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8 Attorneys for Defendants

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; ELIZABETH)
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 1

**MOTION FOR RECONSIDERATION
RE: PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT RE:
DEFENDANTS' VIOLATIONS OF
RESTRICTIVE COVENANTS;
AFFIRMATIVE DEFENSES OF
ESTOPPEL, LACHES AND UNCLEAN
HANDS**

(Oral Argument Requested)

(Assigned to the Honorable David L.
Mackey)

22 Pursuant to Rule 7.1(e), Ariz. R. Civ. P., Defendants Donald and Catherine Cox submit their
23 Motion for Reconsideration Re: Plaintiffs' Motion for Summary Judgment Re: Defendants' Violations
24 of Restrictive Covenants; Affirmative Defenses of Estoppel, Laches and Unclean Hands ("Plaintiffs'
25 Motion") and urge that the Court revisit that motion and ruling. Plaintiffs assert that Defendants are
26 bound under the terms of the Declaration of Restrictions, that the Declaration of Restrictions is
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1 enforceable as a contract to which Defendants and all other property owners in the subdivision are
2 bound. The Plaintiffs assert their right to enforce the Declaration of Restrictions against the
3 Defendants and by, between and against all other property owners in the subdivision. Plaintiffs are,
4 in fact, carrying the banner of enforcement not only for themselves but for other property owners who
5 stand to benefit should Plaintiffs prevail and against others engaged in, in many instances, the very same
6 activities and uses of their properties as Defendants and who will suffer a detriment by the belated
7 enforcement of the Declaration of Restrictions.

8 In responding to Plaintiffs' Motion, Defendants submitted evidence supporting their contention
9 that disputed material facts exist that preclude summary judgment on Defendants' affirmative defenses
10 of estoppel, laches and unclean hands as those defenses apply specifically to these Defendants and
11 Plaintiffs and that go beyond simply the issue of whether the Declaration of Restrictions at issue is
12 enforceable as articulated in its April 4, 2005, Under Advisement Ruling. This Motion for
13 Reconsideration is fully supported by the accompanying Memorandum of Points and Authorities and
14 the record on file.
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17 MEMORANDUM OF POINTS AND AUTHORITIES

18 I. Estoppel.

19 A claim for equitable estoppel arises when one by his acts, representations or omissions
20 intentionally or through culpable negligence induces another to believe and have confidence in certain
21 material facts and the other justifiably relies and acts on such belief causing him injury or prejudice.
22 St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co., 154 Ariz. 307, 742 P.2d 808 (1987); In re
23 Trigg's Estate, 102 Ariz. 140, 426 P.2d 637 (1967); So. Pac. R. Co. of Mexico v. Gonzalez, 48 Ariz.
24 260, 61 P.2d 377 (1936); Terry v. Lincscott Hotel Corp., 3 Ariz.App. 330, 617 P.2d 56 (1980)
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(emphasis added). The doctrine of equitable estoppel is well-established in Arizona and applies to cases involving contracts. Hetzell v. Mecham Pontiac, 152 Ariz. 58, 730 P.2d 235 (Ct. App. 1986). To prevail on this defense as it applies solely to Plaintiffs, and ignoring all of the other property owners who slept on their rights, Defendants must show merely that Plaintiffs by their acts, intentionally or through culpable negligence, induced Defendants to believe that they did not have to comply with the Declaration of Restrictions and thereby causing Defendants to rely upon their belief. In response to Plaintiffs' Motion, Defendants established that prior to filing their lawsuit on May 16, 2003, Plaintiffs made no effort to enforce the Declaration against Defendants. See Defendants' Separate Statement of Facts in Support of Response to Motion for Summary Judgment filed on January 11, 2005 ("DSOF") at ¶ 16. Specifically, Defendants established that over the course of the 1 1/2 years and prior to filing their lawsuit, Defendants constructed their improvements and began using their property as a tree farm, Plaintiffs took no action to put Defendants on notice that they might be violating the Declaration of Restrictions. Id. at ¶ 18-19. Defendants established this was the case despite the fact that each time they drove on Coyote Springs Road between 2000 and May, 2003, Plaintiffs observed Defendants' improvement and use of the Subject Property. Id. at ¶ 20.

Although Plaintiffs assert that the Declaration of Restrictions is enforceable as a contract against Defendants, prior to filing this lawsuit, Plaintiffs never even had a personal or telephonic conversation with Defendants advising them that they believed the use of the Plaintiffs' property violated any restrictive covenant. Id. at ¶ 17. Likewise, property owner in Defendants' subdivision, including Plaintiffs, ever undertook any effort to enforce the Declaration of Restrictions against any other property owner. Rather, Plaintiffs waited by until Defendants had completed their investment of over \$500,000.00 in their property and some time after they began using it to assert their objection

1 by filing their lawsuit Id. at ¶¶ 5, 16-22. Plaintiffs' silence and failure to act constituted their tacit
2 permission to Defendants to proceed with their development and use of their property upon which
3 Defendants relied to their detriment i.e. their investment of more than \$500,000.00.

4 Based on the foregoing, at a minimum a material question of fact exists that should go to the
5 jury regarding whether Plaintiffs' conduct induced Defendants to believe and have confidence in their
6 right to proceed as they did that they justifiably relied upon to their injury or prejudice. In its April 4,
7 2004, Under Advisement Ruling, the Court ruled that the facts established in Defendants' response to
8 Plaintiffs' Motion "do not rise to estoppel, laches and unclean hands as a matter of law." This
9 statement appears to demonstrate some weighing of the evidence by the Court. The Arizona Supreme
10 Court has established that summary judgment is inappropriate "where the trial judge would be 'required
11 to pass on the credibility of witnesses with differing versions of material facts, ... required to weigh the
12 quality of documentary or other evidence, and ... required to choose among competing or conflicting
13 inferences.'" Orme School v. Reeves, 166 Ariz. 301, 311, 802 P.2d 1000, 1010 (1990). Because
14 Defendants have presented a material question of fact, Defendants should be permitted to present the
15 defense of estoppel to the jury.
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18 **II. Laches.**

19 A person must exercise diligence and avoid unreasonable delay in pursuing a claim, the
20 enforcement of which would prejudice another party. Barr v. Petzhold, 77 Ariz. 399, 406, 273 P.2d
21 161 (1954), and Sotomayor v. Burns, 199 Ariz. 81, 82-83, 13 P.3d 1198 (2000). As set forth above,
22 Defendants have presented numerous material facts demonstrating Plaintiffs' lack of diligence and
23 delays in seeking to enforce the Declaration of Restrictions against Defendants. Defendants also have
24 presented evidence demonstrating the prejudice to them in the event the Declaration of Restrictions
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1 are enforced against the Defendants – namely the loss of more than \$500,000.00 invested in their
2 property. Therefore, the jury should be entitled to determine whether Plaintiffs’ conduct is sufficient
3 to constitute laches.

4 **III. Unclean Hands.**

5 An owner of property in a planned subdivision who has violated restrictive covenants cannot
6 enforce the restrictive covenants against others. 20 AmJur2d Covenants, § 276 at 695; 20 AmJur2d
7 Covenants, § 284 at 704; Restatement of Property §§ 550 and 560; Atwood v. Walter, 714 N.E.2d 165
8 (Mass. 1999), 42 Am.Jur. Proof of Facts 3rd at 463, Circumstances Establishing Equitable Defense to
9 Breach of Restrictive Covenant. Although not disclosed as should have been by Plaintiffs, Defendants
10 discovered and produced uncontroverted evidence that Plaintiffs Nash and Page have patronized, and
11 thus fostered, Coyote Curt’s Automotive Repair, which is located in the portion of Coyote Springs
12 Ranch where Defendants’ property is located. See DSOF, ¶ 30. Plaintiffs conduct in transacting
13 business and commercial transactions with other Coyote Springs Ranch constitutes the very conduct
14 of which they allege Defendants have engaged in. Thus, Plaintiffs have promoted violations of the
15 Declaration of Restrictions.

16 Whether Plaintiffs have patronized other Coyote Springs Ranch businesses is unknown since
17 they denied, during their depositions, that they possessed any knowledge of any businesses in the
18 subdivision, which we now know to be an untrue statement. However, the conflict between Plaintiffs’
19 testimony and the documentary evidence creates doubt and should be taken by this Court as evidence
20 of a dispute as to a material fact for purposes of ruling on the request for summary judgment. More
21 importantly, equity demands that by coming to this Court with unclean hands – namely engaging in
22 the very type of conduct they claim Defendants engage in – mandates that Plaintiffs be prevented from
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1 pursuing their claims against the Defendants. At a minimum, the foregoing constitutes a material
2 question of fact concerning the Plaintiffs' right to enforce the Declaration of Restrictions against
3 Defendants. A jury should thus be entitled to consider this defense and its viability as it applies
4 specifically to Plaintiffs and Defendants.

5 **III. Conclusion.**

6 Based on the foregoing, this Court should reconsider its ruling on Defendants' defenses of
7 estoppel, laches and waiver. Defendants have presented legitimate questions of fact supporting those
8 defenses. Those questions of fact are material and go to the heart of Defendants' defense in this case
9 and the viability of Plaintiffs' right to enforce the Declaration of Restrictions. The weight of the
10 evidence to be given these defenses should be left to the jury. Orme School v. Reeves, 166 Ariz. 301,
11 311, 802 P.2d 1000, 1010 (1990).

12 DATED this 25 day of July, 2005.

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14 MUSGROVE, DRUTZ & KACK, P.C.

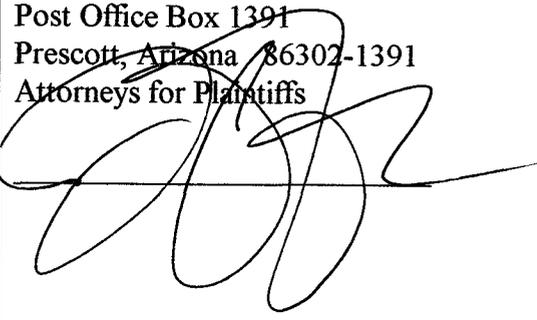
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16 By _____

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

21 A copy of the foregoing was
22 hand-delivered this 25 day of
23 July, 2005 to:

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

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A large, stylized handwritten signature in black ink, likely belonging to David K. Wilhelmsen, is written over the address information. The signature is highly cursive and loops around the text.

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