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JEANNE HICKS, CLERK

BY: 

1 FAVOUR MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
2 Prescott, AZ 86302-1391
Ph: (928)445-2444
3 David K. Wilhelmsen, #007112
Marguerite Kirk, #018054

4 Attorneys for Plaintiffs

Dun

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)**
12 **PAGE, as Trustee of the Kenneth Page and)**
13 **Kathryn Page Trust,)**

12 Plaintiffs,)

13 vs.)

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

15 Defendants.)

Case No. CV 2003-0399

Division 1

**PLAINTIFFS' MOTION
FOR PROTECTIVE ORDER AND
MOTION TO QUASH
SUBPOENA DUCES TECUM
SERVED BY DEFENDANTS
ON NON-PARTY
ALFIE WARE**

(Oral Argument Requested)

17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and
18 through undersigned counsel, hereby move this Court for its order quashing the subpoena *duces tecum*
19 served by Defendants on a non-party to this action, Alfie Ware, demanding the production of
20 documents relating to "the payment of Plaintiffs' attorneys' fees and costs" in this case.

21 Defendants have further propounded a request for production of documents on Plaintiffs
22 demanding Plaintiffs produce copies of all documents relating to attorney's fees and costs Plaintiffs
23 have incurred, as well as any documentation "reflecting any written fee agreement...by and between
24 the Plaintiffs and/or Alfie Ware" and Plaintiffs' counsel.

25 There is absolutely no basis in law or fact for Defendants to compel production of documents
26 under subpoena concerning to *Plaintiffs'* payment of *their* attorney's fees and costs in this case in
order for Defendants to prepare and submit their attorney fee application.

1 This motion is supported by the following memorandum of points and authorities, undersigned
2 counsel's certification pursuant to Rule 37(a)(2)(C), Ariz.R.Civ.Proc., attached exhibits, as well as
3 the entire record in this proceeding.

4 RESPECTFULLY SUBMITTED this 4th day of August, 2005.

5 FAVOUR MOORE & WILHELMSSEN, P.A.
6

7 By: ~~David K. Wilhelmsen~~
8 David K. Wilhelmsen
9 Marguerite Kirk

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. Statement of Case**

12 On July 26, 2005, following oral argument on Defendants' motion for summary judgment re:
13 agricultural activities, this Court held that Defendants were not, as a matter of law, engaged in an
14 activity that violated paragraph 2 of the recorded Declaration of Restrictions. *Minute Entry, CV 2003-*
15 *0399, July 26, 2005 at pp. 1-2.* Upon stipulation of counsel to hold in abeyance the remaining counts
16 in Plaintiffs' first amended complaint, the Court vacated the trial, and ordered Defendants to "submit
17 a form of judgment and application for attorney fees and costs..." *Minute Entry, CV 2003-0399, July*
18 *26, 2005 at p.2.* All other pending motions were deemed "moot" by the Court, "subject to the
19 anticipated Appellate review" on the Court's entry of summary judgment. *Minute Entry, CV 2003-*
20 *0399, July 26, 2005 at p.2.*

21 Subsequently, Defendants' counsel propounded a request for production of documents on
22 Plaintiffs demanding that Plaintiffs produce:

- 23 1. Documents relating to Plaintiffs' attorney fee arrangement with undersigned
24 counsel, and/or documents relating to non-party Alfie Ware's financial assistance to
25 Plaintiffs' cost of litigation;
26 2. Any documentation regarding undersigned counsel's hourly rates charged to

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Plaintiffs; and,

3. "A composite of all attorneys' fees charged to Plaintiffs and/or Alfie Ware to date" in this litigation.¹

See, Defendants' Request for Production of Documents, CV 2003-0399, August 1, 2005 (a copy attached hereto as Exhibit 1). Immediately upon receipt of Defendants' discovery request, undersigned counsel wrote to opposing counsel setting forth the illegitimacy of Defendants' discovery. *See, Plaintiffs' counsel's Rule 37 Certification filed concurrently herewith; and, correspondence from Plaintiffs' counsel to Defendants' counsel, August 2, 2005 (a copy attached hereto as Exhibit 2).*

On that same day, and without affording any notice afforded to undersigned counsel, Defendants obtained a subpoena *duces tecum* directed at non-party Alfie Ware. *See, Subpoena Duces Tecum directed to Alfie Ware, August 2, 2005 (a copy attached hereto as Exhibit 3).* Defendants served Alfie Ware with the subpoena the following day, August 3, 2005. Mr. Ware notified undersigned counsel of the service, and forwarded a copy of the subpoena to Plaintiffs' counsel.

There is no sound basis in law or fact for Defendants' discovery on the issue of Plaintiffs' attorney's fees. The submission and adjudication of Defendants' attorney fee application *does not depend upon* Plaintiffs' attorney's fees. The merits of the hourly rate and total amount of hours Defendants' counsel spent in the litigation is not a function of Plaintiffs' counsel's hourly rate or the number of hours they devoted to this matter. Defendants discovery is obviously aimed to harass and oppress Plaintiffs and/or a non-party to this litigation. Furthermore, Defendants' discovery misconduct unnecessarily increases the cost of litigation and consumes scarce judicial resources.

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¹ Defendants' counsel recently modified this request to now demand from undersigned counsel "the total number of hours spent by each of the attorneys and paralegals in your firm in prosecuting this case." *See, Plaintiffs' Counsel Certification filed concurrently herewith.* For reasons discussed in greater detail below, the modified request remains objectionable and subject to a protective order.

1 **II. Defendants' Attorney's Fees and Costs Application**

2 **Does Not Depend Upon A Determination of Plaintiffs' Attorney's Fees and Costs**

3 Rule 45(c)(3), Ariz.R.Civ.Proc., provides that a court may quash a subpoena "to protect a
4 person subject to *or affected by the subpoena....*" *Id. (emphasis added)*. Rule 26(c), Ariz.R.Civ.Proc.,
5 further provides the court with authority to issue

6 any order which justice requires to protect a party or person from annoyance,
7 embarrassment, oppression, or undue burden or expense, including...(1) that the
8 discovery not be had...(4) that certain matters not be inquired into, or that the scope of
9 the discovery be limited to certain matters....

10 *Id.* A trial court has wide discretion as to the scope and procedure for discovery and imposing
11 appropriate remedies for violations. *Nienstedt v. Wetzel*, 133 Ariz. 348, 651 P.2d 876 (App.Div.1
12 1982).

13 In its seminal decision, *Schweiger v. China Doll Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927
14 (*App. 1983*), the appellate court set forth guidance on the content of an application for attorney's fees
15 and the court's determination of what is reasonable to award. The *Schweiger* court stated: "The
16 beginning point in a development of a reasonable [attorney] fee is the determination of the actual
17 billing rate which the lawyer charged in the particular matter." *Id. at 187, 673 P.2d at 931*. "[F]actors
18 to be considered in determining a reasonable fee" include:

19 (1) *the qualities of the advocate*: his ability, his training, education, experience,
20 professional standing and skill;

21 (2) *the character of the work [] done*: its difficulty, its intricacy, its importance, time
22 and skill required, the responsibility imposed and the prominence and character of the
23 parties where they affect the importance of the litigation;

24 (3) *the work actually performed by the lawyer*: the skill, time and attention given to the
25 work;

26 (4) *the result*: whether the attorney was successful and what benefits were derived.

Id. at 187, 673 P.2d at 931, citing Schwartz v. Schwerin, 85 Ariz. 242, 245-46, 336 P.2d 144, 146
(1959). The reasonableness of the fee charged is based upon attributes of the applicant attorney and
the complexity of the case, *not* his adversary's rate or the hours his adversary devoted to the case.

1 Defendants' counsel must independently set forth the reasonableness of the fee application based upon
2 counsel's skill, experience and professional standing, in relation to the facts and complexity of the
3 case.

4 What Plaintiffs' counsel charged and the hours spent is irrelevant to the court's determination
5 of what amount Defendants should be awarded for their attorney's fees. Indeed, nowhere in the
6 *Schweiger* or *Schwartz* decisions does the Supreme Court or the Court of Appeals set forth a
7 comparison test of the applying counsel's fees and hours in relation to his adversary. If there were any
8 relevance or merit to such an approach, then surely either appellate court in this state would have
9 included such language in precedent.

10 III. Conclusion

11 In this case, Defendants are obviously using discovery for an improper purpose: to harass and
12 impose an undue burden on Plaintiffs and a non-party to the litigation, and to unnecessarily increase
13 the cost of litigation. No appellate court decision requires or allows an applicant-attorney to
14 demonstrate the reasonableness of his fees by engaging in discovery surrounding his adversary's fees.
15 Such an analysis would simply require that the Court order both parties to file their attorney fee
16 agreements and billing statements to allow a comparative analysis. The Arizona Supreme Court and
17 Court of Appeals have obviously rejected such a mechanistic approach²; in fact, neither court has even
18 suggested that an applicant can establish the reasonableness of *his* attorney fee application by pointing
19 to those of his adversary. Defendants' counsel's skill, education, training, experience and reputation
20 (factors employed in determining the reasonableness of the hourly rate) are adjudged independently
21

22 ² This is not to suggest that a mechanistic approach is a simpler or more refined analysis. It
23 takes little imagination to see that a comparative analysis would only devolve into increased motion
24 and hearing practice concerning which party had the "better" attorney or which attorney was the most
25 "efficient" in management of the case. None of this would benefit the court in rendering its decision
26 on the ultimate issue: whether the prevailing party's attorney fee is reasonable as to both rate and
amount of hours spent on the case perceived through the lenses of the complexity of the case and the
attorney's education, experience, skill and reputation in the community.

1 from those of Plaintiffs' counsel. Moreover, the number of hours charged by Defendants' counsel is
2 to be adjudged based upon the task and the quality of the work. The number of hours spent by
3 Plaintiffs' counsel sheds no light on the hours spent by Defendants' counsel for the obvious reason:
4 counsel are adversaries, not team members, so that no work performed by Plaintiffs' counsel does or
5 can resemble work performed by Defendants' counsel given the adversarial nature of litigation.

6 Therefore, Plaintiffs respectfully request that this Court enter a protective order against
7 Defendants' engaging in discovery concerning Plaintiffs' counsel's fee agreement, hourly rate and
8 hours spent on the case; and, that this Court enter an order quashing the subpoena *duces tecum* served
9 by Defendants on non-party Alfie Ware.

10 DATED this 4th day of August, 2005.

11 FAVOUR MOORE & WILHELMSSEN, P.A.

12
13 By: 
14 David K. Wilhelmsen
15 Marguerite Kirk
16 Post Office Box 1391
17 Prescott, Arizona 86302-1391
18 Attorneys for Plaintiffs

17 Original of the foregoing
18 filed this 4th day of August,
19 2005, with:

19 Clerk, Superior Court of Arizona
20 Yavapai County
21 120 S. Cortez St.
22 Prescott, Arizona 86302

21 A copy hand-delivered this
22 4th day of August, 2005, to:

23 Honorable David L. Mackey
24 Division One, Superior Court of Arizona
25 Yavapai County
26 120 S. Cortez St.
27 Prescott, Arizona 86302

26 ///

1 and, a copy mailed this
4th day of August, 2005, to:

2
3 Mark Drutz
Jeffrey Adams
4 MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
5 Prescott, Arizona 86302
Attorneys for Defendants Cox

6
7 By: 
David K. Wilhelmsen
Marguerite Kirk

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EXHIBIT 1

1 Mark W. Drutz, # 006772
2 Jeffrey R. Adams, #018959
3 Sharon Sargent-Flack, #021590
4 **MUSGROVE, DRUTZ & KACK, P.C.**
5 1135 Iron Springs Road
6 Prescott, Arizona 86305
7 (928) 445-5935

8 *Attorneys for Defendants*

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; BECKY**
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.**

Case No. CV 2003-0399

Division No. 1

**REQUEST FOR PRODUCTION OF
DOCUMENTS**

22 **TO: PLAINTIFFS JOHN B. CUNDIFF and BARBARA C. CUNDIFF, husband and wife;**
23 **BECKY NASH, a married woman dealing with her separate property; KENNETH**
24 **PAGE and KATHRYN PAGE, as Trustee of the Kenneth Page and Catherine Page**
25 **Trust, and their attorneys of record, David K. Wilhelmsen of Favour, Moore &**
26 **Wilhelmsen, P.A.**

27 Defendants Donald Cox and Catherine Cox ("Defendants"), pursuant to Rule 34, Arizona
28 Rules of Civil Procedure, request that the above-named Plaintiffs produce for Defendants' inspection
and copying at the offices of Musgrove, Drutz & Kack, P.C., 1135 Iron Springs Road, Prescott,
Arizona 86305 on or before September 10, 2005 the document and things as described herein.

1 INSTRUCTIONS FOR USE

2 1. In producing the documents designated below, you are requested to furnish all
3 documents known or available to you, regardless of whether a document is currently in your
4 possession, custody or control or that of your attorneys, employees, agents, investigators or other
5 representatives or is otherwise available to you.

6 2. If, for any reason, you are unable to produce in full any document requested:

7 a. Produce each such document to the fullest extent possible;

8 b. Specify the reasons for your inability to produce the remainder; and

9 c. State in detail whatever information, knowledge or belief you have concerning
10 the whereabouts and substance of each document not produced in full.

11 3. If any document requested was at one time in existence but is no longer in existence,
12 please state for each document as to which that is the case:

13 a. The type of document;

14 b. The types of information contained therein;

15 c. The date upon which it ceased to exist;

16 d. The circumstances under which it ceased to exist;

17 e. The identity of all persons having knowledge of the circumstances under
18 which it ceased to exist; and

19 f. The identity of all persons having knowledge or who had knowledge of the
20 contents thereof.

21 4. For each document requested which you are unable to produce and which was at any
22 time within your possession, custody or control or to which you had access at any time, specify in
23 detail:

24 a. The nature of the document (i.e., letter, memorandum, etc.);

25 b. The author of the document;

26 c. All recipients of the documents and any copy thereof;

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d. A summary of the information contained in the document;

e. The date on which you lost, relinquished or otherwise ceased to have possession, custody, control of or access to the document;

f. Identify all persons having knowledge of the circumstances whereby you lost, relinquished or otherwise ceased to have possession, custody or control of or access to the document; and

g. Identify all persons who have or have had knowledge of the contents of the document in full or in part.

5. In the event you seek to withhold or do withhold any document, in whole or in part, on the basis that it is not subject to discovery, produce a list of all such documents and, as to each such document, state:

a. The name of each author, writer, sender or initiator of each document.

b. The name of each recipient, addressee or party to whom such document was sent or intended to be sent;

c. The name of each and every person who received a copy of the document;

d. The date of the document or, if no date appears on the document, the date the document was prepared;

e. The title of the document, or if it has not title, then such other description of the document and its subject matter as shall be sufficient to identify the document; and

f. The grounds claimed for withholding the document from discovery (e.g., attorney-client privilege, work product, or any other grounds) and the factual basis for such a claim.

6. In accordance with Rule 34(b), Arizona Rules of Civil Procedure, as to each document produced, you are requested to designate the paragraph and subparagraph of this request to which each such document is responsive.

7. If you dispute the propriety of Instructions 2, 3, 4 and/or 5 as being outside the scope of Rule 34 or otherwise objectionable, then consider such instructions as interrogatories posed pursuant to Rule 33, Arizona Rules of Civil Procedure, and answer them accordingly.

8. This Request is a continuing one and requires that you produce all responsive documents and tangible objects whenever you obtain or become aware of them, even if they are no

1 in your possession or available to you on the date you first produce documents pursuant to this
2 request.

3 **DEFINITIONS**

4 1. "Plaintiffs", "you" and "your" means the plaintiffs in the above-captioned matter and
5 the past and present employees, representatives, agents and attorneys for plaintiffs.

6 2. "Any", "each" and "all" shall be read to be all inclusive and to require the production
7 of each and every document (as hereinafter defined) responsive to the particular request for
8 production in which such term appears.

9 3. "And" and "or" and any other conjunctions or disjunctions used herein shall be read
10 both conjunctively and disjunctively so as to require the production of all documents (as hereinafter
11 defined) responsive to all or any part of each particular request for production in which any
12 conjunction or disjunction appears.

13 4. "Person" means an individual, firm, corporation, association, organization or any
14 other entity.

15 5. The term "document" includes all electronic media or other tangible forms in which
16 information is stored and includes all written or graphic matter of every kind and description,
17 however produced or reproduced, WHETHER DRAFT OR FINAL, original or reproduction,
18 including, but not limited to, letters, correspondence, memoranda, notes, films, transcripts, contracts,
19 agreements, licenses, memoranda of telephone conversations or personal conversations, microfilm,
20 telegrams, books, newspaper articles, magazines, advertisements, periodicals, bulletins, circulars,
21 pamphlets, statements, notices, reports, rules, regulations, directives, teletype messages, minutes of
22 meetings, interoffice communications, reports, financial statements, ledgers, books of account,
23 proposals, prospectuses, offers, orders, receipts, working papers, desk calendars, appointment books,
24 diaries, time sheets, logs, movies, tapes for visual or audio reproduction, recordings or materials
25 similar to any of the foregoing, however denominated, and including writings, drawings, graphs,
26 charts, photographs, data processing results, printouts and computations (both in existence and stored
27 in memory components), and other compilations from which information can be obtained or
28 translated, if necessary, through detection devices into reasonably usable form. THE TERM
"DOCUMENT" INCLUDES ALL COPIES OF A DOCUMENT WHICH CONTAIN ANY
ADDITIONAL WRITING, UNDERLINING, NOTES, DELETIONS OR ANY OTHER
MARKINGS OR NOTATIONS OR ARE OTHERWISE NOT IDENTICAL COPIES OF THE
ORIGINAL.

1 **DOCUMENTS TO BE PRODUCED**

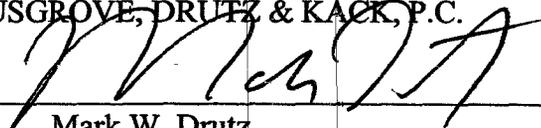
2 1. Each and every agreement, memorandum of understanding, document and/or
3 correspondence reflecting any written fee agreement (including any flat-fee reduction agreement)
4 by and between the Plaintiffs and/or Alfie Ware and the law firm of Favour, Moore & Wilhelmsen
5 pertaining to Yavapai County Superior Court Cause No. CV 2003-0399 (the above-captioned
6 lawsuit).

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8
9 2. Any and all agreements, correspondence, memoranda and/or documents addressing
10 or reflecting the hourly rate or rates at which time was or would be billed or setting forth the
11 effective date of any modification or other terms with respect to the agreed-upon services.

12
13 3. A composite of all attorneys' fees charged to Plaintiffs and/or Alfie Ware to date in
14 the above-captioned lawsuit.

15 DATED this 1st day of August, 2005.

16 MUSGROVE, DRUTZ & KACK, P.C.

17
18 By 

19 Mark W. Drutz
20 Jeffrey R. Adams
21 Sharon Sargent-Flack
22 *Attorneys for Defendants*

23 ORIGINAL of the foregoing hand-delivered
24 this 1st day of August, 2005 to:

25 David K. Wilhelmsen, Esq.
26 Marguerite M. Kirk, Esq.
27 Favour, Moore & Wilhelmsen, P.A.
28 1580 Plaza West Drive
Post Office Box 1391
Prescott, Arizona 86302-1391
Attorneys for Plaintiffs

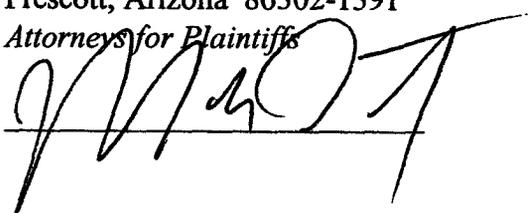


EXHIBIT 2

Favour Moore & Wilhelmsen, P.A.

David K. Wilhelmsen

1580 Plaza West Drive
Post Office Box 1391
Prescott, Arizona 86302

Telephone (928) 445-2444
Facsimile (928) 771-0450
DavidWilhelmsen@FMWlaw.net

August 2, 2005
File No. 10641.001

via Facsimile & U.S. Mail

Mark Drutz
MUSGROVE, DRUTZ & KACK, P.C.
Post Office Box 2720
Prescott, Arizona 86302-2720

Re: Cundiff, et al. v. Cox – Yavapai County Cause No. CV 2003-0399

Dear Mark:

In accordance with Rule 37(a), Ariz.R.Civ.Proc., this correspondence is our good faith effort to resolve a discovery dispute concerning your request for production of documents dated August 1, 2005. Based upon the documents you demand to be produced, it is apparent that you attempt to establish the "reasonableness" of your firm's attorney's fees by comparison to our firm's attorney's fees. There is no basis in law or fact for your position. Your attention is directed to *Schweiger v. China Doll Restaurant*, 138 Ariz. 183, 673 P.2d 927 (App. 1983), which provides, in relevant part, that the court is to look to the requesting attorney's skills and the overall fee charged by attorneys in the community of similar skill, taking into account the complexity of the matter. Judge Mackey is well versed in attorney fee applications, and is quite aware of the prevailing rate charged by attorneys in the community.

Therefore, please withdraw your request for production immediately. Should you fail to do so in writing by 5:00 p.m., August 3, 2005, we will file a motion for protective order and request our attorney's fees.

Secondly, we are in receipt of Ms. Sargent-Flack's letter demanding that we stipulate to dismissal of count III of our clients' amended complaint. As you were in attendance at the oral argument before Judge Mackey on July 26, 2005, you are aware that Ms. Sargent-Flack's request is

misplaced and contrary to our agreement to the Court that claims not disposed by summary judgment would remain in abeyance pending appellate review.

Very truly yours,



David K. Wilhelmsen
For the Firm

cc: Kenneth and Kathryn Page
John and Barbara Cundiff

HP LaserJet 3100
Printer/Fax/Copier/Scanner

END CONFIRMATION REPORT for
Favour Moore & Wilhelmsen, P.A.
928 771 0450
Aug-2-05 10:45

Job	Start Time	Usage	Phone Number or ID	Type	Pages	Mode	Status
142	8/ 2 10:45....	0'48"	928 445 5980	Send.....	3/ 3	EC144	Completed.....

Total 0'48" Pages Sent: 3 Pages Printed: 0

The Law Offices of
FAVOUR MOORE & WILHELMSSEN, P.A.
P. O. Box 1391
Prescott, AZ 86302
Telephone: (928) 445-2444
Telecopier: (928) 771-0450

FAX COVER SHEET

DATE: August 2, 2005

TO: Mark Drutz

FROM: Dave Wilhelmsen

FAX NO (928) 445-5980

PHONE (928) 445-5935

RE: Cundiff, et al. v. Cox
File No. 10641.001

TOTAL PAGES TRANSMITTING (INCLUDING COVER SHEET): 3

SPECIAL INSTRUCTIONS:

If there is a problem with transmittal, please call the operator listed below at (928) 445-2444.

OPERATOR: Karen

If you have not properly received this telecopy, please call at (928) 445-2444
Our telecopy number is (928) 771-0450.

The information contained in this facsimile is attorney privileged and confidential information intended only for the use of the individual or entity named above. If the reader of this message is not the intended recipient, the employee, or agent responsible to deliver it to the intended recipient, please notify Favour, Moore & Wilhelmsen, P.A. immediately. You are hereby notified that any dissemination, distribution or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone (collect), and return the original message to us at the above address via the U.S. Postal service. Thank you.

EXHIBIT 3

771-0450

MUSGROVE, DRUTZ & KACK, P.C.
ATTORNEYS AT LAW
POST OFFICE BOX 2720, PRESCOTT, ARIZONA 86302-2720

JAMES B. MUSGROVE
MARK W. DRUTZ
THOMAS P. KACK
GRANT K. MCGREGOR
JOHN G. MULL
JEFFREY R. ADAMS
CATHY L. KNAPP
SHARON SARGENT-FLACK

PRESCOTT OFFICE
1135 IRON SPRINGS ROAD
PRESCOTT, ARIZONA 86305

TELEPHONE
(928) 445-5935
(928) 445-5980 (FAX)

PRESCOTT VALLEY OFFICE
3001 MAIN STREET, SUITE 2C
PRESCOTT VALLEY, ARIZONA 86314

TELEPHONE
(928) 775-9565
(928) 775 9550 (FAX)

August 3, 2005

File No. 9449-1

VIA HAND DELIVERY

Mr. Alfie Ware
7850 East Florentine Road
Prescott Valley, Arizona 86314

Re: John B. Cundiff and Barbara C. Cundiff, et al. v. Donald Cox and Catherine Cox
Yavapai County Superior Court Cause No. CV 2003-0399

Dear Mr. Ware:

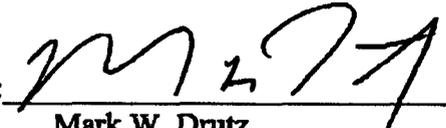
Our office represents Defendants Donald and Catherine Cox with respect to the above-referenced matter. Enclosed is a Subpoena Duces Tecum seeking documents pertaining to the above-referenced lawsuit which are described in the Subpoena. The subpoena does not command you to give testimony. Rather, it seeks the production of certain documents. Please produce the documents on or before August 22, 2005.

Enclosed is a witness fee check in the amount of \$12.00. In the event your copying charges exceed \$12.00, please advise and we will forward the difference to you.

Please note that the date set forth for compliance with the Subpoena is August 22, 2005 at 9:00 a.m. Thank you for your assistance in this matter.

Sincerely,

MUSGROVE, DRUTZ & KACK, P.C.

By: 
Mark W. Drutz
Jeffrey R. Adams

MWD/jw
Enclosures

cc: David K. Wilhelmsen, Esq.
Donald and Catherine Cox

1 If this subpoena asks you to produce and permit inspection and copying of the designated
2 books, papers, documents, tangible things, or the inspection of the premises, you need not appear
3 to produce the items unless the subpoena states that you must appear for a deposition, hearing or
4 trial. See Rule 45(c)(2)(A), Arizona Rules of Civil Procedure.

5 YOUR RIGHT TO OBJECT

6 The party or attorney serving the subpoena has a duty to take reasonable steps to avoid
7 imposing an undue burden or expense on you. The Superior Court enforces this duty and may
8 impose sanctions upon the party or attorney serving the subpoena if this duty is breached. See Rule
9 45(c)(1), Arizona Rules of Civil Procedure.

10 You may object to this subpoena if you feel that you should not be required to respond to the
11 request(s) made. Any objection to this subpoena must be made within 14 days after it is served upon
12 you, or before the time specified for compliance, by providing a written objection to the party or
13 attorney serving the subpoena. See Rule 45(c)(2)(B), Arizona Rules of Civil Procedure.

14 If you object because you claim the information requested is privileged or subject to
15 protection as trial preparation material, you must express the objection clearly, and support each
16 objection with a description of the nature of this document, communication or item not produced so
17 that the demanding party can contest the claim. See Rule 45(d)(2), Arizona Rules of Civil
18 Procedure.

19 If you object to the subpoena in writing you do not need to comply with the subpoena until
20 a court orders you to do so. It will be up to the party or attorney serving the subpoena to seek an
21 order from the court to compel you to provide the documents or inspection requested, after providing
22 notice to you. See Rule 45(c)(2)(B), Arizona Rules of Civil Procedure.

23 If you are not a party to the litigation, or an officer of a party, the court will issue an order to
24 protect you from any significant expense result from the inspection and copying commanded. See
25 Rule 45(c)(2)(B), Arizona Rules of Civil Procedure.

26 You may also file a motion in the Superior Court of the county in which the case is pending
27 to quash or modify the subpoena if the subpoena:

(i) does not provide a reasonable time for compliance;

(ii) requires a non-party or officer of a party to travel to a county different from the county
where the person resides or does business in person; or to travel to a county different from where the
subpoena was served; or to travel to a place farther than 40 miles from the place of service; or to
travel to a place different from any other convenient place fixed by an order of a court, except that
a subpoena for you to appear and testify at trial can command you to travel from any place within
the state;

1 Mark W. Drutz, # 006772
2 Jeffrey R. Adams, #018959
3 Sharon Sargent-Flack, #021590
4 **MUSGROVE, DRUTZ & KACK, P.C.**
5 1135 Iron Springs Road
6 Prescott, Arizona 86305
7 (928) 445-5935
8
9 Attorneys for Defendants

10 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
11 **IN AND FOR THE COUNTY OF YAVAPAI**

12 **JOHN B. CUNDIFF and BARBARA C.**
13 **CUNDIFF, husband and wife; BECKY**
14 **NASH, a married woman dealing with her**
15 **separate property; KENNETH PAGE and**
16 **KATHRYN PAGE, as Trustee of the Kenneth**
17 **Page and Catherine Page Trust,**
18
19 **Plaintiffs,**
20
21 **v.**
22 **DONALD COX and CATHERINE COX,**
23 **husband and wife,**
24
25 **Defendants.**

Case No. CV 2003-0399
Division No. 1

SUBPOENA DUCES TECUM

26 **THE STATE OF ARIZONA TO:** **ALFIE WARE**
27 **7850 East Florentine Road**
Prescott Valley, Arizona 86314

28 **YOU ARE COMMANDED, pursuant to the provisions of Rule 45, Arizona Rules of Civil**
29 **Procedure, to produce or permit inspection and copying of the designated books, documents or**
30 **tangible things described in this Subpoena:**

31 **APPEARANCE MADE BEFORE:** **Certified Court Reporter**
32 **DATE AND TIME OF APPEARANCE:** **August 22, 2005 at 9:00 a.m.**
33 **(NO APPEARANCE NECESSARY)**

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(iii) requires the disclosure of privileged or protected information and no waiver or exception applies; or

(iv) subjects you to an undue burden. See Rule 45(c)(3)(A), Arizona Rules of Civil Procedure.

If this subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial trade information; or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

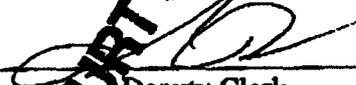
(iii) requires a person who is not a party or an officer of a party to incur substantial travel expense;

The court may either quash or modify the subpoena, or the court may order you to appear or produce documents only upon specified conditions, if the party who served the subpoena shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that you will be reasonably compensated. See Rule 45(c)(3)(B), Arizona Rules of Civil Procedure.

YOU ARE NOTIFIED THAT ANY FAILURE TO OBEY THIS SUBPOENA WITHOUT ADEQUATE EXCUSE MAY BE DEEMED A CONTEMPT OF THIS COURT, AND A CIVIL ARREST WARRANT MAY BE ISSUED. A CIVIL ARREST IS AN ORDER DIRECTING ANY POLICE OFFICER IN ARIZONA TO ARREST YOU AND BRING YOU BEFORE THIS COURT FOR FUTURE PROCEEDINGS.

SIGNED AND SEALED this date: AUG 2 2005

Clerk of the Superior Court
JEANNE HICKS

By  Deputy Clerk

COURT SEAL

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PLACE OF APPEARANCE:

Musgrove, Drutz & Kack, P.C.
1135 Iron Springs Road
Prescott, Arizona 86305

You are commanded to bring with you and produce these books, papers, documents or tangible things described below:

Any and all documentation, correspondence, books, records, cancelled checks, bank statements, hand-written notes, contracts or other written memoranda of any kind in your possession related, in any way, to an agreement with the Plaintiffs and/or Plaintiffs' attorneys (the law firm Favour, Moore & Wilhelmsen) for the payment of Plaintiffs' attorneys' fees and costs in connection with the above-captioned matter.

ANY FAILURE TO OBEY THIS SUBPOENA WITHOUT ADEQUATE EXCUSE MAY BE DEEMED A CONTEMPT OF COURT, AND A CIVIL ARREST WARRANT MAY BE ISSUED.

*****THIS SUBPOENA DUCES TECUM MAY BE COMPLIED WITH BY MERELY HAND DELIVERING OR SENDING VIA CERTIFIED MAIL THE RECORDS TO MUSGROVE, DRUTZ & KACK, P.C., IN PRESCOTT, ARIZONA BY THE DATE INDICATED ABOVE. IF, HOWEVER, YOU CHOOSE TO APPEAR IN PERSON, PLEASE TELEPHONE OUR OFFICE TO CONFIRM.*****

Requests for reasonable accommodation for persons with disabilities must be made to the division assigned to the case by parties at least three judicial days in advance of a scheduled court proceeding.

You have been subpoenaed by Defendants whose attorney's name, address and telephone number is:

Mark W. Drutz, Esq.
Jeffrey R. Adams, Esq.
Sharon Sargent-Flack, Esq.
Musgrove, Drutz & Kack, P.C.
1135 Iron Springs Road
P.O. Box 2720
Prescott, Arizona 86302
(928) 445-5935

YOUR DUTIES IN RESPONDING TO THIS SUBPOENA

You have the duty to produce the documents requested as they are kept by you in the usual course of business, or you may organize the documents and label them to correspond with the categories set forth in this subpoena. See Rule 45(d)(1), Arizona Rules of Civil Procedure.