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BY: 

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5 **IN THE SUPERIOR COURT OF ARIZONA**

6 **COUNTY OF YAVAPAI**

7
8 **JOHN B. CUNDIFF and BARBARA C.)**
9 **CUNDIFF, husband and wife; BECKY NASH,)**
10 **a married woman dealing with her separate)**
11 **property; KENNETH PAGE and KATHRYN)**
PAGE, as Trustee of the Kenneth Page and)
Kathryn Page Trust,)

12 Plaintiffs,)

13 vs.)

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

15 Defendants.)

Case No. CV 2003-0399

Division 1

PLAINTIFFS' REQUESTED JURY INSTRUCTIONS

16
17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, hereby
18 request the following jury instructions and verdict form for the trial scheduled for August 2, 2005.
19 In accordance with the Arizona appellate court's decision in *Ahwatukee Custom Estates Management*
20 *Assoc. Inc. v. Turner, 196 Ariz. 631, 2 P.3d 1276 (App. Div.1 2000)*, that the determination of whether
21 to grant a party injunctive relief is solely within the Court's equity, Plaintiffs' requested jury
22 instructions confirm that the jury in this case will be advisory to the Court.

23 **RECOMMENDED ARIZONA JURY INSTRUCTIONS**

Jury Instruction	Given	Refused
1: Claims and Elements		
2: Duty of Jurors		
3: Role of Advisory Jury		

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4: Evidence		
5: Rulings of the Court		
6: Arguments of Counsel		
7: Credibility of Witnesses		
8: Plaintiffs' Standing to bring Suit against Defendants		
9: Plaintiffs' Burden of Proof		
10: Legal Effect of Recorded Restrictive Covenants		
11: Actual Notice of Restrictive Covenants		
12: The Legal Effect of Restrictive Covenants		
13: Determining the Meaning of Words used in Restrictive Covenant		
14: Intention of the Parties to Contract at time of Contract Formation		
15: Legal Definition of the term "Business"		
16: Abandonment of the recorded Declaration of Restrictions		
17: Restrictive Covenants are Independent of Each Other		
18: Findings of Advisory Jury		
19: Closing Instruction		

Plaintiffs also request the following attached additional jury instructions.

DATED this 22nd day of July, 2005.

FAVOUR MOORE & WILHELMSSEN, P.A.

By: 
David K. Wilhelmsen
Marguerite Kirk
Post Office Box 1391
Prescott, Arizona 86302-1391
Attorneys for Plaintiffs

1 **PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 1**

2 **Claims and Elements**

3 I will give you detailed instructions of law later in these instructions, but I now will
4 give you a statement of each claim in the case and a statement of what has to be proved on each claim.

- 5 (1) Both Plaintiffs and Defendants own property located in Coyote Springs Ranch that
6 governed by a Declaration of Restrictions recorded on June 13, 1974. Recording
7 restrictive covenants operates to provide constructive notice to all property owners and
8 purchasers of the existence and contents of the Declaration of Restrictions.

9 The term constructive notice means the law considers a person to know of the
10 existence of an instrument such as the Declaration of Restrictions, and to be bound by
11 its terms regardless of whether that person is actually aware of its existence.

- 12 (2) The Declaration of Restrictions at issue did not establish a homeowner's association
13 to enforce the covenants as is typical in many subdivision. Instead, the Declaration of
14 Restrictions provide any property owner within the subdivision could enforce the
15 Declaration of Restrictions against any other property owner for a violation or
16 threatened violation.

- 17 (3) Plaintiffs are requesting a judgment declaring the rights of the respective parties under
18 the Declaration of Restrictions, specifically: whether

19 (A) Defendants Donald and Catherine Cox are using their property located at 7325 N.
20 Coyote Springs Road for business purposes in connection with Prescott Valley
21 Growers and Prescott Valley Nursery in violation of the restrictive covenant that states:
22 "No trade, business, profession or any other type of commercial or industrial activity
23 shall be [initiated] or maintained within [property governed by the Declaration of
24 Restrictions] or any portion thereof";

25 and whether, (B) Defendants Donald and Catherine Cox are in violation of any other
26 provision of the Declaration.

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Plaintiffs are specifically seeking an injunction that Defendants Cox remove their business operation from their property and restore it to residential use.

(4) Recorded restrictions such as the Declaration of Restrictions in this case are considered contracts binding on all property owners to which the recorded covenants apply.

(5) Plaintiffs have the burden of proving that the Defendants have engaged in a trade, business, profession or any other type of commercial or industrial activity.

(6) Defendants claim they had no actual or constructive knowledge of the Declaration of Restrictions at the time they purchased their property. Defendants further claim the Plaintiffs are not entitled to enforce the Declaration of Restrictions because the Declaration of Restrictions have been historically disregarded by the property owners in Coyote Springs Ranch subdivision that they have been abandoned.

(7) Defendants have the burden of proving the their use of the property in connection with their nursery business does not violate the recorded Declaration of Restrictions; that they have not violated any other provision of the Declaration as claimed by Plaintiffs; and, that the restrictive covenants imposed upon the use of the lots 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 of the covenants.

SOURCE: RAJI Contract 2, as modified.

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 2

Duty of Jurors

I will now tell you the rules you must follow to decide this case. I will instruct you on the law. It is your duty to follow the law whether you agree with it or not.

It is also your duty to determine the facts. You must determine the facts only from the evidence produced in court. You should not speculate or guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion you may feel I have about the facts.

You must take account of all my instructions on the law. You are not to pick out on instruction, or part of one, and disregard the others. However, after you have determined the facts, you may find that some instructions do not apply. You must then consider the instructions that do apply, together with the facts as you have determined them.

Decide the case by applying the law in these instructions to the facts.

SOURCE: RAJI Standard 1.

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 3

Role of an Advisory Jury

In this case, the Plaintiffs have brought an action requesting a judgment requiring the Defendants to discontinue their business or commercial activity of warehousing and growing shrubs and trees on the land located in Coyote Springs Ranch as inventory for Prescott Valley Growers and Prescott Valley Nursery.

This form of judgment is referred to as an injunction.

In an action where injunctive relief is requested, it is the role of the judge to decide the case. However, the Arizona Rules of Civil Procedure allow for a jury to listen to the evidence and render an advisory opinion to the judge in making his decision.

In this case, you are sitting as an advisory jury and while your decision will not decide the outcome of this case, I will take your decision into consideration in rendering my judgment.

SOURCE: *Graham v. Shooke*, 107 Ariz. 79, 80, 462 P.2d 446, 447 (1971); *Kostolansky v. Leshner*, 95 Ariz. 103, 106, 387 P.2d 804, 806 (1963) citing former Rule 39(k), Ariz.R.Civ.Proc. (subsequently renumbered to present Rule 39(m), Ariz.R.Civ.Proc.).

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 4

Evidence

You will decide the facts from the evidence presented here in court. That evidence consists of testimony of witnesses, any documents and other things received into evidence as exhibits, and any facts stipulated or agreed to by the parties or which you are instructed to accept.

You will decide the credibility and weight to be given to any evidence presented in the case, whether it be direct or circumstantial evidence.

SOURCE: RAJI Standard 2.

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 5

Rulings of the Court

Admission of evidence in court is governed by rules of law. I have applied those rules during the trial and resolved any issues concerning the admission of evidence.

If an objection to a question was sustained, you must disregard the question and you must not guess what the answer to the question might have been. If an exhibit was offered into evidence and an objection to it was sustained, you must not consider that exhibit as evidence. If testimony was ordered stricken from the record, you must not consider that testimony for any purpose. If evidence was admitted for a limited purpose, you shall consider that evidence only for that limited purpose.

Do not concern yourselves with the reasons for my rulings on the admission of evidence. Do not regard those rulings as any indication from me of the credibility or weight you should give to any evidence that has been admitted.

SOURCE: RAJI Standard 3.

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 6

Arguments of Counsel

In the opening statements and closing arguments the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence, but it may help you to understand the law and the evidence.

SOURCE: RAJI Standard 4.

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 7

Credibility of Witnesses

In deciding the facts of this case, you should consider what testimony to accept, and what to reject. You may accept everything a witness says, or part of it, or none of it.

In evaluating testimony, you should use the tests for truthfulness that people use in determining matters of importance in everyday life, including such factors as: the witness's ability to see or hear or know the things the witness testified to; the quality of the witness's memory; the witness's manner while testifying; whether the witness had any motive, bias, or prejudice; whether the witness was contradicted by anything the witness said or wrote before trial, or by other evidence; and the reasonableness of the witness's testimony when considered in the light of the other evidence.

Consider all of the evidence in the light of reason, common sense, and experience.

SOURCE: RAJI Standard 5.

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 8

Plaintiffs' Standing to bring Suit against Defendants

Under Arizona law, and paragraph 19 of the Declaration of Restrictions, any property owner in Coyote Springs Ranch subdivision has the right to bring a lawsuit to obtain a judgment against any other property owner in that subdivision ordering that property owner to comply with the restrictive covenants in the Declaration of Restrictions.

Plaintiffs have filed suit requesting that judgment be entered against Defendants prohibiting Defendants from using their land in Coyote Springs Ranch for business or commercial purposes in connection with Defendants' operation of Prescott Valley Growers and Prescott Valley Nursery.

SOURCE: *O'Malley v. Central Methodist Church*, 67 Ariz. 245, 252, 194 P.2d 444, 449 (1948);
Tucson-North Town Home Apt. Homeowners' Assoc. v. Robb, 123 Ariz. 4, 5, 596 P.2d 1176, 1177-78 (App. 1979).

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 9

Plaintiffs' Burden of Proof

(More Probably True)

Burden of proof means burden of persuasion. A party who has the burden of proof must persuade you by the evidence that the claim is more probably true than not true. In other words, the evidence supporting a proposition that a party has the burden of proving must outweigh the evidence opposed to it. In determining whether a party has met this burden, you will consider all the evidence, whether produced by plaintiff or defendant.

In this case, it is Plaintiffs responsibility to demonstrate that Defendants had constructive or actual notice of the Declaration of Restrictions and that Defendants have engaged in a trade, business, profession or any other type of commercial or industrial activity on their land in Coyote Springs Ranch.

SOURCE: RAJI Standard 9.

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 10

Legal Effect of Recorded Restrictive Covenants

The function of Arizona's recording statutes is to protect persons who deal with interests in land by giving notice. Recording restrictive covenants is considered notice to all subsequent purchasers of land. Under the rules of constructive notice, a party is charged with notice of any covenant that is properly recorded in an instrument. A party who purchases property that is subject to recorded covenants is bound by the covenants contained in the instrument and must comply with the covenants.

SOURCE: *Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 388, 803 P.2d 104, 108 (1990) *citing to A.R.S. §33-416.*

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 11

Actual Notice of Restrictive Covenants

Under Arizona law, a property owner is deemed to have actual notice of recorded covenants and restrictions if he receives a copy of the recorded restrictions or if the recorded restrictions are noted in the title report he receives at the time of his purchase.

SOURCE: *Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 388-89, 803 P.2d 104, 108-9 (1990) *citing to A.R.S. §33-416.*

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 12

The Legal Effect of Restrictive Covenants

Under Arizona law, the obligations and prohibitions contained in restrictive covenants are considered a contractual agreement between all the owners of property in the subdivision to comply with the obligations and prohibitions in the restrictive covenants.

SOURCE: *Burke v. Voicestream Wireless Corp.*, 207 Ariz. 393, 395-96, 87 P.3d 81, 83-84 (App. Div.1 2004).

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 13

Determining the Meaning of Words Used in a Restrictive Covenant

Words used in a restrictive covenant must be given their ordinary meaning, and the use of the words within a restrictive covenant gives strong evidence of the intended meaning. Unambiguous restrictive covenants are generally enforced according to their terms. Restrictions that are not absolutely clear should be interpreted in the ordinary and popular sense, related to circumstances under which they were used, having in mind their purpose and general situation.

SOURCE: *Burke v. Voicestream Wireless Corp.*, 207 Ariz. 393, 396, 87 P.3d 81, 84 (App. Div. 1 2004), citing *Duffy v. Sunburst Farms E. Mut. Water & Agric. Co.*, 124 Ariz. 413, 416-17, 604 P.2d 1124, 1127-28 (1979); and, *Riley v. Stoves*, 22 Ariz.App. 223, 226, 526 P.2d 747, 750 (1974); see also, *Tucson-North Town Home Apt. Homeowners' Assoc. v. Robb*, 123 Ariz. 4, 6, 596 P.2d 1176, 1178 (App. 1979).

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 14

Intention of Parties to Contract at time of Contract Formation

Under Arizona law, you may consider the testimony of the person who created a restrictive covenant in determining its meaning. You have heard the testimony of Robert Conlin concerning his intention in prohibiting any trade, business, profession or any other type of commercial or industrial activity and may consider whether the Defendants are in violation of the Declaration of Restrictions in light of his testimony.

SOURCE: *Cavanagh v. Schaefer*, 112 Ariz. 600, 602, 545 P.2d 416, 418 (1976).

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 15

Legal Definition of the Term "Business"

The Defendants have raised the defense that they are not in violation of the Declaration of Restrictions because growing and warehousing shrubs and trees for later re-sale at Prescott Valley Growers and Prescott Valley Nursery is not a business activity.

The law defines one to be involved in a "business or trade" where the party is involved in the activity with continuity and regularity and the party's primary purpose for engaging in the activity is for income or profit. A sporadic activity, a hobby, or an amusement diversion does not qualify.

SOURCE: *Comm'r of Internal Revenue v. Groetzinger*, 480 U.S. 23, 35, 107 S.Ct. 980, 987, 94 L. Ed. 2d 25, 37 (1987).

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PLAINTIFFS’ REQUESTED JURY INSTRUCTION NO. 16

Abandonment of the recorded Declaration of Restrictions

The Defendants argue in the alternative that if their use of the Coyote Springs Ranch land to grow and warehouse shrubs and trees is a business activity, that they should not be required to discontinue this business or commercial use of the property because the restrictive covenants have been abandoned and are therefore no longer enforceable.

Defendants bear the burden of proof by a preponderance of the evidence that the recorded Declaration of Restrictions have been abandoned.

In order to establish abandonment, the Defendants are required to establish by a preponderance of the evidence that the restrictions imposed in the use of lots have historically 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 the restrictions were imposed and consequently amount to an abandonment of the restrictive plan.

Therefore, in order for you to find the restrictive covenants have been abandoned as Defendants claim, you must find that the Declaration of Restrictions has historically been so disregarded by property owners in the sub-division that no reasonable person would believe that the restrictive covenants serve any purpose.

SOURCE: *Burke v. Voicestream Wireless Corp.*, 207 Ariz. 393, 399, 87 P.3d 81, 87 (App. Div.1 2004) quoting *Condos v. Home Development Company*, 77 Ariz. 129, 133, 267 P.2d 1069, 1071 (1954).

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 17

Restrictive Covenants are Independent of Each Other

In support of their affirmative defense of abandonment, Defendants have offered evidence of alleged violations of restrictive covenants other than the covenant prohibiting business or commercial activity.

Under Arizona law, covenants and restrictions are considered independent of each other, and the right to enforce one covenant against a property owner is not affected by violations of other restrictive covenants.

SOURCE: *Condos v. Home Development Company*, 77 Ariz. 129, 133-34, 267 P.2d 1069, 1071 (1954).

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 18

Findings of Advisory Jury

If you find that Defendants activities and use of the land in Coyote Springs Ranch constitute a business, and that the restrictive covenants have not been abandoned, you must find in favor of the Plaintiffs.

SOURCE: *Condos v. Home Development Company, 77 Ariz. 129, 267 P.2d 1069 (1954).*

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PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 19

Closing Instruction

The case is now submitted to you for decision. When you go to the jury room you will choose a foreman. He or she will preside over your deliberations.

At least six of you must agree on a verdict. If all eight agree on a verdict, only the foreman need sign it, on the line marked "Foreman." If six or seven agree on a verdict, all those who agree, and only those who agree, must sign the verdict on the numbered lines provided, leaving the line marked "Foreman" blank. Please print your name under your signature.

You will be given ____ forms of verdict. They read as follows and you are to attach no significance to the order in which they are read:

SOURCE: RAJI Standard 8, as modified.

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