

2005 JAN 11 PM 11:38

1 Mark W. Drutz, Esq., # 006772
Jeffrey R. Adams, #018959
2 MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
3 Prescott, Arizona 86305
(928) 445-5935

FILED
Debra Kelen
DEPUTY CLERK

4 Attorneys for Defendants
5

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

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

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

11 Plaintiffs,

12 v.

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

15 Defendants.
16
17
18

CASE NO. CV 2003-0399

DIVISION 1

**CONTROVERTING STATEMENT IN
RESPONSE TO PLAINTIFFS'
SEPARATE STATEMENT OF FACTS IN
SUPPORT OF MOTION FOR SUMMARY
JUDGMENT**

AND

**DEFENDANTS' SEPARATE
STATEMENT OF FACTS IN SUPPORT
OF RESPONSE TO MOTION FOR
SUMMARY JUDGMENT**

(Assigned to the Hon. David L. Mackey)

(Oral Argument Requested)

19
20 Defendants submit the following statements pursuant to the provisions of Rule 56(c)(2), Ariz.
21 R. Civ. P., to controvert the Plaintiffs' Separate Statement of Facts in Support of Motion for Summary
22 Judgment ("PSOF"). The facts of record show the impropriety of several of PSOF and Plaintiffs'
23 Motion for Summary Judgment Re: Defendants' Violations of Restrictive Covenants; Affirmative
24 Defenses of Estoppel, Laches and Unclean Hands ("Plaintiffs' MSJ") and establish the existence of
25 material issues of fact in dispute and that the Plaintiffs' MSJ must be denied.

26 1. Answering PSOF ¶¶ 1-3, Defendants admit that Plaintiffs John and Barbara Cundiff,
27 Becky Nash, and Kenneth and Kathryn Page have admitted to owning real property in Coyote Springs,
28

DIV. 1
JAN 13 2005

63

1 and deny that any instruments of ownership of Plaintiffs are set forth in PSOF's Exhibits in support of
2 their MSJ.

3 2. Defendants admit in part and deny in part PSOF, ¶ 4. Defendants assert further that
4 Coyote Springs Ranch consists of an area of real property that is larger than simply that portion of real
5 property described in the Declaration of Restrictions recorded on June 13, 1974 (a copy of which is
6 attached as Exhibit "14"). Rather, Coyote Springs Ranch includes that area of real property purported
7 to be governed by a second instrument, recorded **December 20, 1974**, in the Official Records of
8 Yavapai County, Arizona at Book 944, Page 752, a copy of which is attached hereto as Exhibit "15".
9 See also, Affidavit of Robert D. Conlin attached hereto as Exhibit "16" and which was submitted to
10 the Yavapai County Superior Court in Cause No. 2000-0472 as Exhibit A attached to State of Facts
11 in Support of Defendants'/Counterclaimants'/Third Party Plaintiffs' Motion for Summary Judgment
12 and Opposition to Launderers' Motion for Summary Judgment.

13 3. Defendants admit in part and deny in part PSOF, ¶ 5. Defendants reassert the defenses
14 set forth in their answer, disclosure and discovery. Further answering PSOF, ¶ 5, Defendants
15 incorporate their response to PSOF, ¶ 4.

16 4. Responding to PSOF ¶ 6 Defendants admit that the cited paragraphs appear to be
17 accurately quoted, and assert that the Declaration of Restrictions recorded on June 13, 2004, in the
18 Official Records of Yavapai County, Arizona at Book 416, Page 680, speaks for itself. Further,
19 Defendants reassert the defenses set forth in their answer, disclosure and discovery.

20 5. Answering PSOF, ¶ 7, Defendants admit ownership of real property in Coyote Springs
21 Ranch. In further responding to PSOF, ¶ 7, Defendants incorporate their response to PSOF, ¶ 4.
22 Defendants further assert (i) that on April 21, 1998, Defendants purchased that real property legally
23 described on the Warranty Deed attached hereto as Exhibit "2" ("**Defendants' Property**") and (ii) that
24 the Defendants' Property is not within that portion of real property legally described on Exhibit "16"
25 attached hereto, which is also part of Coyote Springs Ranch. Defendants deny any form of notice of
26 the Declaration, and were provided with no documents purporting to be recorded Declarations
27
28

1 applicable to their property, prior to or at the time of their purchase. (See DSOF ¶ 8). Alternatively,
2 Defendants reassert the defenses set forth in their answer, disclosure and discovery.

3 6. Responding to PSOF ¶ 8, Defendants assert that Plaintiffs appeared to have attached
4 a complete copy of Mr. Cox's deposition to PSOF, and that the deposition speaks for itself. Further,
5 Defendants assert that in addition to the testimony cited at pp.17:25 – 18:3, Mr. Cox also testified as
6 follows:

7 [Plaintiffs' attorney]: Did [Waneta Offerman, Realtor] tell you about
8 any covenants or restrictions about the use of
the land?

9 [Mr. Cox]: No, she didn't.

10 Q: Did you, after that meeting [with attorney
Launders], check with any neighbors with
11 regard to your plans for the property?

12 A: Yes, I did.

13 Q: Who did you check with or who did you speak
with?

14 A: I talked to the pastor of the church, which is
15 next door to us on the south. I talked to Mr.
16 James, which was down the street a ways. I
17 talked to Wendy, and I don't know her last
18 name, you have it there. She's right next door
19 to us. So neither of those two people had any
20 objection to it.

(Depo. of Donald Cox, pp. 18:15-17; 24:6-12, attached as Exh. "6").

21 7. Responding to PSOF ¶¶ 9-10, Defendants deny this paragraph in that they do not fully
22 describe the improvements made to Defendants' Property or the time periods during which those
23 improvements were made. Defendants began making improvements to their property in 2000, for
24 purposes of growing trees and shrubs, to be relocated at various times to their retail and wholesale
25 business locations on Highway 69 and Viewpoint Drive. (See Affidavit of Catherine Cox attached
26 hereto as Exhibit "4". See also DSOF ¶¶ 2-5). Since the year 2000, Defendants have constructed
27 improvements to their property that have included constructing a driveway, drilling a well, establishing
28 electricity and placing thereon a mobile home, establishing and installing irrigation lines and tree lines,
support posts and cables along the tree lines, planting boundary trees, construction of a pump-house
and meter for the well, construction of boundary fencing, construction of a tack room and corrals and

1 substantial grading of the Subject Property. (*Id.*) The majority of improvements to the Defendants'
2 Property were completed in 2002, which coincided with our first use of the Defendants' Property as
3 a tree farm. (*Id.*) Not including the inventory of trees for the tree farm, the Defendants' cost of their
4 property, improvements constructed thereon and equipment purchased for use at the Defendants'
5 Property have cost Defendants approximately Five Hundred Fifteen Thousand Six Hundred Six
6 Dollars and Seventy-Two Cents (\$515,606.72). (*Id.*)

7 8. Defendants deny PSOF ¶ 10. Further responding to PSOF, ¶ 10, Defendants assert that
8 nowhere in Mrs. Cox's deposition testimony referenced does she state that they use Defendants'
9 Property "for their nursery business." Plaintiffs have completely misstated and mis-characterized Mrs.
10 Cox's deposition testimony. The undisputed fact is, Defendants transact absolutely no business on the
11 Defendants' Property and, rather, merely use the Defendants' Property for agricultural purposes –
12 namely as a tree farm – which land use is not prohibited by the Declaration. (*See* Affidavit of Mrs.
13 Cox, attached as Exhibit "4").

14 9. Responding to PSOF ¶ 11, Defendants admit that Mr. Reynolds issued a letter dated
15 September 1, 2004, in which he stated that he is "offering this information which is accessible to the
16 public." However, the copies are not certified as true and correct, nor is there any indication that this
17 is a complete copy of the Development Services Department file. Further, the "Record" states that
18 there were "No Violations" on the Coxes' property and "File Closed." *See* PSOF, Exhibit "5".
19 Further, Plaintiffs offer Exhibit 5 in support of their statement that "Doug Reynolds [] visited
20 Defendants' subject property" "on or about May 30, 2001". Exhibit 5 states no such thing. Mrs.
21 Cox testified that she met with Mr. Reynolds, who did not make an appointment prior to his visit, and
22 that a mobile home had been placed on the property, but nothing else. (*See* Depo. of Catherine Cox,
23 pp. 53:4-57:4, attached as Exhibit "5").

24 10. Responding to PSOF ¶ 12, Defendants admit that they grow trees for transfer to their
25 wholesale and retail businesses, located elsewhere in Prescott Valley; the wholesale business is located
26 on Viewpoint Drive ("Prescott Valley Growers") and the retail nursery at 6195 East Highway 69
27 ("Prescott Valley Nursery"). (*See* Depo. of Catherine Cox, pp: 14:18-22; 15:11-16:1, attached as
28

1 Exhibit "5"). The Coxes further assert that it is private property, not open to the public, there is no
2 sign on the subject property, and no sales related to Prescott Valley Growers ever have taken place
3 on the subject property. (See Records of Yavapai County Development Services, attached as Exhibit
4 "5" to PSOF and Affidavit of Catherine Cox, ¶ 7, attached hereto as Exhibit "4").

5 11. Responding to PSOF ¶ 13, Defendants admit that there is an undocumented general
6 partnership between the family members, but deny that this admission constitutes the presence of a
7 commercial or industrial enterprise on the subject property under the CC&Rs, or that this admission
8 constitutes an admission of any violation of the subject CC&Rs.

9 12. Responding to PSOF ¶ 14, the Coxes admit that Mrs. Cox testified in her deposition
10 that there is a yard foreman at Coyote Springs, and incorporate their response to paragraph 10, *supra*.

11 13. The Coxes admit in part and deny in part PSOF ¶ 15. Mrs. Cox testified that there her
12 son's motor home is there for a "short time" but not that it is used by her son or that it is otherwise
13 occupied. (Depo. of Catherine Cox, p. 85:5-6, attached as Exhibit "5"). Defendants further
14 incorporate their response to paragraph 10, *supra*.

15 14. Responding to PSOF ¶ 16, the Coxes deny that their Statement of General Agricultural
16 Use constitutes an admission of a violation of the CC&Rs, or an admission that a commercial or
17 industrial enterprise exists on the subject property. Moreover, the Coxes' application clearly shows
18 in addition to various growing areas, a home site with a mobile home on the property. (See Exhibit
19 "5" attached to PSOF. The Coxes live on the property. (See Depo. of Catherine Cox, p. 4:10-18,
20 attached as Exhibit "5"). Further, Mrs. Cox testified that only trees are grown on the property, and
21 not flowers or vegetables. (See Depo. of Catherine Cox, p. 19, attached as Exhibit "5").

22 15. Defendants deny PSOF, ¶ 17 in part, on the grounds that the Defendants do not operate
23 a nursery on the Defendants' Property. Defendants admit PSOF, ¶ 17 in that Plaintiffs have alleged
24 in their First Amended Complaint that Defendants have violated paragraphs 2, 7(e) and 15 of the
25 Declaration of Restrictions that were recorded on June 13, 2004, in the Official Records of Yavapai
26 County, Arizona at Book 416, Page 680. See First Amended Complaint. However, Defendants have
27 denied those allegations, in part, on the basis of waiver and because the Declaration of Restrictions
28

1 recorded on June 13, 2004, in the Official Records of Yavapai County, Arizona at Book 416, Page 680
2 have been abandoned. See Answer to Plaintiffs' First Amended Complaint.

3 16. The Coxes admit PSOF ¶¶ 18-19, and assert that Plaintiffs filed an amended complaint,
4 one month short of six years after the Coxes acquired the subject property. *See Plaintiffs' First*
5 *Amended Complaint.*

6 17. Responding to PSOF ¶ 20, the Coxes admit that Mr. Conlin has executed an affidavit,
7 but deny that Mr. Conlin is an expert and is able to form an opinion as to the nature of the subject
8 property, or as to the interpretation, application or validity of the subject CC&Rs.

9 **DEFENDANTS' SEPARATE STATEMENT OF FACTS IN SUPPORT OF THEIR**
10 **RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
11 **RE: DEFENDANTS' VIOLATIONS OF RESTRICTIVE COVENANTS; AFFIRMATIVE**
12 **DEFENSES OF ESTOPPEL, LACHES, AND UNCLEAN HANDS**

13 Pursuant to Rule 56, Ariz. R. Civ. P., Defendants Catherine and Donald Cox, by and through
14 undersigned counsel, hereby submit their separate Statement of Facts ("DSOF") in support of their
15 Response to Plaintiffs' Motion for Summary Judgment:

16 1. Defendants Cox (also "**the Coxes**") are the owners of property located in Coyote Springs
17 Ranch at 7325 N. Coyote Springs Road, Prescott Valley, Arizona ("**Subject Property**") that they
18 purchased in April 1998. (Warranty Deed, recorded at book 3568, page 863, Yavapai County
19 Recorder, attached as Exhibit "3").

20 2. In August 2000, the Coxes began making vertical and subterranean improvements to the
21 Subject Property for purposes of using it as a tree farm on which trees and shrubs were cultivated, and
22 then relocated at various times to the Coxes' retail and wholesale business locations on Highway 69
23 and Viewpoint Drive. (Depo. of Catherine Cox, pp. 31:13-15; 49:18-51:18, 60:16-65:18, attached as
24 Exhibit "5").

25 3. Since the year 2000, Defendants constructed improvements to the Subject Property that have
26 included constructing a driveway, drilling a well, establishing electricity and placing thereon a mobile
27 home, which has since been replaced by a manufactured home, establishing and installing an automatic
28 drip-irrigation system and tree lines, support posts and cables along the tree lines, placing perimeter
trees around the property, construction of a pump-house and meter for the well, construction of

1 boundary fencing, construction of a tack room and corrals and substantial grading of the Subject
2 Property. (*Id.*)

3 4. The majority of improvements to the Subject Property were completed in early 2002, which
4 coincided with Defendants' first use of the Subject Property as a tree farm. (*Id.*)

5 5. Not including the inventory of trees for the tree farm, the Defendants' improvements
6 constructed thereon and equipment purchased for use at the Subject Property since 2000 total
7 approximately Five Hundred Fifteen Thousand Six Hundred Six Dollars and Seventy-Two Cents
8 (\$515,606.72), a significant property investment. (Aff. of Mrs. Cox, a copy of which is attached as
9 Exhibit "4").

10 6. Prior to purchasing the Subject Property, the Coxes drove around the Coyote Springs
11 Ranch area and saw evidence of many examples of non-residential improvements and activity,
12 including:

- 13 (1) a church;
- 14 (2) llama farms;
- 15 (3) alpaca farms;
- 16 (4) horse breeding;
- 17 (5) boarding and training facilities;
- 18 (6) a hay sales facility;
- 19 (7) a general contractor's warehouse;
- 20 (8) a shipping company;
- 21 (9) a Christmas tree farm; and
- 22 (9) numerous commercial vehicles.

23 (copy of aff. of Mrs. Cox, attached as Exhibit "4"; depo. of Catherine Cox pp. 32:13-19, 33: 25-33:1,
24 36:17-22, 75:20-78:12, 87:15-93:16, 118:8-119:5, 129:6-24, attached as Exhibit "5"; depo. of Donald
25 Cox, p. 32:3-33:12, attached as Exhibit "6").

26 7. Given these observations, the Coxes believed that the area was not strictly residential. (*Id.*)
27
28

1 8. The Coxes do not recall ever seeing the Declaration of Restrictions ("**Declaration**" or
2 "CC&Rs") that is subject of this lawsuit prior to their purchase of the Subject Property. (Affidavit of
3 Catherine Cox, attached as Exhibit "4"; depo. of Catherine Cox, pp. 36:17-22, 122:15-20, attached
4 as Exhibit "5").

5 9. Based upon their observations of Coyote Springs Ranch and the uses being made of properties
6 in the area by other property owners, they had no reason to believe that their anticipated use of the
7 Subject Property as a tree farm was not permitted. (*Id.*)

8 10. In January, 2001, the Coxes filed an application with Yavapai County Development Services
9 to obtain an agricultural exemption for the Subject Property. (Depo. of Catherine Cox, pp. 44:3-45:6,
10 attached as Exhibit "5").

11 11. Yavapai County granted the exemptions (which remains valid and effective), further leading
12 the Coxes to believe that their use of the Property as a tree farm was allowed. (Exhibit "7"). *See also*
13 Exhibit "5" attached to PSOF (Development Services records).

14 12. In the spring of 2001, Bob Launders an attorney who resided in the Coyote Springs Ranch area
15 regarding their proposed use of the Subject Property, met with the Coxes at his office. (Depo. of
16 Catherine Cox, p. 57:17-22, attached as Exhibit "5").

17 13. During their meeting, Mr. Launders advised the Coxes that there should be no problems with
18 their use of the Subject Property as long as their neighbors had no objection. (*Id.*)

19 14. Thereafter, the Coxes discussed the proposed tree farm with their neighbors who owned
20 property in the portion of Coyote Springs Ranch where the Subject Property is located. (Depo. of
21 Donald Cox, pp. 18:15-17, 24:6-12, 26:2-31:14, attached as Exhibit "6").

22 15. Those people consented to, and registered approval of, Defendants' expected use of the Subject
23 Property, which again led the Coxes to believe that they could use the Subject Property as a tree farm.
24 (*Id.*)

25 16. Prior to filing their lawsuit on May 16, 2003, Plaintiffs made no effort to enforce the Declaration
26 against Defendants. (depo. of John Cundiff, p. 69:3-9, attached as Exhibit "8"; depo. of Barbara
27 Cundiff, p. 11:20-25, 53, attached as Exhibit "9"; depo. of Becky Nash, p. 8:12 - 24, 9:17-25, 10:1-

1 11:1, 16:1-25, 17:8-18:4, attached as Exhibit "10" to *DSOF*; depo. of Kathryn Page, pp. 43:1-44:12,
2 attached as Exhibit "11"; ; depo. of Kenneth Page, pp. 7:21-10:23, 13:8-20, 16:12-19:21, attached as
3 Exhibit "12").

4 17. In fact, prior to filing this lawsuit, Plaintiffs never even had a personal or telephonic
5 conversation with Defendants advising them that they believed the use of the Subject Property violated
6 any restrictive covenant. (*Id.*).

7 18. All Plaintiffs acquired their land prior to the Coxes or during approximately the same time that
8 the Coxes began their improvements. (depo. of Barbara Cundiff, p. 9:16-18, attached as Exhibit "9";
9 depo. of Becky Nash, p. 8:12, attached as Exhibit "10", deed of trust and assignment of rents from
10 trustor Becky J. Nash to beneficiary Kenneth A. and Kathryn J. Page, trustees, dated August 25,
11 2000, and Disclaimer Deed by Thomas Nash to Becky J. Nash, dated August 28, 2000, attached as
12 Exhibit "20"; depo. of Kenneth Page, p. 6:15-18:17, attached as Exhibit "12").

13 19. They had the opportunity to observe the Coxes' improvements over the course of one-and-half-
14 years. (*Id.* See also depo. of John Cundiff, p. 69:3-9, attached as Exhibit "8"; depo. of Barbara
15 Cundiff, p. 11:20-25, 53, attached as Exhibit "9"; depo. of Becky Nash, p. 8:12 - 24, 9:17-25, 10:1-
16 11:1, 16:1-25, 17:8-18:4, attached as Exhibit "10"; depo. of Kathryn Page, pp. 43:1-44:12, attached
17 as Exhibit "11"; depo. of Kenneth Page, pp. 7:21-10:23, 13:8-20, 16:12-19:21, attached as Exhibit
18 "12").

19 20. Each time they drove on Coyote Springs Road between 2000 and May, 2003, Plaintiffs
20 observed Defendants' improvement and use of the Subject Property. (*Id.*).

21 21. Plaintiffs even met at a church (not a residence) located within Coyote Springs, just prior to
22 filing the lawsuit, to discuss other property owners' violations of the Declaration. (*See* *DSOF* ¶ 29).

23 22. Still, they did not advise the Coxes of what they believed to be purported violations, primarily
24 with regard to paragraph 2 of the Declaration. (*See* *DSOF* ¶¶ 16 and 17; depo. of Catherine Cox, pp.
25 49:20-24, 63:19-21, attached as Exhibit "5", and Exhibit "14").

26 23. Further, while Plaintiffs claimed during depositions that their reason for not objecting to
27 Defendants' use of the Subject Property prior to filing their lawsuit was a lack of funds, that argument
28

1 fails because their action against Defendants is not costing them any money. (*See* depo. of Kathryn
2 Page, p. 157:5-12, attached as Exhibit "11"; depo. of Becky Nash, p. 31:7-32:20, attached as Exhibit
3 "10")

4 24. Rather, the lawsuit filed against Defendants is being funded in its entirety by an individual,
5 namely Alfie Ware, who lacks any legal standing to bring the lawsuit, as Mr. Ware never has entered
6 into any covenants with the Coxes regarding land use restrictions. (*See* depo. of Kathryn Page, p.
7 52:7-10, attached as Exhibit "11").

8 25. As such, the poverty claim lacks merit. (*Id.*) Rather, Plaintiffs are engaging in selective
9 enforcement. (*See, e.g.*, depo. of Barbara Cundiff, pp. 49:7 - 57:17, attached as Exhibit "9"; depo.
10 of Becky Nash, pp. 30:4-21:6, attached as Exhibit "10").

11 26. Furthermore, an investigation of the Coyote Springs Ranch subdivision has revealed that few
12 property owner have complied with the Declaration. (copy of aff. of Ms. Cahill, attached as Exhibit
13 "13". *See also* copy of aff. of Catherine Cox, attached as Exhibit "4").

14 27. The CC&Rs violations are broad-based and include violations of virtually every restrictive
15 covenant set forth in the Declaration, including numerous violations of the provision dealing with
16 business and commercial activities that have existed, in many cases, for decades. (*Id.*)

17 28. Plaintiffs are included amongst those in violation of the Declaration of Restrictions. For
18 example, Plaintiffs have installed and continue to maintain above-ground water tanks on their property
19 in violation of ¶ 16 of the Declaration, attached as Exhibit "14". (depo. of Kathryn Page, pp. 138:22-
20 24, 140:11-25, attached as Exhibit "11"; depo. of Barbara Cundiff, pp. 46:13-47:3, attached as Exhibit
21 "9").

22 29. Further, Plaintiffs admit to attending a meeting in 2003, in a Church located within Coyote
23 Springs Ranch, to discuss violations by other property owners, including ostensibly the Coxes; admit
24 that a Church is not a residence and admit that it violates the Declaration. (depo. of John Cundiff, pp.
25 49:5 - 50:15, 62:22 - 63:15; 68:2 - 69:2, attached as Exhibit "8"; depo. of Barbara Cundiff, 13:14 - 24,
26 16:1 - 10, attached as Exhibit "9"; depo. of Becky Nash, pp. 14:15 - 15:4, attached as Exhibit "10";

27
28

1 depo. of Katheryn Page, pp. 45:18-47:5, 47:20-49:17, attached as Exhibit "11"; depo. of Kenneth
2 Page, p. 15:9-15, attached as Exhibit "12").

3 30. Plaintiff Kenneth Page admits that repairing cars in exchange for payment is considered a
4 business. (See depo. of Kenneth Page, pp. 30:14-19, attached as Exhibit "12" to *DSOF*).

5 [the Coxes' Attorney]: Someone repairing cars and having a garage to repairs
6 on their property in Coyote Springs Ranch -- *** --
would that be a business?

7 [Mr. Page]: Yeah, I would assume if he -- you know according to --

8 [Q]: Okay. Let me ask you this: Regardless of the size of the
9 business operation being conducted on properties out in
10 Coyote Springs Ranch, regardless of their size -- *** --
should the Declaration of Restrictions be applicable to
all of them?

11 [A]: Yeah, I assume so, yeah.

12 (depo. of Kenneth Page, pp. 30:14 - 31:3, attached as Exhibit "12". In fact, Plaintiffs Kenneth and
13 Katheryn Page and Becky Nash themselves have solicited -- or "initialed" -- automotive repair since
14 at least 1999 from Coyote Curt's Auto Repair¹, located in Coyote Springs. (Affidavit of Curtis
15 Kincheloe and check from Becky Nash dated January 8, 2005, attached as Exhibits "1" and "2"; ¶ 2,
16 CC&Rs, recorded June 13, 1974 and December 20, 1974 ("no trade, business, profession or any other
17 type of commercial or industrial activity shall be initialed" attached as Exhibits "14 and "15"). The
18 Plaintiffs themselves have "initialed" or solicited business within Coyote Springs. (*Id.*). Based on the
19 sheer volume of violations, especially those numerous violations of the prohibition of business and
20 commercial activities, the Declaration has been abandoned by the owners of properties in Coyote
21 Springs Ranch. (*Id. and Exhibit "13"*) Restrictions on business operations may have, at some time
22 prior to the Coxes' purchase, been effective. However, they long since have been abandoned, as
23 Plaintiffs themselves implicitly acknowledge through their conduct. In short, Plaintiffs have no viable
24 answer to Defendants' equitable defenses. (*Id.*)

25
26
27 ¹ Plaintiff Becky Nash testified that she has *never* been to Coyote Curt's. (depo. of Becky Nash, p.
28 81:3-8, attached as Exhibit "10").

1 31. Neither Plaintiffs nor any other Property owners have attempted to enforce the Declaration
2 against any other property owner, despite the noted violations. (depo. of Catherine Cox, pp. 49:20-
3 24, 63:19-21, attached as Exhibit "5"; depo. of John Cundiff, pp. 49:5-50:15, 54:3-24, 55:21-59:18,
4 attached as Exhibit "8"; depo. of Barbara Cundiff, pp. 43:14-48:2, 49:7-10, 50:13-23, 51:11-53:25,
5 attached as Exhibit "9"; depo. of Becky Nash, p. 26:1-21, attached as Exhibit "10"; ; depo. of Kathryn
6 Page, pp. 36:6-9, 37:20-41:15, 124:2-8, attached as Exhibit "11"; depo. of Kenneth Page, p. 74:12-18,
7 attached as Exhibit "12"). This is acquiescence, and in the alternative, selective enforcement. (*Id. See*
8 *also* DSOF ¶¶ 23-30, *supra*).

9 32. Many property owners support the Coxes' tree farm. (Exhibit "17").

10 33. In fact, many owners have expressed their written support and offers to defray legal costs
11 associated with this frivolous lawsuit. (*See* written support for the Coxes' trees, from Grant L.
12 Griffiths -- owner of New Life Landscapes, Karrie Decker -- owner of Tranquil Spirits Alpaca Ranch,
13 Karen L. Wargo -- Wargo Construction, Frank and Laura Lamberson ("we are very much in favor and
14 would like it to stay"), Larry Kurtz ("their property is neat and clean"), RT Contracting Specialists,
15 Christin Bowra, Jeff and Mychel Westra -- llama ranch owners, Charles A. Hildebrandt ("complete
16 support") -- uses land for agriculture), attached as Exhibit "17").

17 34. Not only do factual circumstances exist for barring Plaintiffs' claims on the equitable bases of
18 laches, unclean hands, acquiescence, as set forth above, the CC&Rs themselves provide for
19 abandonment by this Court:

20 The foregoing restrictions and covenants run with the
21 land and shall be binding upon all parties and all
22 persons claiming through them until June 1, 994, at
23 which time said covenants and restrictions shall be
automatically extended for successive periods of ten
(10) years, or so long thereafter as may be now or
hereafter permitted by law.

24 (§ 17, Exhibit "14")

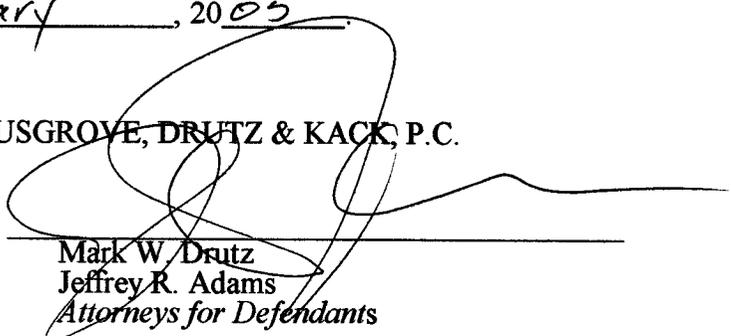
25 35. The CC&Rs also arguably permit agricultural activity. The CC&Rs only preclude commercial
26 or industrial activity: "No trade, business, profession or any other type of commercial or industrial
27 activity". (§ 2, Exhibit "14"). This clause is far from unambiguous. (*Id.*)

1 36. The Coxes' activity is purely agricultural – there is no office, no public, no transactions. The
2 drip irrigation and fertilization system is fully automated, requiring a minimal number of employees –
3 two to three. (depo. of Catherine Cox, pp. 14:15-22, 19, 20:14-17, 66:9-67:15, attached as Exhibit
4 "5", and documents relating to the Coxes automated drip irrigation and fertilization system, attached
5 as Exhibit "18").

6 37. The Coxes' tree cultivation is no different than a private estate having a full time grounds-
7 keeping crew to tend to the landscaping. (See, e.g., Exhibit "19" regarding San Simeon).

8 DATED this 11 day of January, 2005.

10 MUSGROVE, DRUTZ & KACK, P.C.

11
12 By 
13 Mark W. Drutz
14 Jeffrey R. Adams
15 Attorneys for Defendants

15 A copy of the foregoing was
16 hand-delivered this 12 day of
17 January, 2005 to:

17 David K. Wilhelmsen
18 Marguerite M. Kirk
19 FAVOUR, MOORE & WILHELMSSEN, P.A.
20 Post Office Box 1391
21 Prescott, Arizona 86302-1391
22 Attorneys for Plaintiffs
23
24
25
26
27
28