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8 *Attorneys for Defendants*

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2005 JUL 14 AM 11:03

JEANNE HICKS, CLERK ✓

BY: MBretton

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

MOTION TO CONTINUE TRIAL

(Expedited Oral Argument Requested)

(Assigned to the Honorable David L.
Mackey)

22 Pursuant to Yavapai County Superior Court Administrative Order No. 2004-03, Defendants
23 Donald and Catherine Cox (hereinafter the "Coxes"), through counsel undersigned, request that the
24 Court continue the trial in this matter. Based upon the numerous extensions previously requested by
25 Plaintiffs' counsel pertaining to the filing of and responding to dispositive motions there is insufficient
26 time for the Court to properly consider, and rule upon, Defendants' Motion to Join Indispensable
27 Parties Pursuant to Rule 19(a), Ariz. R. Civ. P., or, in the Alternative, Motion to Dismiss Pursuant
28 to Rule 12(b)(7), Ariz. R. Civ. P. ("Motion to Join"), Defendants' Motion for Summary Judgment

Div 1

1 Re: Agricultural Activities, and Defendants' Motion for Summary Judgment Re: Declaration
2 Vagueness and Ambiguity. In particular, if the Court grants Defendants' Motion to Join, there will
3 be insufficient time to join the indispensable parties prior to trial commencing on August 2, 2005.
4 Furthermore, Plaintiffs have not filed their list of expert and non-expert witnesses which has hindered
5 Defendants' trial preparation. This Motion to Continue is fully supported by the accompanying
6 Memorandum of Points and Authorities and the record on file herein.
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9 **MEMORANDUM OF POINTS AND AUTHORITIES**

10 On April 5, 2005, the Court established the calendar for this case including trial dates of
11 August 2, 3, 4, 5, 9 and 10, 2005. See April 5, 2005, Minute Entry. Pursuant to the Court's April 5,
12 2005 Minute Entry, non-expert witnesses were to be disclosed on May 19, 2005; dispositive motions
13 and the disclosure of expert witnesses were due on June 3, 2005; discovery cut-off was scheduled
14 for June 17, 2005; and Motions *in Limine* were due by July 1, 2005. Id. The Court also ordered that
15 this matter be assigned to Judge Hess of Division Pro Tem A for a settlement conference. *Id.*
16

17 On April 6, 2005, Judge Hess scheduled a settlement conference for June 20, 2005, requiring
18 settlement conference memorandum to be filed a week before the settlement conference. On June 6,
19 2005, Plaintiffs and Defendants filed their Stipulation Re: Expert and Non-Expert Disclosures,
20 Completion of Discovery and Dispositive Motions agreeing to continue the deadlines referenced
21 above to June 24, 2005, in an effort to avoid incurring the cost and expense of complying with the
22 deadlines originally established by the Court should this case have settled as a result of the settlement
23 conference. The Court granted this extension, signing its Order on June 10, 2005.
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26 On June 20, 2005, the parties participated in a settlement conference. However, the parties
27 were unable to reach a settlement. As a result, the parties have proceeded with litigation.
28

1 On June 24, 2005, Defendants were prepared to comply with the Court's June 10, 2005,
2 Order. Consequently, Defendants had completed their discovery, filed their (i) Motion to Join
3 Indispensable Parties Pursuant to Rule 19(a), Ariz. R. Civ. P., or, in the Alternative, Motion to
4 Dismiss Pursuant to Rule 12(b)(7), Ariz. R. Civ. P., for Failure to Join Indispensable Parties, (ii)
5 Motion for Summary Judgment Re: Declaration Vagueness and Ambiguity, and (iii) Motion for
6 Summary Judgment Re: Agricultural Activities, and were prepared to file their non-expert and expert
7 witness lists. However, late in the day on June 24, 2005, during a telephone conversation with
8 Plaintiffs' counsel, Defendants' counsel was asked to continue the deadlines set on June 10, 2005,
9 to June 30, 2005 because of a calendaring error on the part of Plaintiffs' counsel. As a courtesy to
10 Plaintiffs' counsel, Defendants' counsel agreed to the foregoing and signed the June 24, 2005,
11 Stipulation to Extend Time Limits Within Which to Disclose Witnesses, Expert Witnesses,
12 Dispositive Motions and to Complete Discovery. The Court granted the foregoing request, signing
13 the June 29, 2005, Order in which the Court also ordered that "no further extensions to file
14 dispositive motions will be granted." Complying with the June 29, 2005, Order, Defendants filed
15 their Notice of Filing Witness List on June 30, 2005. Defendants likewise complied with the April
16 5, 2005, Minute Entry by filing their Motion *in Limine*.

21 Late last week, on July 8, 2005, because of an upcoming vacation, Plaintiffs' counsel
22 requested an extension of time to respond to the motions filed by Defendants on June 24, 2005,
23 despite the Court's June 29, 2005, Order that "no further extensions to file dispositive motions will
24 be granted." Pursuant to Plaintiffs' request, responses to Defendants' June 24, 2005, motions would
25 be filed by July 18, 2005. Again, as a courtesy to Plaintiffs' counsel, Defendants' counsel agreed to
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1 this request, which will thus require that replies to Defendants' pending motions will be due just five
2 judicial days before trial.

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4 Based on the foregoing, Defendants submit that it would be appropriate to continue the trial
5 in this case. This request is made because (i) there will be insufficient time for the Court to
6 adequately consider the merits of Defendants' pending motions, conduct oral argument and render
7 its rulings prior to trial, (ii) complying with the present deadlines as they relate to Defendants'
8 pending motions and which have been extended will prevent the Court from evaluating any motions
9 to reconsider its rulings on Defendants' pending motions. This request also is necessary because (i)
10 Plaintiffs' failure to comply with the Court's June 29, 2005, Order requiring the filing of their list of
11 expert and non-expert witnesses by June 30, 2005, which has prevented Defendants from adequately
12 preparing for Plaintiffs' case in chief, and (ii) are continuing to conduct discovery past the discovery
13 cut-off date, having served Defendants with their Fifth Supplemental Rule 26.1 Disclosure Statement,
14 a copy of which is attached hereto as Exhibit "1", which identifies (a) a witness Plaintiffs presumably
15 expect to call during trial and (b) documentation Plaintiffs presumably expect to use during trial.

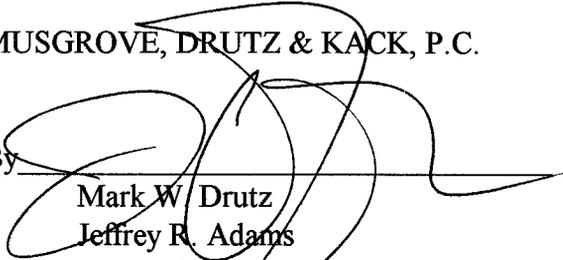
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19 No continuance of the trial has been requested or granted previously. A continuance would
20 not adversely affect either party as the parties have already stipulated to maintaining the status quo
21 pending the final outcome of this case and that stipulation will remain in full force and effect if a
22 continuance of the trial date is granted. Continuation of the trial date will provide the Court with
23 sufficient time to thoughtfully consider Defendants' pending motions, to allow Plaintiffs' an
24 opportunity to provide Defendants with their list of witnesses and consequently allow Defendants to
25 adequately prepare for trial and will enable both Plaintiffs and Defendants to complete their discovery
26 as it is apparent from Plaintiffs' most recent disclosure statement, they wish to continue discovery.
27
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1 As required by Yavapai County Superior Court Administrative Order No. 2004-03, Plaintiffs' counsel
2 was contacted to discuss the request herein. Plaintiffs' counsel refused to take undersigned's
3 telephone call. As a result, a message explaining the purpose of the telephone call was left. In
4 response, undersigned received the letter attached hereto as Exhibit "2" from Plaintiffs' counsel
5 advising us that they object to the request for a continuance of the trial. Nonetheless, based on the
6 facts set forth above, continuance of the trial date in this case is proper.
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9 Finally, in the event Plaintiffs oppose this trial continuance, Defendants request that the Court
10 enforce its Order dated June 29, 2005 requiring the filing of the parties' list of expert and non-expert
11 witnesses by June 30, 2005 and based upon Plaintiffs' failure to comply with this Court Order, they
12 should be precluded from calling any witnesses at trial.
13

14 RESPECTFULLY SUBMITTED this 14 day of July, 2005.

15 MUSGROVE, DRUTZ & KACK, P.C.

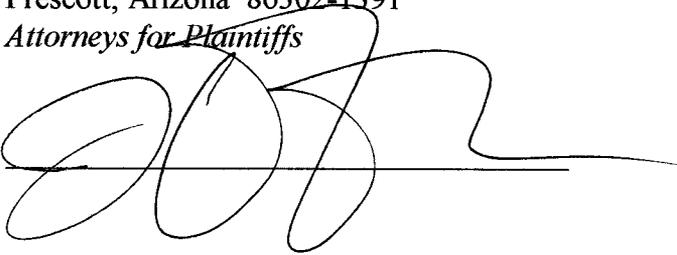
16
17 By 

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

22 COPY of the foregoing hand-delivered
23 this 14 day of July, 2005, to:

24 Honorable David L. Mackey
25 Yavapai County Superior Court
26 Division 1
27 Yavapai County Courthouse
28 Prescott, Arizona 86301

1 David K. Wilhelmsen, Esq.
2 Marguerite M. Kirk, Esq.
3 Favour, Moore & Wilhelmsen, P.A.
4 1580 Plaza West Drive
5 Post Office Box 1391
6 Prescott, Arizona 86302-1391
7 *Attorneys for Plaintiffs*

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to be the name of one of the attorneys listed above.

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1 FAVOUR MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
2 Prescott, AZ 86302-1391
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3 David K. Wilhelmsen, #007112
Marguerite Kirk, #018054
4 Attorneys for Plaintiffs

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,)**
14 **Plaintiffs,)**
15 **vs.)**
16 **DONALD COX and CATHERINE COX,)**
17 **husband and wife,)**
18 **Defendants.)**

Case No. CV 2003-0399

Division 1

**PLAINTIFFS' FIFTH
SUPPLEMENTAL
RULE 26.1
DISCLOSURE STATEMENT**

19 Pursuant to Rule 26.1(b)(2), Ariz.R.Civ.Proc., Plaintiffs, John and Barbara Cundiff, Becky
20 Nash, and Kenneth and Kathryn Page, hereby supplement their Rule 26.1 disclosure statement and
21 make the following additional disclosure.

22 **III. Identity of Witness(es) and Substance of Expected Testimony**

23 (I) Steven Stein, CPA
1113 West Mohawk Lane
24 Phoenix, Arizona 85027-3680
25 P: (623) 582-2688

26 Description of Testimony: Mr. Stein will testify as to his preparation of Prescott Valley Growers' tax
returns for the years 2000 through 2004.

EXHIBIT " 1 "

1 **VIII. Existence, Location, Custodian and Description of Tangible Evidence and Documents**

2 Plaintiffs have identified the following tangible document and evidence that may be introduced
3 at time of trial:

4 (L) Prescott Valley Growers Partnership tax returns for 2000, 2001, 2002, 2003 and 2004
5 which are already in Defendants possession as they produced them through discovery.

6 Plaintiffs reserve the right to supplement their disclosure statements as discovery progresses.

7 DATED this 11TH day of July, 2005.

8 FAVOUR MOORE & WILHELMSSEN, P.A.

9
10 By: Marguerite Kirk
11 David K. Wilhelmsen
12 Marguerite Kirk

13
14 Original of the foregoing mailed
this 11TH day of July, 2005 to:

15 Mark Drutz
16 Jeffrey Adams
17 MUSGROVE, DRUTZ & KACK, P.C.
18 1135 Iron Springs Road
19 Prescott, Arizona 86305
20 Attorneys for Defendants Cox

21 By: Marguerite Kirk
22 David K. Wilhelmsen
23 Marguerite Kirk
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25
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July 13, 2005
File No. 10641.001

via Facsimile & U.S. Mail

Mark Drutz
Jeffrey Adams
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 Jeff:

In response to your voice mail message today that you were contacting our office pursuant to local rule to discuss your intention of filing a motion to continue the trial in this matter based upon Mark's grant of an extension of time to Dave until Monday, July 18, 2005, to file responses to your motions for summary judgment, motion *in limine* and motion to join indispensable parties, as well as prior extensions of time to file dispositive motions and extend discovery deadlines, please be advised that we are opposed to continuing the trial in this case.

The extension of time your office requested which was agreed upon for the filing of dispositive motions was for your benefit, allowing you to file two (2) motions for summary judgment, as well as a motion to join as indispensable parties *all* homeowners in the subject subdivision. Without addressing the merits of any of those motions, each of those motions raised issues that could have been raised by you much earlier in the course of proceedings. Indeed, the motion to join indispensable parties could have been filed two years ago when your clients were served with the complaint as you had ample notice and opportunity to determine at that juncture whether neighbors were indispensable parties as you now claim. The complaint was filed May 15, 2003 and your clients were served June 16, 2003.

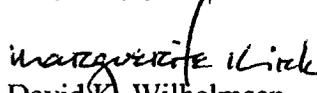
EXHIBIT " 2 "

Furthermore, the extension of time to file disclosure statements, complete discovery, and file dispositive motions was at your office's request. Only days prior to the June 30, 2005 deadline ordered by the Court did you file your motions for summary judgment and motion to join indispensable parties. It is extremely suspect that at the eleventh hour prior to trial would you now request a trial continuance based upon your office's request for an extension of time to file dispositive motions. That Mark agreed to give Dave an extension of time until after Dave returns from vacation to file responses to your motions does not change your underlying rationale for requesting a trial continuance. Extensions of time to accomplish filings and discovery are relatively routine and a matter of convenience. The agreement to extend time cannot thereafter be used to bootstrap a request for a trial continuance. The timing and rationale for your request for a trial continuance appears in bad faith and motivated by an improper purpose.

Finally, the time and cost associated with a trial continuance at this juncture in the proceedings compels that trial proceed on August 2, 2005. It is extremely difficult to obtain six (6) days for a jury trial on the Court's calendar. To delay trial (which practically speaking would probably not be reset until next year), with the consequent additional opportunity to you to file even more motions and conduct additional discovery, unnecessarily protracts the proceedings and increases the cost of litigation. This cost and expense is not limited to our clients; it is an inexcusable cost and expense to you seek to have the Court bear as well.

Therefore, we oppose any motion you may file with the Court to continue trial in this matter. Should you file your motion and attest to contacting our firm to discuss this matter, fairness to the Court demands that you attach this letter to your motion as an accurate representation of our position.

Very truly yours,


David K. Wilhelmsen
Marguerite Kirk
For the Firm

cc: Kenneth and Kathryn Page
John and Barbara Cundiff