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

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

12 Plaintiffs,)

13 vs.)

14 **DONALD COX** and **CATHERINE COX**,)
15 husband and wife,)
Defendants.)

~~Case No. CV 2005-1000~~

Division 1 ✓

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

(Oral Argument Scheduled: Jan. 31, 2005)

17
18 Plaintiffs, by and through undersigned counsel, hereby reply to Defendants' response to
19 Plaintiffs' motion for summary judgment on Defendants' affirmative defenses of laches, estoppel,
20 unclean hands against Plaintiffs action for enforcement of the restrictive covenants, particularly the
21 prohibition against business and commercial enterprises, contained in the Declaration of Restrictions
22 governing Coyote Springs Ranch.

23 This reply is supported by the following memorandum of points and authorities, as well as the
24 entire record in this proceeding. Plaintiffs' motion for summary judgment on these affirmative
25 defenses raised by Defendants, together with Plaintiffs' previous motion for summary judgment on
26 the issue of waiver, would leave at issue only Defendants' affirmative defense of abandonment.

DIV. 1

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RESPECTFULLY SUBMITTED this 28th day of January, 2005.

FAVOUR MOORE & WILHELMSSEN, P.A.

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MEMORANDUM OF POINTS AND AUTHORITIES

**I. DEFENDANTS USE OF THE LAND IS IN VIOLATION OF THE
RECORDED COVENANTS**

Defendants incorrectly argue that agricultural use is not a business. The record clearly demonstrates that Defendants are using the property to produce inventory for their nursery business. The fact that a mobile home is on the land does not alter their violation of the recorded covenant prohibiting businesses. The fact that Defendants applied for and obtained an agricultural use exemption establishes that they are not using the land for residential purposes. The agricultural use exemption by its very terms requires that “the primary function is to produce an agricultural crop or commodity” and residential purposes is an incidental use of the land. *See, Plaintiffs’ Separate Statement of Facts at Exhibit 5, Statement of General Agricultural Use, signed by Defendants.*

Defendants cannot plausibly maintain that their use of the property is no different than a homeowner who employs landscapers and workers to maintain pristine grounds. In this instance, Defendants are not maintaining pristine grounds, but admittedly using the land to grow inventory. Boxed trees are mobile and are not an permanent part of the Defendants’ “grounds.” Furthermore, their business records reveal their employees that work on the land do so not to care for the residential grounds, but rather the inventory that Defendants grow on the land with the intent of re-selling it later for a profit.

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1 **II. *EQUITAS SEQUITUR LEGEM***

2 It is a well-known legal maxim that “equity follows the law” (*equitas sequitur legem*). The
3 import of this elementary legal principle is that where there is an adequate remedy at law, one cannot
4 proceed in equity. Conversely, where one is sued in law, one cannot raise equitable defenses.
5 Unfortunately, it appears the import of this maxim is lost in Defendants’ response to Plaintiffs’ motion
6 for summary judgment that raises the pure legal question of Defendants’ ability to raise affirmative
7 equitable defenses in this breach of contract action.

8 Plaintiffs have filed a legal action for breach of contract based upon Defendants’ operation of
9 a business in violation of the recorded Declaration of Restrictions. No equitable claim has been
10 raised, as Plaintiffs have a remedy at law. Laches, estoppel and unclean hands are indisputably
11 equitable defenses that are not recognized defenses to a legal action for breach of contract.

12 Laches is the equitable counter-part to the statute of limitations. In this case, because Plaintiffs
13 have filed suit in contract, the statute of limitations applies, *not* the equitable defense of laches.
14 Laches is not a viable limitations defense to a contract action. Defendants are thus barred from raising
15 this defense as a matter of law, and Plaintiffs are entitled summary judgment on this issue.

16 Secondly, Defendants’ assertion of unclean hands is misplaced in this case. Defendants’ error
17 is compounded by mixing in two issues not before the Court in this motion: waiver and abandonment.
18 As to the former, this issue was addressed in a previous motion for summary judgment filed by
19 Plaintiffs based upon the appellate decision in *Burke v. Voicestream Wireless Corp.*, 207 Ariz. 393,
20 87 P.3d 81 (App. Div.1 2004). Abandonment has never been raised in either this or Plaintiffs’
21 previous motion for summary judgment addressing waiver.

22 Even if estoppel, an equitable defense, did apply to this case, Defendants’ argument is again
23 misplaced. The Supreme Court of Arizona has set forth the elements of estoppel as:

24 A claim for estoppel arises when one by his acts, representations or admissions
25 intentionally or through culpable negligence induces another to believe and have
26 confidence in certain material facts and the other justifiably relies and acts on such
belief causing him injury or prejudice.

1 *St. Joseph's Hospital and Med. Ctr. v. Reserve Life Ins. Co.*, 154 Ariz. 307, 317, 742 P.2d 808, 818
2 (1987) (internal citations omitted). Estoppel requires that the asserting party have justifiably relied
3 upon an affirmative act made by the party against whom the defense is raised. Defendants have failed
4 to point to any fact in the record that they justifiably relied upon any act or statement made by
5 Plaintiffs to them concerning their use of the property for business purposes. Moreover, Defendants
6 have failed to provide any evidence to this Court that they knew and justifiably relied upon any
7 affirmative conduct by Plaintiffs with regard to any other business in the area that would entitle
8 Defendants to raise estoppel if it were an available defense.

9 Thirdly, unclean hands is an equitable remedy to unjust enrichment. If Plaintiffs were engaged
10 in conduct that afforded them a specific enrichment which they then seek to deny Defendants, then
11 arguably unclean hands would apply if the action were brought for unjust enrichment. However,
12 unclean hands is not a defense in a breach of contract action. If Defendants contention is that
13 Plaintiffs did some act in violation of the recorded Declaration of Restrictions, that provides
14 Defendants with a contract action against Plaintiffs – *not* a defense to Plaintiffs' enforcement of the
15 restrictive covenants.

16 III. CONCLUSION

17 There is no question of fact that Defendants are utilizing their property for business purposes,
18 not residential purposes, in violation of the recorded Declaration of Restrictions. Defendants
19 attempted analogy to their use of the property being no different than a residential owner who employs
20 individuals to maintain the homeowners' gardens. Here, Defendants admit that they are raising
21 inventory for later re-sale. This provides the critical profit motive inherent in any business, and
22 distinguishes it from the residential homeowner who employs landscapers. Moreover, Defendants'
23 argument that use of the land for agricultural purposes is not in violation of the recorded covenants
24 is fatally flawed, as Defendants admitted that their use of their land is for the growing of inventory.
25 Agriculture is a business, and falls within the plain meaning of those activities in violation of the
26 covenant. Agriculture is clearly not a residential purpose.

1 Defendants are not entitled in a breach of contract action to raise the equitable defenses of
2 laches, estoppel or unclean hands. Defendants' misplaced assertion of these defenses is inherently
3 confusing to the efficient litigation of this case, and is equally misleading. Defendants would not be
4 entitled to a jury instruction on equitable defenses in a legal action. Therefore, there is no question
5 of material fact and as a matter of law, Defendants from raising these equitable defenses in this case.

6 DATED this 28th day of January, 2005.

7 FAVOUR MOORE & WILHELMSSEN, P.A.

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12 ORIGINAL of the foregoing filed
13 this 28th day of January, 2005 to:

14 Clerk, Superior Court of Arizona
15 Yavapai County
16 120 S. Cortez
17 Prescott, Arizona 86302

18 A copy hand-delivered this 28th day
19 of January, 2005 to:

20 Honorable David L. Mackey
21 Division One
22 Superior Court of Arizona
23 120 S. Cortez
24 Prescott, Arizona 86302

25 and, a copy hand-delivered this
26 28th day of January, 2005 to:

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