

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2005 MAY -9 PM 4:55

JEANNE HICKS, CLERK

BY: *[Signature]*

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

Attorneys for Defendants

7 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF YAVAPAI**

9
10 JOHN B. CUNDIFF and BARBARA C.
11 CUNDIFF, husband and wife; BECKY
12 NASH, a married woman dealing with her
13 separate property; KENNETH PAGE and
14 KATHRYN PAGE, as Trustee of the Kenneth
15 Page and Catherine Page Trust,

16 Plaintiffs,

17 v.

18 DONALD COX and CATHERINE COX,
19 husband and wife,

20 Defendants.

Case No. ~~2003-0309-1~~

Division No. 1

**OBJECTION TO PLAINTIFFS'
SUBPOENA DUCES TECUM**

(Assigned to the Honorable David L.
Mackey)

21 Prescott Valley Growers, by and through undersigned counsel, hereby objects, pursuant to the
22 provisions of Rule 45(c)(2)(B), Ariz. R. Civ. P., to the production for inspection and copying of the
23 documents, papers and tangible objects sought by the Subpoena Duces Tecum served on or about
24 April 23, 2005 on the following grounds. A copy of the Subpoena Duces Tecum is attached as
25 Exhibit "1" hereto.

26 Plaintiffs have requested all of the Prescott Valley Growers' tax returns for the years 1998-
27 2004 as well as "all business and financial documents and records or the like used in the preparation
28

DIV. 1

MAY 10 2005

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1 of the partnership returns.” Prescott Valley Growers’ submits that the foregoing request is overly
2 broad and would subject partners of Prescott Valley Growers who are not parties to the instant action
3 to surrender private tax returns and financial documentation that have absolutely nothing to do with
4 this case.¹ Prescott Valley Growers’ financial condition is not at issue in this case. Requiring the
5 production of the tax returns and documentation requested would result in the disclosure of
6 confidential financial information of a non-party (Prescott Valley Growers) to this action without a
7 showing of good cause by the Plaintiffs. 27 C.J.S., Discovery §90 states as follows:
8
9

10 As a general rule, under the statutes relating to the production and inspection
11 of books or papers, the private books or papers of persons not parties to the action are
12 not subject to discovery, even though they contain information which is important to
13 the preparation of the case for trial. On the other hand, it has been held that the
14 production of the records of a third person, not a party to the suit, may be ordered, in
15 the discretion of the court; but the court must consider whether good cause has been
16 shown for the examination, whether the person not a party to the suit may be unduly
17 affected by the revelation of the private affairs, and whether the books and records are
18 within the possession, custody, or control of the other party to the suit.

19 Furthermore, Plaintiffs have already been provided with Defendants’ K-1s for the years at
20 issue, which document Defendants’ pro rata share of each of the line items shown on Prescott Valley
21 Growers’ tax returns. Therefore, Plaintiffs already possess information related to Defendants’ interest
22 in Prescott Valley Growers that is contained in the tax returns and financial documentation requested.
23 Defendants have already produced to Plaintiffs all of their documentation, receipts and billing
24 statements for improvements made to the property, complete employee records, inventory and
25 maintenance records, and equipment purchase and maintenance records for all three of the

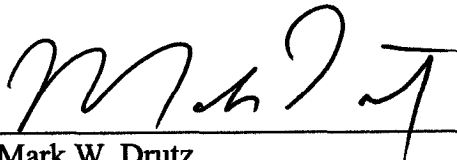
26 ¹The partners in Prescott Valley Growers who are not parties to this action are James M.
27 Cox and Alan L. Cox.

1 Defendants' properties – Prescott Valley Nursery located at 6195 E. Highway 69, Prescott Valley
2 Growers located at Prescott Valley, Arizona, 6750 North Robert Road, Prescott Valley, Arizona and
3 the subject property. Therefore, Plaintiffs' request is unreasonable.
4

5 Plaintiffs' request for financial information pertaining to Prescott Valley Growers is akin to
6 the proverbial "fishing expedition". Furthermore, the production of the documentation requested is
7 not likely to lead to discoverable evidence. Even if Plaintiffs were entitled to some of the tax returns
8 and documentation requested, their request is not sufficiently limited to only those items directly
9 related to the real property at issue in this case. For that reason, the request is vague and ambiguous.
10 Finally, Plaintiffs have failed to show that production of requested documents and tax returns are
11 "indispensable to [their] case and cannot be obtained elsewhere." 27 C.J.S. Discovery § 86. To the
12 contrary, Plaintiffs have already obtained all that they are entitled in that they have received
13 Defendants personal tax returns for the years in question along with their K-1s from Prescott Valley
14 Growers.
15
16

17 DATED this 9th day of May, 2005.
18

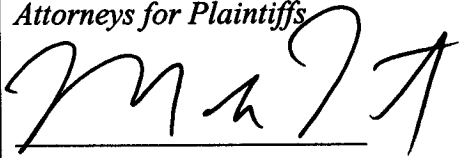
19 MUSGROVE, DRUTZ & KACK, P.C.

20
21 By 
22 Mark W. Drutz
23 Jeffrey R. Adams
24 *Attorneys for Prescott Valley Growers*
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1 COPY of the foregoing hand-delivered
2 this 9th day of May, 2005 to:

3 The Honorable David L. Mackey
4 Yavapai County Superior Court
5 Division 1
6 Yavapai County Courthouse
7 Prescott, Arizona 86301

8 David K. Wilhelmsen, Esq.
9 Marguerite M. Kirk, Esq.
10 Favour, Moore & Wilhelmsen, P.A.
11 1580 Plaza West Drive
12 Prescott, Arizona 86303
13 *Attorneys for Plaintiffs*



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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

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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

SUBPOENA DUCES TECUM

16
17 **THE STATE OF ARIZONA TO:** Custodian of Records
18 PRESCOTT VALLEY GROWERS
6195 East Highway 69
19 Prescott Valley, AZ 86314

20 **YOU ARE COMMANDED** to appear at the offices of Favour Moore & Wilhelmsen, P.A., 1580
21 Plaza West Drive, Prescott, Arizona, 86303, on May 10, 2005, at the hour of 8:30 a.m. to testify on
22 deposition at the instance of the Custodian of Records and to remain at the deposition until it is complete.

23 **YOU ARE ALSO COMMANDED** to bring with you and produce at the above time and place
24 the following:

25 **Complete copies of all Prescott Valley Growers' income tax returns**
26 **for the years 1998, 1999, 2000, 2001, 2002, 2003 and 2004**
including, but not limited to, all business and financial documents,

Exhibit "1"

1 records or the like used in the preparation of the partnership
2 returns.

3 Your Duties In Responding To This Subpoena

4 You have the duty to produce the documents requested as they are kept by you in the usual
5 course of business, or you may organized the documents and label them to correspond with the
6 categories set forth in this subpoena. See Rule 45(d)(1) of the ARIZONA RULES OF CIVIL PROCEDURE.

7 If this subpoena asks you to produce and permit inspection and copying of the designated
8 books, papers, documents, tangible things, or the inspection of premise, you need not appear to
9 produce the items unless the subpoena states that you must appear for a deposition, hearing or trial.
See Rule 45(c)(2)(A) of the ARIZONA RULES OF CIVIL PROCEDURE.

10 Your Right To Object

11 The party or attorney serving the subpoena has a duty to take reasonable steps to avoid
12 imposing an undue burden or expense on you. The superior Court enforces this duty and may impose
13 sanctions upon the party or attorney serving the subpoena if this duty is breach. See Rule 45(c)(1) of
the ARIZONA RULES OF CIVIL PROCEDURE.

14 You may object to this subpoena if you feel that you should not be required to respond to the
15 request(s) made. Any objection to this subpoena must be made within 14 days after it is served upon
16 you, or before the time specified for compliance, by providing a written objection to the party of
attorney serving the subpoena. See Rule 45(c)(2)(B) of the ARIZONA RULES OF CIVIL PROCEDURE.

17 If you object because you claim the information requested is privileged or subject to protection
18 as trial preparation material, you must express the objection clearly, and support each objection with
19 a description of the nature of the document, communication or item not produced so that the
demanding party can contest the claim. See Rule 45(d)(2) of the ARIZONA RULES OF CIVIL
20 PROCEDURE.

21 If you object to the subpoena in writing you do not need to comply with the subpoena until a
22 court orders you to do so. It will be up to the party or attorney serving the subpoena to seek an order
23 from the court to compel you to provide the documents or inspection requested, after providing notice
to you. See rule 45(c)(2)(B) of the ARIZONA RULES OF CIVIL PROCEDURE.

24 If you are not a party to the litigation, or an officer of a party, the court will issue a order to
25 protect you from any significant expense resulting from the inspection and copying commanded. See
Rule 45(c)(2)(B) of the ARIZONA RULES OF CIVIL PROCEDURE.

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2 You also may file a motion in the superior court of the county in which the case is pending to
3 quash or modify the subpoena if the subpoena:

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

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

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

13 (iv) subjects you to an undue burden. See Rule 45(c)(3)(A) of the ARIZONA RULES OF
14 CIVIL PROCEDURE.

15 If this subpoena:

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

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

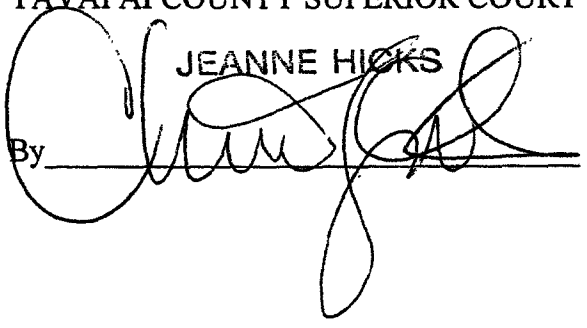
21 (iii) requires a person who is not a party or an officer of a party to incur substantial travel
22 expense;

23 The court may either quash or modify the subpoena, or the court may order you to appear or
24 produce documents only upon specified conditions, if the party who served the subpoena shows a
25 substantial need for the testimony or material that cannot be otherwise met without undue hardship
26 assures that you will be reasonably compensated. See Rule 45(c)(3)(B) of the ARIZONA RULES OF
CIVIL PROCEDURE.

In the event this subpoena is for appearance before the court, please contact the court stated
about to determine if the trial has been changed. Requests for reasonable accommodation for persons

1 with disabilities must be made to the court by parties at least three working days in advance of a
2 scheduled court proceeding. A.R.S. §§ 22-217, 12-2211; RCP 45(a) and (g), 53(e).
3 YOU ARE NOTIFIED HEREBY THAT ANY FAILURE TO OBEY THIS SUBPOENA WITHOUT
4 ADEQUATE EXCUSE MAY BE DEEMED A CONTEMPT OF THIS COURT, AND A CIVIL
5 ARREST WARRANT MAY BE ISSUED. A CIVIL ARREST WARRANT IS AN ORDER
6 DIRECTING ANY POLICE OFFICER IN ARIZONA TO ARREST YOU AND BRING YOU
7 BEFORE THIS COURT FOR FUTURE PROCEEDINGS.

8 SIGNED AND SEALED: _____ APR 19 2005

9 YAVAPAI COUNTY SUPERIOR COURT
10 JEANNE HICKS
11 By  _____

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1 COPY of the foregoing
2 Subpoena Duces Tecum
3 mailed this 20th day of
4 April, 2005, to:

4 Honorable David L. Mackey
5 Division One
6 Superior Court of Arizona
7 Yavapai County
8 Prescott, Arizona

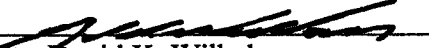
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12 Prescott, Arizona 86302
13 Attorneys for Defendants Cox

12 Lott Reporting
13 316 N. Alarcon
14 Prescott, AZ 86301

15

16

17

By: 
David K. Wilhelmsen
Marguerite Kirk

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