d at 411-412 (citing *Crissman v. Dedakis*, 330 So. 2d 103 (Fla. App. 1976)). And from a
7 fundamental standpoint, restrictive covenants are not favored in the law and doubts and ambiguities
8 regarding their existence and enforcement are to be resolved against the restriction. *Lacer*, 141 Ariz.
9 396, 404, 687 P.2d 404, 412 (citing to *Duffy v. Sunburst Farms East Mutual Water & Agricultural*
10 *Company, Inc.*, 124 Ariz. 413, 604 P.2d 1124 (1979)).

12 Assuming, *arguendo*, that the Coxes' cultivation of young trees (absent any retail operation
13 where transactions occur) is a business, this does nothing to support Plaintiffs' argument due to the
14 changed circumstances at Coyote Springs. It is abundantly clear that the CC&Rs, recorded thirty (30)
15 years ago, have long been abandoned. A vast majority of the property owners have disregarded the
16 CC&Rs. (See DSOF ¶¶ 27-29). Apparent infractions and non-compliance is the general *rule*, rather
17 than the exception, in Coyote Springs. See *O'Malley* 67 Ariz. at 258, 194 P.2d at 453. (See DSOF
18 ¶¶ 27-29). The patently non-residential character of many of the properties within Coyote Springs
19 frustrate the original purposes of the CC&Rs, assuming that the original purposes were to preclude
20 business activity within Coyote Springs. *Decker v. Hendricks*, 97 Ariz. 36, 41, 396 P.2d 612 (1964)
21 See also aff. of R. Conlin, attached as Exhibit "6" to PSOF. Thus, circumstances have changed such
22 that the original purpose of the CC&Rs is defeated and they may not be enforced as a matter of law.
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1 *Murphy* encompasses the **changed circumstances** prevalent within Coyote Springs itself, not merely
the “surrounding areas”. *See Murphy*, 84 Ariz. at 302, 327 P.2d at 753.

2 Furthermore, as stated above, restrictive covenants are to be strictly construed against persons
3 seeking to enforce them and any ambiguities or doubts as to their effect should be resolved in favor of
4 the free use and enjoyment of the property and against restrictions. *R & R Realty Co. v. Weinstein*,
5 422 P.2d 148, 1966 Ariz. App. LEXIS 528 (App. 1966) (intent must be mutual). If the court is
6 presented with a persuasive reason why the CC&Rs should be abandoned -- that is, the non-waiver
7 provision not enforced -- it has the authority to rule that a non-waiver provision is ineffective and thus,
8 the CC&Rs abandoned. *Burke*, 207 Ariz. at 398-99, 87 P.3d at 86-87. *See also Arizona Biltmore*
9 *Estates Assoc. v. Tezak*, 177 Ariz. 447, 449, 868 P.2d 1030, 1032 (App. 1993) (*citing Duffy v.*
10 *Sunburst Farms East Mutual water & Agricultural Co., Inc.*, 124 Ariz. 413, 417, 604 P.2d 1124, 1128
11 (1980) (quoting *Grossman v. Hatley*, 21 Ariz. App. 581, 583, 522 P.2d 46, 48, 1974)). At a minimum,
12 factual circumstances are in question, the inferences from which this Court might reasonably consider
13 abandonment. In such a situation, summary judgment in favor of Plaintiffs on the issue of enforcement
14 should be *denied*.

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18 **2. There is no business activity conducted on the Defendants' property.**

19 From the material facts in this case, it is in dispute whether the Defendants are conducting a
20 commercial or business activity on their property. While Plaintiffs serve up one red herring after
21 another in a transparent attempt take another bite at summary judgment, Plaintiffs again hoist
22 themselves on their own petard.
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24 For example, Plaintiffs draw from a seemingly authoritative source, Arizona Revised Statutes,
25 A.R.S. § 3-201, in support of their proposition that the Defendants operate a formidable commercial
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1 conglomerate in Coyote Springs. *See* Plaintiffs' MSJ, p. 17:2-9. However, Plaintiffs' source patently
2 does not apply to this case. Their source, which is taken from Title 3 dealing with Agricultural
3 Administration; Definitions. Title 3 does not deal with the regulation of commercial enterprises.
4 Rather, it governs the administration and regulation of foreign vegetation and the like (i.e., pest
5 control). The definitions from that statutory reference clearly are not applicable to this case and adds
6 nothing to the determination of what constitutes a business in the context of the Declaration.

7 Further, the CC&Rs are far from clear and unambiguous in purportedly restricting the type
8 of agricultural cultivation on the Coxes' and other property owners' land. *See* color copy photos
9 depicting various businesses, attached as Exhibit "1" to Aff. of Catherine Cox (¶ 12), attached as
10 Exhibit "6" to Defendants' Separate Statement of Facts filed on September 29, 2004. (*See also* DSOF
11 ¶ 34, Corr. from Mr. Hildebrandt, who engages in agricultural activity, in support of the Coxes' tree
12 farm). The ambiguity is no more obvious than from the fact that the original author of the Declaration
13 has attested that his intent in creating the Declaration bears no resemblance to the actual language he
14 employed in that document. Additionally, the CC&Rs only preclude business, commercial or industrial
15 activity: "No trade, business, profession or any other type of commercial or industrial activity". (*See*
16 DSOF ¶ 35). In applying the foregoing to the Defendants and their use of their land, the doctrine of
17 *ejusdem generis* does not apply. *See Bilke v. State*, 206 Ariz. 462, 80 P.3d 269 (2003) (rule of
18 *ejusdem generis* applies only where general words follow enumeration of particular classes of things;
19 here, legislature did not create list of specific or similar things from which court could infer intention
20 to narrow the subsequent general class of "other proceedings"); *A.P.S. v. Town of Paradise Valley*, 125
21 Ariz. 447, 610 P.2d 449 (1980) (*citing to White v. Moore*, 46 Ariz. 48, 57, 46 P.2d 1077, 1081
22 (1935) ("in following the enumeration of nine particular businesses followed by the general term 'or
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any other business or occupation charging * * * rents'") [emphasis supplied]. Here, the provision (¶ 2) at issue is not specific and fails to preclude agricultural activities. Thus, paragraph 2 of the Declaration does not prohibit the Coxes' tree growing activities because only business, commercial or industrial activities are prohibited. (*Id.*)

Plaintiffs' Motion references the testimony of Mrs. Cox, as she explains how the Coxes obtained agricultural status to allow them to cultivate the trees at Coyote Springs Ranch. *See, e.g.,* Plaintiffs' MSJ, pp. 3:13-16; 9:13-20. Plaintiffs turn to the Websters' dictionary to promulgate their position, relying heavily on the definition of "business, commerce, trade, [and] industry". *See* at 8:2-6. While this definition is inapplicable, as the Coxes do not engage in the purchase or sale of commodities or related financial transaction; exchange and transport commodities; or produce commodities by manufacturing or processing, it is unnecessary to look to Webster's. That is because Arizona courts recognize the distinction between industry/commerce and agriculture. *See Arizona Tax Commission v. Dairy & Consumers Coop. Ass'n*, 70 Ariz. 7, 215 P.2d. ** (1950); *Hibbs v. Chandler Ginning Co.*, 164 Ariz. 11, 790 P.2d 297 (App. 1990); *Central Citrus Co. v. Dept. of Revenue*, 157 Ariz. 562, 760 P.2d 562 (App. 1988). Agricultural property is used for "growing crops or raising animals." *Central Citrus Co.*, 157 Ariz. at 565, 760 P.2d at 565. In *Central Citrus* the court held that a citrus packing plant where goods were graded, sized, washed, waxed, treated and packed was devoted to commercial or industrial purpose, not agricultural purpose; no crops even were grown on the property [emphasis supplied]. (*Id.*) The opposite is true here. The only thing occurring on the property is the growing of trees. As Mrs. Cox's testimony demonstrates, it may be concluded that the Coxes, if anything, enjoy agricultural status. They hold no business licenses for the Coyote Springs property. *See, e.g.,* Plaintiffs' MSJ, pp. 3:13-16; 9:13-20. *See also* Ariz. R. Evid. 803 (7) and (10) (absence of

records) (2004). At minimum, these are questions of fact for the jury to decide and summary judgment cannot be entered in favor of Plaintiffs.

3. **Even Plaintiffs' own cited opinions and offered affidavits fail to support enforcement of the Declaration as a matter of law**

Asking the Court to ignore the changed circumstances in Coyote Springs and well-settled authority supporting the equitable defense of abandonment, as set forth above, Plaintiffs cite *Burke* in support of their contention that the CC&Rs are clear and unambiguous and must be enforced against the Coxes as a matter of law. *See* Plaintiffs' MSJ, p. 5. However, their position is belied by their own statement of facts, which contain the attestation of the original creator of the Declaration whose statements today differ from the actual language he employed in the Declaration 30 years ago.

Further, even if this Court could disregard the doctrine of changed circumstances in this case, *Burke* is significantly distinguished in that the court in *Burke* found only violations of the clause that was 'at issue' in the case. *Burke*, 207 Ariz. at 395, 81 P.3d at 84. "These equitable considerations must be kept in mind when turning to the standards of interpretation." *Mains Farm Homeowners Assoc. v. Worthington*, 121 Wn.2d. 810, 815, 854 P.2d 1072, 1074 (Wash. 1993) (*cited* by Plaintiffs' MSJ, at p. 7:23-24). In this case, there are diverse violations by many property owners of myriad CC&R clauses, *including* Plaintiffs; many of which were presented to this Court in response and opposition to Plaintiffs' *prior* Motion. (*See* aff. of Ms. Cahill, a copy of which is attached as Exhibit "13" to DSOF). The facts of *Burke* further differ dramatically from those at bar. In *Burke*, the defendant proceeded with the construction, knowing of the restrictions and knowing of objections from neighboring homeowners. Here, the opposite is true. The Coxes had not reviewed the CC&Rs prior to their purchase and their inspection of Coyote Springs made it clear to them that their intended use of their property was permissible. (*See* DSOF ¶ 6). Moreover, Plaintiffs failed to object to the

1 Coxes' use of their property since 2000; and at present many Coyote Springs property owners have
2 express unqualified support for the Coxes' "well presented," "beautiful set of trees" and do not want
3 the trees to be removed (DSOF ¶ 19) (*See also* DSOF ¶ ¶ 32-33 – written support for the Coxes'
4 trees, from Grant L. Griffiths -- owner of New Life Landscapes, Karrie Decker – owner of Tranquil
5 Spirits Alpaca Ranch, Karen L. Wargo – Wargo Construction, Frank and Laura Lamberson ("we are
6 very much in favor and would like it to stay"), Larry Kurtz ("their property is neat and clean"), RT
7 Contracting Specialists, Christin Bowra, Jeff and Mychel Westra – llama ranch owners, Charles A.
8 Hildebrandt ("complete support") -- uses land for agriculture)). *Cf. Burke*, 207 Ariz. at 398, 87 P.3d
9 at 399. In short, Plaintiffs are engaging in nothing more than selective enforcement of the Declaration,
10 which this Court may not uphold. *See McRae v. Lois Grunow Memorial Clinic*, 40 Ariz. 496, 509,
11 14 P.2d 478, 483 (1932). (DSOF ¶ 31).

12
13 Another opinion erroneously relied upon by Plaintiffs is one from the Washington supreme
14 court. *Mains Farm Homeowners Assoc. v. Worthington*, 121 Wn.2d. 810, 815, 854 P.2d 1072, 1074
15 (Wash. 1993) (*cited* by Plaintiffs' MSJ at p. 7:23-24). Not only is *Mains* extra-jurisdictional, it is
16 sufficiently distinguished that it actually contradicts Plaintiffs' position. The issue in *Mains* was
17 whether defendant's adult-care home, which housed and cared for four (4) residents, violated
18 declarations providing that lots "shall be used for single family residential purposes only."¹ The court,
19 in finding for the Association, concluded:
20
21

22 *Before* defendant bought the premises, she *read* the restrictive covenants. She had
23 moved out of her prior adult care home because of opposition from neighbors.
24 **Written opposition** by plaintiffs was made known to defendant immediately after

25 ¹ It should be noted that there is no language in the subject CC&Rs similar to those at issue in *Mains*.
26
27

her purchase. *** Despite that knowledge, defendant applied for a building permit She was advised by the County that her intended facility did not comply with applicable zoning. She later obtained the permit by stating that only her family would be living with her. In her words: "I told them what they wanted to hear." Clerk's Papers, at 174. **These equitable considerations must be kept in mind when turning to the standards of interpretation.**

Id. at 815, 1074 [emphasis in bold supplied]. Unlike the defendants in *Mains*, the Coxes never were informed by their Realtor of any deed restrictions; nor do they recall receiving a copy prior to their purchase. (See DSOF ¶ 8)². Further, the Defendants received no objection to their use of their property prior to the time their development was complete and they had been long-involved in their tree farm. The Coxes further have **written support, not "written opposition,"** from neighboring landowners. Compare *Mains*, 121 Wn.2d. 810 at 815, 854 P.2d at 1074, and Exhibit "17" at DSOF. And the Coxes received full permission to undertake their agricultural activity receiving an agricultural exemption from Yavapai County. See, i.e., Exhibit "5", attached to PSOF. Significantly different from the defendant in *Mains*, the Coxes' tree growing does not include a commercial element as they do not "receive payment" for the activity conducted on their property. *Id.* at 821, 1077.

A Florida court of appeals opinion, *Robins v. Walter*, 670 So. 2d 971, 21 Fla. L. Weekly D 16 (App. 1 1995), also cited by Plaintiffs, is distinguished. See Plaintiffs' MSJ, p. 8:11-15. In *Robins*, the defendants were operating and receiving payment, on site, for transient guests; the defendants operated a bed and breakfast *on* the premises in Florida; they sold food *on* the premises; and they received monetary recompense for these services, *on* the premises. *Id.* at 973. Although the Florida appeals court held that the restrictive covenants precluded operation on the premises of a bed

² After beginning improvements in 2000, no Plaintiffs ever contacted the Coxes regarding their ongoing improvements to their property, although the Coxes undertook improvements over a period of 17 months, between August 2000 and January 2002. (DSOF ¶ 31).

and breakfast, it also ruled that the restriction on the rental of a carriage house was "overly broad and must be stricken." *Id.* at 973. If anything, Plaintiffs' interpretation of the primary restriction at issue (paragraph 2 of the CC&Rs)³ is overly broad in purported application to an agricultural, as opposed to a commercial/industrial activity. *See id.* (See also DSOF ¶ 35). Moreover, the facts in *Robins* bear little resemblance to those at bar. Unlike *Robins*, no business is conducted on Defendants' property. (DSOF ¶ 36). The Defendants' property is not open to the public⁴ (*Id.*). The Coxes maintain no offices at Coyote Springs. (*Id.*). The Coxes receive no remuneration at Coyote Springs. (*Id.*). The Coxes only grow trees at Coyote Springs. (*Id.*). The Coxes solicit business, and customers purchase, from the wholesale and retail locations, *outside* of Coyote Springs. (*Id.*). The only activity at Coyote Springs is watching trees grow. *See* Plaintiffs' Motion for Summary Judgment, p. 9:13-20. *See also Central Citrus Co. v. Dept. of Revenue*, 157 Ariz. at 565, 760 P.2d at 565. Thus, there is no facts from which to conclude that the Defendants engage in business or commercial activities. At a minimum, questions of fact exist precluding summary judgment.

Even the original grantor has attested that it was his intent in implementing the CC&Rs for Coyote Springs, that property owners be allowed to operate at home, and tell the public about their home-based businesses. *See* affidavit of Mr. Robert Conlin, attached as Exhibit "6" to PSOF.⁵

³ There is no evidence that the Coxes have more than one residential structure on their property. Mrs. Cox testified that her son had his motor home there for a short time. There is no evidence that the motor home, at the time of the Coxes' deposition, was occupied. Nor has any evidence been presented since that time.

⁴ Unlike, for example, the Church at Coyote Springs, and Coyote Curt's Automobile Repair shop solicited by Plaintiffs Page and Nash.

⁵ The Coxes strenuously object to Mr. Conlin's affidavit to the extent that it purports to aver to his observations and conclusions about the Coxes' activities. *See* Exhibit "6", attached to PSOF. Plaintiffs have disclosed Mr. Conlin as a witness. However, Mr. Conlin is not identified as expert witness, and Plaintiffs have provided no foundation for Mr. Conlin's expertise or ability to form legal conclusions about the validity, interpretation and application of the Declaration to Coyote Springs Ranch property owners, including Plaintiffs and the Coxes. *See, e.g.,*

Underscoring the lack of clarity of the Declaration, the grantor attests that at the time he created the

1 CC&Rs:

2 The covenant . . . was not intended to prohibit against landowners or occupiers from
3 **maintaining a home-office in their residence, from parking or maintaining**
4 **their business vehicles or equipment on their property or from indicating to the**
5 **public that they had a home office at their residence.**

6 *See* Plaintiffs' MSJ, p. 7:11-13. Mr. Conlin, the original grantor, did not intend that home-based
7 businesses be restricted. *Id.* This calls into question Plaintiffs' overly broad interpretation. At a
8 minimum, Mr. Conlin's recent comments raise a significant question as to the precise meaning of the
9 language of the Declaration as well as its scope, which are questions of material fact that cannot be
10 resolved by summary judgment.

11 Thus, at best, relying on Mr. Conlin's "intent," the Declarations promote selective
12 enforcement, which this court cannot endorse. *McRae v. Lois Grunow Memorial Clinic*, 40 Ariz.
13 496, 509, 14 P.2d 478, 483 (*citing* 32 Corpus Juris 215, § 334) (no injunction will lie where barred by
14 Plaintiffs' conduct, such as laches, acquiescence, waiver, or estoppel, or a breach by Plaintiffs). *See*
15 *also Ahwatukee Custom Estates Mgt. Assoc., Inc. v. Turner*, 196 Ariz. 631, 2 P.3d 1276 (App. 1
16 2000). It cannot be said that the CC&Rs are enforceable as a matter of law. That much *is* clear and
17 summary judgment must be denied.

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19
20 **III. PLAINTIFFS SEEK EQUITABLE RELIEF AND THE COXES ARE ENTITLED TO**
21 **RELY ON EQUITABLE AFFIRMATIVE DEFENSES, INCLUDING LACHES,**
22 **UNCLEAN HANDS AND EQUITABLE ESTOPPEL.**
23

24 _____
25 *Id.* at ¶ 6. Further, Mr. Conlin is not a property owner, nor does he hold any right, title, or interest in Coyote Springs,
26 and therefore, has no contractual obligations or rights with respect to Coyote Springs Ranch property. Finally, Mr.
27 Conlin attests that he has attached a true and correct copy of Exhibit "A" -- the Declarations -- to his affidavit. None
are attached. *See* Exhibit "6" at PSOF.

Equity enforces restrictive covenants and equity will defeat them as well when changes in the surrounding areas are so fundamental or radical as to defeat or frustrate the original purposes of the restrictions. *Decker v. Hendricks*, 97 Ariz. 36, 41, 396 P.2d 609, 612. Within the rule permitting the enforcement of a restrictive covenant as to the use of land, when buildings or structures have been erected, removal may be ordered unless the right is barred by Plaintiffs' own conduct, such as laches, acquiescence, waiver, or estoppel, or a breach of restrictions by plaintiffs. *McRae v. Lois Grunow Memorial Clinic*, 40 Ariz. 496, 509, 14 P.2d 478, 483 (citing 32 Corpus Juris 215, § 334). See also *Ahwatukee Custom Estates Mgt. Assoc., Inc. v. Turner*, 196 Ariz. 631, 2 P.3d 1276 (App. 1 2000) (equitable considerations include the relative hardships and injustice; the public interest; misconduct of the parties; delay on the part of the plaintiff; and the adequacy of other remedies) (citing, *inter alia*, *McRae*).

It is well established that relief against restrictions will be denied a party guilty of laches in pressing a suit against one violating the restrictions sought to be enforced. *Id.* at 39, 611. Laches is the equitable counterpart to the statute of limitations and a claim is considered unenforceable in an action in equity where, under the *totality of the circumstances*, the claim, by reason of delay, would produce an unjust result. *Harris v. Purcell*, 193 Ariz. 409, 410, 973 P.2d 1166, 1167 (1998). See also *Sotomayor v. Burns*, 199 Ariz. 81, 13 P.3d 1198 (2000). The doctrine of laches likewise is precisely designed to discourage dilatory conduct. *Sotomayor*, 199 Ariz. at 83. Equitable estoppel is a doctrine that prevents one party from taking unfair advantage of another when, through false language or conduct or the failure to act, the person to be estopped has induced another person to act in a certain way, with the result that the other person has been injured in some way. *Gene Hancock Const. Co. v. Kempton & Snedigar Dairy*, 20 Ariz.App. 122, 510 P.2d 752 (App. 1 1973). Ordinarily,

1 however, an owner of a lot in a tract who has violated the building restrictions cannot enforce them
2 against others. *See* 20 Am.Jur.2d Covenants, § 276 at 695; Restatement of Property §§ 550 and 560,
3 *Atwood v. Walter*, 714 N.E.2d 165 (Mass. 1999), 42 Am.Jur. Proof of Facts 3rd at 463,
4 Circumstances Establishing Equitable Defense to Breach of Restrictive Covenant. This is the doctrine
5 of unclean hands. All of the foregoing apply in this case. Minimally, questions of fact are abundant
6 in considering Defendants' affirmative defenses rendering summary judgment inappropriate.

7 Plaintiffs knew the Coxes were making improvements to their land. Plaintiffs likewise
8 observed, each time they traveled down Coyote Springs Road, Defendants development and use of
9 their property. Yet Plaintiffs waited until Defendants were finished with their improvements and
10 considerable time after they began their tree farm to object by filing their lawsuit. It is an undisputed
11 fact that prior to filing this lawsuit, Plaintiffs never communicated with the Coxes about their belief that
12 the Coxes allegedly were in violation of the Declaration. Neither Plaintiffs nor any other owner of
13 property in the portion of Coyote Springs Ranch where Plaintiffs' and Defendants' properties are
14 located have attempted to enforce the provisions of the Declaration now at issue against any other
15 property owner. Plaintiffs unreasonably delayed their claim, resulting in a substantial detriment to the
16 Coxes, who have made a substantial investment in their property. Plaintiffs cannot rely upon the
17 general statute of limitations to defeat an equitable affirmative defense when Plaintiffs themselves seek
18 equitable relief in the form of enforcement of the CC&Rs. Plaintiffs' dilatory conduct should not be
19 endorsed by the Court; rather, the Coxes have raised a viable affirmative defense for the fact-finder to
20 determine.
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25 On the issue of unclean hands, several facts are noteworthy. Here, Plaintiffs Page and Nash
26 have – and continue to – solicit business from a an auto repair shop called Coyote Curt's located in
27

Coyote Springs. In establishing the foregoing, the owner of Coyote Curt's, Curtis Kincheloe, has
1 attested as follows:

2 I currently reside in the Coyote Springs Ranch area of Prescott Valley, Arizona
3 where I live at 8950 East Mummy View Drive, Prescott Valley, Arizona 86314. ***
4 Since 1997, I have owned and operated Coyote Curt's Auto Repair, which is
5 operated at the Property. Coyote Curt's Auto Repair was solicited by David Page
6 to do maintenance/repair work on "Quality Bumper" Vehicles. **This work was**
7 **performed from October 1999 to the present time. David Page solicited this**
8 **work on behalf of Kenneth and Kathryn Page who, based upon my personal**
9 **knowledge, are the owners of "Quality Bumper."** In November of 2003,
10 **Rodney Page solicited work on a 1987 Toyota Van for Juanita Woods,**
11 **Kathryn Page's mother. As of December 1, 2004, work on a 1991 Nissan was**
12 **solicited by David Page and a deposit for parts was paid by a check drafted by**
13 **Becky Nash.**⁶

10 (DSOF ¶ 30).

11 The type of conduct engaged in by Mr. Kincheloe has been described by Mr. Page as being a business
12 and commercial activity prohibited by the Declaration:

14 [the Coxes' Attorney]: Someone repairing cars and having a garage to repairs on their
15 property in Coyote Springs Ranch -- *** -- would that be a business?

16 [Mr. Page]: Yeah, I would assume if he -- you know according to --

17 [Q]: Okay. Let me ask you this: Regardless of the size of the business
18 operation being conducted on properties out in Coyote Springs
19 Ranch, regardless of their size -- *** -- should the Declaration of
Restrictions be applicable to all of them?

20 [A]: Yeah, I assume so, yeah.

21 (DSOF ¶ 30).

22 This is an egregious example of Plaintiffs' unclean hands. But, this is not the only example.
23 Plaintiffs also have installed and continue to maintain above ground water tanks on their property, in
24

25 _____
26 ⁶ Ms. Nash testified she had never been to Coyote Curt's (depo. of Becky Nash, p. 81:3-8, attached
27 as Exhibit "10" to DSOF).

1 violation of ¶ 16 of the Declaration. (DSOF ¶ 28). Further, Plaintiffs all admit to attending a meeting
2 in 2003, in a church, another non-residential enterprise located within Coyote Springs Ranch, to discuss
3 *violations* by other property owners, including ostensibly the Coxes. In discussing the meeting at the
4 Church, Plaintiffs admit that a Church is not a residence and that it violates the Declaration. (DSOF
5 ¶ 29). Thus, Plaintiffs unquestionably come to this court with unclean hands, and summary judgment
6 should be denied.

7 Addressing Plaintiffs' argument, it is noteworthy that Plaintiffs turn to the Indiana Court of
8 Appeals in support of their motion to deny the Coxes of their equitable defenses despite Plaintiffs'
9 virtual apathy in prosecuting their alleged claims against the Coxes in a timely fashion and as against
10 any other property owner. *See Stewart v. Jackson*, 635 N.E.2d 186, 1994 Ind. App. LEXIS 696
11 (App. 1994). Even if it were necessary to look beyond Arizona's well-settled authority that ultimately
12 bars Plaintiffs' claims, *Stewart* does nothing to bolster Plaintiffs' claims. Therein, *Stewart* upheld a
13 lower court's ruling that the Plaintiffs were "not entitled to injunctive relief because [Plaintiffs]
14 acquiesced in similar activities in the neighborhood." *Id.* 194 [emphasis supplied].
15

16 Furthermore, in this case, scores of apparent violations have been noted by a private
17 investigator, within Plaintiffs' neighborhood, including the following:
18

- 19 Parcel 401-01-042B - The parcel had more than one residence and numerous junk cars on
20 the property in apparent violation of paragraphs 7(e) and 9 of the
21 Declaration.
22 Parcel 401-01-036 - This property has a garage but does not have a residential dwelling on
23 it, which is in violation of paragraph 5 of the Declaration.
24 Parcel 401-01-012G - The parcel has more than one residence on the property in violation
25 of paragraph 7(e) of the Declaration.
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1 Parcel 103-01-060F - There are also two large metal trash containers visible at the property,
one outside the gate on the road and one inside by the new building
they are constructing, in violation of paragraph 16 of the Declaration.

2 Parcel 103-01-089A - On this parcel, there is one residence that has been burnt down which
3 is still there, on the south side of the property, while another residence
4 (possibly an apartment house - has numerous doors) is to the
5 northeast of the burnt structure, in violation of paragraph 7(e) of the
6 Declaration.

7 Parcel 103-01-107B - This property has two residences and exposed propane tanks next to
each one in violation of paragraph 7(e) and 16 of the Declaration.

8 (DSOF ¶ 26).

9
10 The private investigator also verified that many business and commercial activities are being
11 conducted in Coyote Springs Ranch in apparent violation of paragraph two of the Declaration. (*Id.*)

12 In determining the status of any businesses or commercial activities that are being operated on Coyote
13 Springs properties, the private investigator searched the records of the (1) Arizona Secretary of State,
14 (2) the Arizona Corporation Commission, (3) the Arizona Registrar of Contractor, and (4) the Yavapai
15 County Recorder's Office. *Id.* The search covered the period from January 1, 1970 to July 20, 2004.

16
17 *Id.* Specific examples of business and commercial activities identified included the following:

18 Parcel 401-01-042B - There are several horse trailers on this property, showing "Alvey
19 Racing Diane Darrel Darcey" and "Saunders Racing Stables", along
20 with the extra residences and all of the horses.

21 Parcel 103-01-084D - According to the Arizona Secretary of State, Bruce Friss-Pettitt, the
22 owner of the parcel, has an active trademark under the name of
23 "Round Logo, Red, Navy and Cream Colored with All New Again
24 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.

25 Parcel 103-01-078B - Daniel G. Belangeri, the owner, is involved in a lawsuit with Gloria A.
26 Miller as Plaintiff, in the Yavapai County Superior Court case number
27 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.

- 1 Parcel 401-01-126A&B - Owned by the owners of Wargo Construction, Inc. and Wargo
2 Masonry, Inc. On the records of the Arizona Registrar of
3 Contractors, they are showing a P.O. Box 725, Prescott, Arizona, but
4 use a Prescott Valley phone number, 928-772-3210. However, the
5 property has a block fence around it and the observation of the
6 property demonstrated that it was being used as a storage facility for
7 construction materials, supplies and vehicles.
- 8 Parcel 103-01-067F - The owners, Grant and Pamela Griffiths, have a company licensed
9 with the Arizona Registrar of Contractors, and registered with the
10 Arizona Corporation Commission, under the name of New Life
11 Landscapes Inc. The address is listed as 8815 Spurr Lane, Prescott
12 Valley, Arizona, which is the address in Coyote Springs.
- 13 Parcel 401-01-037B - The owners, Shawn Timothy Kilduff and Virginia Marie Kilduff, have
14 two licenses with the Registrar of Contractors, and a corporate filing
15 with the Arizona Corporation Commission, under the name of Custom
16 Crete Inc., with their address showing as 9315 E. Spurr Lane,
17 Prescott Valley, Arizona, which is in Coyote Springs.
- 18 Parcel 401-01-015C - Owned by Robert Taylor, he is licensed with the Registrar of
19 Contractors, and listed with the Arizona Corporation Commission
20 under the name of R T Contracting Specialists LLC, which appears is
21 being operated at the property. He also owns Parcel 103-01-130E.
- 22 Parcel 401-01-015D - One of the owners of the property, Robert K. Gardiner, has a listing
23 with the Arizona Corporation Commission under the name of Valley
24 to Valley Transport, Inc. With the Secretary of State, he has
25 registered the tradename Valley to Valley Transport/Feed, and shows
26 himself as owner at the address of 9690 E. Plum Creek Way, Prescott
27 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 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.

- 1 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".
- 2
- 3 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.
- 4
- 5
- 6 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.
- 7
- 8
- 9
- 10 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.
- 11
- 12 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.
- 13
- 14
- 15 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.
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- 17
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- 20 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.
- 21
- 22
- 23 Parcel 103-01-073F - This is a church owned by Living Faith Inc. It is obviously a business being conducted.
- 24
- 25 Parcel 103-01-073D - Michael A. Kelly is currently listed with the Arizona Corporation Commission as the Statutory Agent, and Manager, of Northland
- 26
- 27

Equipment Rental & Service, LLC. The address listed is 8920 Dreamy Draw Way, Prescott Valley, which is in Coyote Springs.

1 (Id.)

2
3 Not only do the foregoing 19 examples of business activities that go unpunished by Plaintiffs
4 clearly show Plaintiffs acquiescence in the types of alleged activities about which they complain
5 concerning the Coxes, these findings buttress support for the equitable defenses asserted. At a
6 minimum, Defendants' evidence of existing violations of the Declaration, including paragraph 2, the
7 total failure of Coyote Springs Ranch property owners in enforcing the Declaration, and the Plaintiffs'
8 dilatory conduct in raising objections to the Coxes' alleged violation, raises a material question of fact
9 on the issues of (1) unclean hands, (2) abandonment, (3) equitable estoppel and (3) laches, thus
10 precluding summary judgment. This is especially the case because (i) the Court is required to view the
11 evidence and record in the light most favorable to the non-moving party – namely, Defendants; (ii) the
12 evidence of the non-movant – namely, Defendants – is to be believed; and (iii) all justifiable inferences
13 are to be drawn in the non-movant's – namely, Defendants' – favor. See Sanchez v. City of
14 Tucson, 191 Ariz. 128, 953 P.2d 168 (1998); and Hegel v. O'Malley Ins. Co., Inc., 122 Ariz. 52, 593
15 P.2d 275 (1979). Thus, summary judgment against Defendants is inappropriate and Plaintiffs' motion
16 must be denied.
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20 Returning to Plaintiffs' reliance on extra jurisdictional opinions purporting to support their
21 position, relying heavily on the Michigan Supreme Court's opinion in *Beverly Island Ass'n v. Zinger*,
22 113 Mich. App. 322, 317 N.W.2d 611 (Mich. App. 1982), *Stewart*⁷ applied the following rule: "A
23 business use does not violate a residential use covenant if (1) the non-residential use was casual,
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25

26 ⁷ cited by Plaintiffs.
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infrequent or unobtrusive, and (2) was not detrimental to the neighbor's property values. *Id.* at 191.

1 Here, Plaintiffs have presented no such evidence that the Coxes' tree cultivation is detrimental to
2 property values. *See Id.* Further, the property owners' stance in favor of the Coxes' tree cultivation
3 obviously lends support in meeting the 'unobtrusive' prong of the *Stewart* rule. (*Id.*) (*See Exh. "17*
4 *" to DSOF*). Like the child day-care at issue in *Beverly Island*, where the children were found to have
5 been cared for in the same manner as the defendant's own children, the Coxes are cultivating their trees
6 in the same manner as an intricate landscape design on their property.⁸ *Id.* There is no restriction in
7 the Declaration prohibiting the hiring of groundskeepers. Although this Court might not take judicial
8 notice, it is understood that "private estates" employ full time crews to tend the grounds, à la San
9 Simeon (the Hearst estate in California). (DSOF ¶ 37). Following the *Beverly Island* guidelines cited
10 by *Stewart*, it is clear that (1) the use of the Coxes' property for the cultivation of greenery in no way
11 eclipses its use as also a residence by the Coxes pursuant to the Declaration; (2) the trees -- as greenery
12 -- are no more obtrusive than any other intricately landscaped property would be⁹; and (3) like
13 unlicensed child care in one's home, landscaping and the growing of trees on one's property is activity
14 that customarily is incident to the residential use of the property. *Stewart*, 635 N.E.2d 192.

15 We are not surprised that the trial court found the hindrance minimal. The record

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⁸ The court adopted guidelines set forth in *Beverly Island* and *Metzner v. Wojdyla*, 69 Wash. App. 405 (1993). "Although both cases refer to the lack of such [restrictive covenants] it was not decisive in determining whether the day care homes were residential uses. So even though we note that the restrictive covenants here permit a narrower variety of uses, we still must consider the relevant factors to determine whether defendant did not use here property for residential purposes only." *Stewart*, 635 N.E.2d at 192.

⁹ The Coxes have trees around the perimeter of their property, screening the tree cultivation from view.

Yeah, well they put all the perimeter and they have -- they're growing up, you know. First thing I became aware of was that they had a trailer on there, and they had, had Mexican people working on it and living there with the jay-john on the property and things like that and it was just a little disturbing.

(*See depo.* of Kenneth Page, pp. 10:18-23, 21:2-5, attached as Exhibit "12" to DSOF).

reflects that the activities at the [defendant's] home day care and its effect upon the neighborhood are not different than the usual comings and goings at any other home. We, as judges, are not required to forget what we know from human experience.

Id. at 193.

As the foregoing analyses show, even applying the rules cited by Plaintiffs in their motion, summary judgment is entirely inappropriate in favor of Plaintiffs, where it is clear that the Coxes' tree farm is not a business and instead incident to the residential and historically agricultural character of the neighborhood. *See Id.* (See, e.g. depo. of Catherine Cox, p. 73:14-23, attached as Exhibit "5" to DSOF testifying about Mr. Sanders' trees planted around perimeter of his 10-acre property -- 400 trees). At minimum, there are questions of fact to be resolved.

IV. **CONCLUSION: NO BASIS EXISTS TO GRANT SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS WHERE THE COXES HAVE PROPERLY ASSERTED EQUITABLE DEFENSES; AND, THE CC&Rs ARE UNENFORCEABLE AS A MATTER OF LAW; AT MINIMUM, FACTUAL ISSUES REMAIN REGARDING THEIR VALIDITY.**

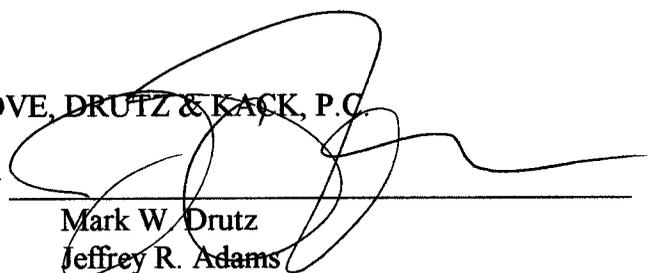
As made abundantly clear in the foregoing memorandum, the Coxes are pursuing agricultural activity, as opposed to business/commercial/industrial activity. Paragraph 2 of the CC&Rs only precludes business/commerce/industry, as opposed to agriculture. Alternatively, the CC&Rs have been abandoned long ago and this court cannot enforce the CC&Rs as a matter of law if there remains a question of fact as to abandonment.

Finally, all equitable defenses raised by the Coxes -- the doctrine of laches, unclean hands, and equitable estoppel, as well as acquiescence/selective enforcement -- preclude summary judgment. Defendants request that Plaintiffs' Motion be denied and further request all attorneys' fees and costs incurred in defending against Plaintiffs' Cundiff, Nash, and Page action.

DATED this 11 day of January, 2005.

MUSGROVE, DRUTZ & KACK, P.C.

By


Mark W. Drutz
Jeffrey R. Adams
Sharon Sargent-Flack
Attorneys for Defendants

A copy of the foregoing was
hand-delivered this 12 day of
January, 2005 to:

The Honorable David L. Mackey
Yavapai County Superior Court
Division 1
Yavapai County Courthouse
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Attorneys for Plaintiffs

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