

2005 JUN 13 AM 4: 34

JEANNE HICKS, CLERK ✓

BY: M. Button

1 Mark W. Drutz, Esq., # 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

Attorneys for Defendants

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

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

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

16 **Plaintiffs,**

17 v.

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

20 **Defendants.**

Case No. CV 2003-0399

Division No. 1

**REPLY TO PLAINTIFFS' RESPONSE
TO OBJECTION TO PLAINTIFFS'
SUBPOENA DUCES TECUM**

(Assigned to the Honorable David L.
Mackey)

21 Prescott Valley Growers, by and through undersigned counsel, hereby replies to Plaintiffs'
22 Response to Objection to Plaintiffs' Subpoena Duces Tecum. Prescott Valley Growers' objection was
23 pursuant to the provisions of Rule 45(c)(2)(B), Ariz. R. Civ. P., and was premised upon the clear and
24 obvious fact that the request is unreasonable, unduly burdensome and outside the boundaries of
25 permissible discovery. This Reply is supported by the accompanying Memorandum of Points and
26 Authorities.
27
28

✓ Div 1

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

As stated in Prescott Valley Growers' objection, Plaintiffs have requested all of the Prescott Valley Growers' tax returns for the years 1998-2004 as well as "all business and financial documents and records or the like used in the preparation of the partnership returns." As should be obvious, the requested documentation is overly broad and would subject partners of Prescott Valley Growers who are not parties to the instant action to surrender private tax returns and financial documentation that have absolutely nothing to do with this case.¹

Interestingly, Plaintiffs do not contest the fact that Prescott Valley Growers' financial condition is not at issue in this case. Nor do they deny the fact that the K-1s of the Defendants related to their partnership interest in Prescott Valley Growers has already been provided to Plaintiffs. Rather, Plaintiffs argue that Defendants' production of their K-1s was not enough for them to evaluate the "characterization and treatment of the subject property and all improvements thereon" by the Defendants when compared to Defendants' deposition testimony. The fact is, nothing in the Defendants' K-1s contradicted anything they said during their depositions; nor do Plaintiffs point to any contradictions. Rather, the K-1s, which detail Defendants' pro rata share of all items of revenues and expenses of Prescott Valley Growers, demonstrate that the subject property is not used as a business asset of Prescott Valley Growers and that Defendants' deposition testimony was entirely consistent with that fact.

¹The partners in Prescott Valley Growers who are not parties to this action are James M. Cox and Alan L. Cox.

1 This Court should view Plaintiffs discovery request for what it is – a fishing expedition.
2 Plaintiffs are obviously disappointed with the fact that nothing Defendants said during their depositions
3 was inconsistent with the information to be gleaned from their K-1s that Plaintiffs have already
4 received. Defendants further have already produced reams of paperwork and documentation related
5 to all of the improvements to the property at issue in this case. The fact that Defendants' K-1s and the
6 other documentation already produced does not support Plaintiffs theories is not a sufficient basis upon
7 which to order the production of private, confidential tax and financial information of people and an
8 entity that are not parties to a lawsuit. Clearly, requiring the production of the tax returns and
9 documentation requested would result in the disclosure of confidential information of non-parties to
10 this action without a showing of good cause by the Plaintiffs. On this point, it is worth remembering
11 the general rule stated as follows:
12
13
14

15 As a general rule, under the statutes relating to the production and inspection
16 of books or papers, the private books or papers of persons not parties to the action are
17 not subject to discovery, even though they contain information which is important to
18 the preparation of the case for trial. On the other hand, it has been held that the
19 production of the records of a third person, not a party to the suit, may be ordered, in
20 the discretion of the court; but the court must consider whether good cause has been
21 shown for the examination, whether the person not a party to the suit may be unduly
22 affected by the revelation of the private affairs, and whether the books and records are
23 within the possession, custody, or control of the other party to the suit.

24 27 C.J.S., Discovery §90 .

25 Plaintiffs have already been provided with Defendants' K-1s for the years at issue. Again, the
26 K-1s document Defendants' pro rata share of each of the line items shown on Prescott Valley Growers'
27 tax returns. In other words, the characterization of all items of revenues and expenses, and the
28 relationship of those revenues and expenses to Prescott Valley Growers' assets and liabilities (i.e.

1 Defendants' pro rata share of depreciation, expense, amortization, etc.), are reflected on Defendants'
2 K-1s. Therefore, Plaintiffs already possess the information they seek and which is related to
3 Defendants' interest in Prescott Valley Growers. Defendants also have already produced to Plaintiffs
4 all of the documentation, receipts and billing statements related to improvements made to the property,
5 complete employee records, inventory and maintenance records, and equipment purchase and
6 maintenance records for all three of the Defendants' properties – Prescott Valley Nursery located at
7 6195 E. Highway 69, Prescott Valley Growers located at Prescott Valley, Arizona, 6750 North Robert
8 Road, Prescott Valley, Arizona and the subject property. Thus, the question begging to be asked is
9 why do Plaintiffs want more. The answer is simple – because they did not find what they were hoping
10 existed and they now need to fish for it.
11
12

13
14 The production of the documentation requested is not likely to lead to discoverable evidence.
15 Furthermore, contrary to Plaintiffs' claim, their request is not sufficiently limited to only those items
16 directly related to the real property at issue in this case. For that reason, the request is vague and
17 ambiguous. Finally, Plaintiffs have failed to show that production of requested documents and tax
18 returns is "indispensable to [their] case and cannot be obtained elsewhere." 27 C.J.S. Discovery § 86.
19 Therefore, their request should be denied.
20

21 DATED this 13 day of June, 2005.

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

24 By _____

25 Mark W. Drutz

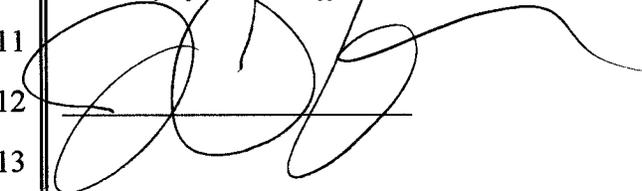
26 Jeffrey R. Adams

27 *Attorneys for Defendants and Prescott Valley*
28 *Growers*

1 COPY of the foregoing hand-delivered
2 this 17 day of June, 2005 to:

3 The Honorable David L. Mackey
4 Yavapai County Superior Court
5 Division 1
6 Yavapai County Courthouse
7 Prescott, Arizona 86301

8 David K. Wilhelmsen, Esq.
9 Marguerite M. Kirk, Esq.
10 Favour, Moore & Wilhelmsen, P.A.
11 1580 Plaza West Drive
12 Prescott, Arizona 86303
13 *Attorneys for Plaintiffs*

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of one of the attorneys listed above.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28