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JEANNE HICKS, CLERK

BY:

*J. Cunningham*

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7 Attorneys for Plaintiffs

8 **IN THE SUPERIOR COURT OF ARIZONA**  
9 **COUNTY OF YAVAPAI**

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

17 vs. )

18 **DONALD COX and CATHERINE COX, )**  
19 **husband and wife, )**  
20 **Defendants. )**

Case No. [REDACTED]

Division 1 ✓

**PLAINTIFFS' COMPREHENSIVE  
PRETRIAL STATEMENT  
IN ACCORDANCE WITH  
RULE 16(b), ARIZ.R.CIV.PROC.**

21 Plaintiffs, by and through their counsel undersigned, hereby submit Plaintiffs' Comprehensive  
22 Pretrial Conference Memorandum pursuant to ARIZ. R. CIV. P. 16(b). The time frames set forth in this  
23 memorandum are based upon the premise that the trial will occur in March, 2005. Should the actual  
24 trial date be set prior to or later than that anticipated date, it will be necessary to reevaluate the  
25 deadlines set forth herein. Plaintiffs have been unable to reach an agreement with Defendants' counsel  
26 on a joint pretrial statement, and have stated to Defendants' counsel that Plaintiffs will not agree to  
certain statements made by Defendants in their form of the joint pretrial statement. Consequently,  
Plaintiffs are herein filing their pretrial statement with the Court.

**1. Discovery**

Depositions of each Plaintiff as well as each Defendant have been taken. Other fact witnesses  
will be interrogated, as necessary, by interview of counsel. Additionally, the parties have exchanged  
their initial disclosure statement in accordance with Rule 26.1. It is anticipated that Plaintiffs will

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1 pursue other discovery under Rules 33, 34 and 36.

2 Several discovery disputes between the parties remain at issue. In particular, Plaintiffs have  
3 filed a motion *in limine* regarding several lay witnesses and a potential expert witness Defendants seek  
4 to have testify at the time of trial. This motion has been fully briefed to the Court. Additionally,  
5 Plaintiffs have filed a motion to compel Defendants' response to Plaintiffs' Rule 34 request for  
6 production of Defendants' tax returns for the prior 5 year period.

7 **2. Expert Witnesses**

8 Plaintiffs suggest that expert witnesses be disclosed no later than 60 days before trial.  
9 Defendants have recently recharacterized lay witness Sheila Cahill as an expert witness. Plaintiffs  
10 have moved to have Ms. Cahill precluded from testifying as both a lay and expert witness.

11 **3. Determination or Designation of Experts**

12 Defendants have stated in response to Plaintiffs' motion *in limine* that Sheila Cahill will be  
13 disclosed as an expert witness. Plaintiffs dispute that Ms. Cahill's anticipated testimony can be  
14 characterized as "expert testimony" under Rule 702, Ariz.R.Evid., as well as dispute that Ms. Cahill  
15 qualifies as an expert witness. At this time, Plaintiffs have not made any determination or designation  
16 of expert witnesses that it may utilize at the time of trial.

17 **4. Disclosure of Nonexpert Witnesses**

18 The parties have each disclosed a number of lay witnesses in their respective disclosure  
19 statements. As noted herein, Plaintiffs' have filed a motion *in limine* to which Defendants have  
20 responded, seeking to preclude a number of lay witnesses Defendants have disclosed from testifying  
21 at the time of trial.

22 Plaintiffs suggest that nonexpert witnesses be disclosed no later than 75 days before trial.

23 **5. Discovery Disputes**

24 As previously noted, Plaintiffs have filed a motion *in limine* and a motion to compel. It is  
25 anticipated that as discovery progresses in this matter, additional discovery disputes will arise between  
26 the parties.

1 **6. Elimination of Unmeritorious Claims or Defenses**

2 Plaintiffs contend that Defendants' defenses of waiver, unclean hands, estoppel, and  
3 contributory negligence and other tort-based defenses are unmeritorious.

4 **7. Amendment of Pleadings**

5 At this time, Plaintiffs do not anticipate any further amendments to their pleadings will be  
6 required.

7 **8. Identification of Issues of Fact**

8 The parties dispute whether the recorded Declaration of Restrictions has been abandoned.  
9 Plaintiffs contend that Defendants are operating a commercial enterprise or business in violation of  
10 the recorded covenants.

11 **9. Stipulations re Foundation or Admissibility**

12 At the present time Plaintiffs believe such stipulations are premature.

13 **10. Special Procedures**

14 Plaintiffs do not anticipate that any special procedures for management of this case are  
15 necessary.

16 **11. Alternative Dispute Resolution**

17 The parties have engaged in mediation on two prior occasions without success. Plaintiffs  
18 remain willing to attempt to settle this matter, but cannot do so if Defendants position is simply that  
19 it will not remove its current existing business.

20 **12. Modification/Suspension of Any Rules**

21 Plaintiffs do not believe this is necessary.

22 **13. Rule 26.1 Compliance**

23 The parties have exchanged their initial disclosures statements under ARIZ. R. CIV. P. 26.1.  
24 Plaintiffs recommend that the parties agree that they shall supplement their disclosures on a seasonable  
25 basis as required under the rule, and that the parties agree that full compliance with ARIZ. R. CIV.  
26 P. 26.1 will have been made by the discovery cut-off 30 days prior to trial.

1 **14. Settlement Conference**

2 The parties on two occasions have previously attempted mediation of this matter.

3 **15. Joint Pretrial Statement**

4 Plaintiffs will agree that a Joint Pretrial Statement be filed within ten days of trial.

5 **16. Trial Date**

6 Plaintiffs anticipate that a March 2005 trial date would be suitable. It should be noted that all  
7 recommended deadlines contained in this memorandum have been suggested with the understanding  
8 that a trial setting will not be made earlier than March 2005.

9 **17. Motions in Limine/Dispositive Motions**

10 Plaintiffs recommend that any other motions *in limine*, if necessary, should be filed no later  
11 than 20 days before trial. Dispositive motions should be filed no later than 60 days prior to trial.

12 **18. Jury Trial**

13 Plaintiffs action is for declaratory and injunctive relief. Therefore, any jury would be only  
14 advisory. Under this circumstance, Plaintiffs do not consider the resources and time necessarily  
15 incurred for a jury trial to be warranted in this case.

16 DATED this 7<sup>th</sup> day of October, 2004.

17 FAVOUR MOORE & WILHELMSSEN, P.A.

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23 Original of the foregoing  
24 filed this 7<sup>th</sup> day of October, 2004  
with:

25 Clerk, Superior Court of Arizona  
26 Yavapai County  
Prescott, Arizona

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A copy hand-delivered this 7<sup>th</sup> day  
of October, 2004 to:

Honorable David L. Mackey  
Division One  
Superior Court of Arizona  
Yavapai County  
Prescott, Arizona

and, a copy mailed this 7<sup>th</sup> day  
of October, 2004 to:

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