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5  
6 **IN THE SUPERIOR COURT OF ARIZONA**  
7 **COUNTY OF YAVAPAI**

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

**(Oral Argument Requested)**

16  
17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and  
18 through undersigned counsel, hereby moves this Court for an order pursuant to Rule 37(a),  
19 Ariz.R.Civ.Proc., compelling Defendants Donald and Catherine Cox to disclose information and  
20 documents requested by Plaintiffs pursuant to Rule 34, Ariz.R.Civ.Proc., for Plaintiffs' attorney's fees  
21 and costs incurred in bringing this motion, and for such other relief as the Court deems just and  
22 equitable.

23 This motion is supported by the following memorandum of points and authorities and  
24 supporting documents, separate statement of undersigned counsel in compliance with Rule 37(a)(2)(C)  
25 filed concurrently with this motion, as well as the entire record in this proceeding.

26 ///

**DIV. 1**

OCT -1 2004

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1 RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of September, 2004.

2 FAVOUR MOORE & WILHELMSSEN, P.A.

3  
4 By: Marguerite Kirk  
5 David K. Wilhelmsen  
Marguerite Kirk

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. Statement of Case**

8 This case involves Defendants Cox's use of their property as a commercial or business  
9 enterprise and other violations of the recorded Declaration of Restrictions. *Cundiff, et al. v. Cox, First*  
10 *Amended Complaint, CV 2003-0399, March 18, 2004*. Plaintiffs are neighboring landowners who are  
11 also subject to the June 13, 1974 Declaration of Restrictions that apply to Defendants' land. *Id.*  
12 Defendants have raised the affirmative defenses of waiver, estoppel and abandonment of the covenants  
13 and restrictions. *Cundiff, et al. v. Cox, Answer to First Amended Complaint, May 21, 2004 at ¶24, p.3.*

14 During her deposition, Defendant Catherine Cox testified that the Coyote Springs Ranch  
15 property was used as "a growing yard for our excess inventory." *Cundiff, et al. v. Cox, CV 2003-0399,*  
16 *Deposition Transcript of Catherine Cox, p.15 at line 22 through p.16 at line 1; and, p.17 at line 23*  
17 *through p.18 at line 23 (a true and correct copy attached hereto and by this reference incorporated*  
18 *herein as Exhibit "1").* Defendants Cox operate their business as a partnership with their two sons.  
19 *Deposition Transcript of Catherine Cox, p.16 at line 10 through p.17 at line 7 (a true and correct copy*  
20 *attached hereto and by reference herein as Exhibit "2").* Defendants Cox's partnership with their  
21 sons, which includes the "growing yard for [] excess inventory" located at Coyote Springs Ranch is  
22 pursuant to an oral agreement. *Deposition of Catherine Cox, p.13 at lines 6-24 (a true and correct*  
23 *copy attached hereto and by this reference incorporated herein as Exhibit "3"); and, pp.16-17*  
24 *(Exhibit 1).* Defendant Catherine Cox further admitted during her testimony that there are employees  
25 working at the "growing yard." *Deposition of Catherine Cox, p.14 at line 23 through p.15 at line 4*  
26 *(a true and correct copy attached hereto and by this reference incorporated herein as Exhibit "4").*

1 Defendants Cox have taken the position during litigation that they are not in violation of the  
2 recorded Declaration of Restrictions as they are not operating a “business” on the subject property.<sup>1</sup>  
3 In light of their defense, and based upon Defendant Catherine Cox’s deposition testimony, Plaintiffs  
4 propounded a request for production of Defendants Cox’s income tax returns from 1998 to the present.  
5 *Plaintiffs’ Request for Production of Documents, CV 82003-0399, July 1, 2004 at p.3, Request for*  
6 *Production No. 3 (a true and correct copy attached hereto and by this reference incorporated herein*  
7 *as Exhibit “5”).*

8 In response, Defendants Cox have refused to disclose copies of their tax returns for the past  
9 five (5) years of filing tax returns (that is, 1998 to 2003). Defendants Cox assert, *inter alia*, that the  
10 request is unduly burdensome, and the documentation has no relevance and is not calculated to lead  
11 to relevant evidence. *Defendants Cox’s Responses to Plaintiffs’ Request for Production, August 30,*  
12 *2004 at p.3, Response to Request No.3 (a true and correct copy attached hereto and by this reference*  
13 *incorporated herein as Exhibit “6”).*

## 14 **II. Plaintiffs’ Request for Production of Defendants’**

### 15 **Income Tax Returns is Permissible under Rule 26(b), Ariz.R.Civ.Proc.**

16 Rule 26(b), Ariz.R.Civ.Proc., defines the scope of permissible discovery by parties:

17 Parties may obtain discovery regarding any matter, not privileged, which is relevant  
18 to the subject matter involved in the pending action, whether it relates to the claim or  
19 defense of the party seeking discovery or to the claim or defense of any other party....It  
20 is not ground for objection that the information sought will be inadmissible at the trial  
21 if the information sought appears reasonably calculated to lead to the discovery of  
22 admissible evidence.

23 *Id. at subsection (1).* A court may limit discovery when it determines that “the discovery sought is  
24 unreasonably cumulative or duplicative, or obtainable from some other source....”; the party seeking  
25 discovery “has had ample opportunity by discovery in the action to obtain the information sought;”  
26 or the discovery sought is “unduly burdensome or expensive....” *Id. at subsection (1)(i-iii).*

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<sup>1</sup>Defendants Cox assert, presumably in the alternative, that the recorded Declarations of Restrictions have been abandoned.

1 None of these stated exceptions apply to this case. Defendants' tax returns, which will include  
2 tax returns and schedules for the partnership that operates the tree-growing facility located on the land  
3 at issue, is both relevant and material to the claims at issue. Moreover, there is no other or better  
4 available documentary evidence that Plaintiffs can obtain to ascertain and corroborate Defendants'  
5 financial characterization and treatment of the subject property as well as the employees who work  
6 there, and the inventory, equipment and mobile housing on the land.

7 Tax returns contain statements made under oath or verification. Defendants' tax returns will  
8 contain the partnership terms, and the assets of the partnership. To the extent that Defendant  
9 Catherine Cox testified that the partnership she and her husband have with their sons include the  
10 operation occurring on the subject land, this information is relevant. *Deposition of Catherine Cox,*  
11 *p.71 at lines 11-14 (a true and correct copy attached hereto and by this reference incorporated herein*  
12 *as Exhibit "7").* The tax returns are highly relevant as these set forth the Defendants' characterization  
13 of the property, both the real property as well as the personal property on the land. The tax returns will  
14 also reveal Defendants' prior statements as to the improvements made to the property over the past  
15 five years, which include a fence, drive-way, pump house, irrigation lines, and approximately 800 trees  
16 planted along the perimeter of the property. The documents will provide Defendants' prior verified  
17 statements made pursuant to legal obligation as to their characterization and tax treatment of the  
18 nature, amount and extent of inventory on the property over the past five years. Depreciation taken  
19 by Defendants on any or all personal property or improvements they have made to the land is both  
20 relevant and material.

21 Clearly, Defendants' tax returns will provide information that is crucial to the claims and  
22 defenses in this case. Obviously, the information contained on the tax returns cannot be obtained from  
23 any other comparable source. For instance, financial statements are not prepared under penalty of  
24 perjury, nor do financial statements provide for property characterization, depreciation, and the like.  
25 Bills and receipts for improvements also lack critical financial treatment of the asset. Most  
26 importantly, the request poses no undue burden on Defendants as Defendant Catherine Cox testified

1 that she has in her possession, or their accountant has, the tax returns for the past five years.  
2 *Deposition of Catherine Cox, p.71 at lines 15-22 (a true and correct copy attached hereto and by this*  
3 *reference incorporated herein as Exhibit "8").*

### 4 **III. Request for Attorney's Fees**

5 Rule 37(a) affords the Court the authority to impose sanctions either in the event a motion to  
6 compel is granted *or* the requested disclosure is provided after the motion is filed.

#### 7 (4) *Expenses and Sanctions.*

8 (A) If the motion is granted or if the disclosure or requested discovery is provided  
9 after the motion was filed, ***the court shall***, after affording an opportunity to be heard,  
10 require the party or deponent whose conduct necessitated the motion or the party or  
attorney advising such conduct or both of them to pay the moving party the reasonable  
expenses incurred in making the motion, including attorney's fees....

11 *Id.* (italics in original; bold italics for emphasis added). In this instance, Defendants Cox's refusal to  
12 produce the requested income tax returns for the prior five year period was made in bad faith and for  
13 the purpose of thwarting permissible discovery in this case.

### 14 **IV. Conclusion**

15 Therefore, Plaintiffs respectfully request that this Court enter its order requiring Defendants  
16 to produce full and complete copies of their income tax returns from 1998 to present as requested in  
17 Plaintiffs' discovery. Plaintiffs also request that this Court award them their attorney's fees incurred  
18 in attempting to resolve this discovery dispute with Defendants' counsel, and in the bringing of this  
19 motion to compel.

20 DATED this 28<sup>th</sup> day of September, 2004.

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