

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

JEANNE HICKS, CLERK

IN AND FOR THE COUNTY OF YAVAPAI

BY: 

JOHN B. CUNDIFF, et ux, et al, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 DONALD COX, et ux, )  
 )  
 Defendants. )

No. CV 2003-0399

HEARING ON MOTION  
FOR SUMMARY JUDGMENT

**REPORTER'S TRANSCRIPT OF PROCEEDINGS  
Before the Honorable David L. Mackey  
Judge of the Superior Court**

Prescott, Arizona  
July 26, 2005

**ORIGINAL**

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1 (The Plaintiffs were represented by  
2 David K. Wilhelmsen and Marguerite Kirk,  
Attorneys at Law.)

3 (The Defendantz were represented by  
4 Mark Drutz and Jeffrey Adams,  
Attorneys at Law.)

5 (July 26, 2005)

6  
7 THE COURT: This is CV 2003-0399, John and Barbara  
8 Cundiff, et al, vs. Donald and Catherine Cox. Plaintiffs are  
9 represented by David Wilhelmsen and Marguerite Kirk.

10 Mr. Wilhelmsen, are your clients present?

11 MR. WILHELMSEN: No they're not, Your Honor.

12 THE COURT: And the Defendants are represented by  
13 Mark Drutz and Jeff Adams.

14 Mr. Drutz, are your clients present?

15 MR. DRUTZ: Yes, Your Honor.

16 THE COURT: All right. This is the time the court  
17 had set for oral argument on pending motions as well as a  
18 pretrial conference.

19 The first motion I would like to address is the  
20 motion for summary judgment regarding agricultural activities.  
21 I've reviewed the motion, the statement of facts by the  
22 Defendant, Plaintiff's response, and the Plaintiff's  
23 controverting statement of facts. I've considered the file.  
24 And given the number of motions we have today, I'm going to  
25 limit counsel's arguments to ten minutes per side on this

1 issue.

2 Mr. Drutz, do you or Mr. Adams wish to argue that  
3 motion?

4 MR. DRUTZ: I'll argue this one if it's all right,  
5 Judge.

6 THE COURT: You may proceed.

7 MR. DRUTZ: Thank you, Your Honor. I probably won't  
8 even take ten minutes I'm sure, Judge. You've read the  
9 pleadings and you can see the dispositive paragraph as far as  
10 this motion is concerned is Paragraph 2 of the declaration of  
11 covenants -- restrictions, and it prohibits trade, business,  
12 profession or any other type of commercial or industrial  
13 activity.

14 There is no definition in the CC&Rs, the  
15 declaration, as to what those terms mean, so they're of course  
16 to be given their ordinary meaning, and in our motion we stated  
17 what the ordinary meaning is according to Webster, and actually  
18 the Plaintiff I don't even think disputes that. Significantly,  
19 what isn't contained in that Paragraph 2 is any prohibition to  
20 agricultural activities. And that's exactly what we have here.

21 This case has gone on for a long time but really  
22 what we've got going on in my clients' Coyote Springs  
23 property -- remember in this case the clients are Don and  
24 Catherine Cox -- what they have got going out on that property,  
25 they reside there, is a tree farm, an agricultural activity.

1 It's got an exemption from Yavapai County.

2           It's undisputed that they're not transacting any  
3 commercial or business activities out there, they're not  
4 selling trees, it's not a retail operation, they don't have  
5 customers coming to the property. I mean they're growing  
6 trees. And the objection that we have from the Plaintiffs to  
7 our motion for summary judgment, their basis is they link  
8 what's going on at the Coyote Springs property, which is  
9 subject to Paragraph 2, to what is going on at the Prescott  
10 Valley Nursery miles away. And that property is owned --  
11 Prescott Valley Nursery is a completely different entity. It's  
12 a partnership, of which the Coxes are two of the four partners.  
13 Their two sons are the other partners.

14           And what you've got in the pleadings in front of you  
15 is an effort by the Plaintiff to say, no, you have to combine  
16 what's happening at the Coyote Springs property where they're  
17 growing trees, an agricultural activity, and that they are then  
18 being sold somewhere else and that makes it a business. That's  
19 what their argument is, it's a business. They're not saying  
20 it's a commercial activity out there or industrial, they're  
21 saying what's happening out at Coyote Springs is a business.  
22 But the only way that they can do that is if they link what's  
23 happening out at Coyote Springs with what's happening out at  
24 the Prescott Valley Nursery. And it's just simply put, our  
25 position is you can't do that.

1           What's happening out at the Prescott Valley Nursery  
2 is not subject to Paragraph 2. Paragraph 2 only applies to  
3 Coyote Springs, and you really can't bootstrap what's occurring  
4 at the Prescott Valley Nursery onto what's occurring at Coyote  
5 Springs and say, well, since you're raising trees at Coyote  
6 Springs and that you're ultimately going to sell some of those  
7 trees at a different location, arguably, that that makes what's  
8 happening at Coyote Springs a business.

9           And if they wanted to prohibit agricultural  
10 activities, then when they drafted Paragraph 2 they simply had  
11 to have a provision in Paragraph 2 that says agricultural  
12 activities are prohibited, and then we wouldn't be making this  
13 argument. But there isn't any prohibition to it. When you  
14 look at the ordinary meaning of trade, business, commercial  
15 activity, it doesn't include what's happening out at the Coyote  
16 Springs.

17           Now the court has in front of it -- and I just  
18 wanted -- not from this motion, Judge, but obviously you've got  
19 some other motions for summary judgment where there was --  
20 might I approach and hand the court some pictures? These are  
21 already in the record.

22           THE COURT: Mr. Wilhelmsen, any objection?

23           MR. WILHELMSSEN: Let me take a look at it.

24           MR. DRUTZ: What I wanted to hand the court --

25           MR. WILHELMSSEN: If they're for demonstrative

1 purposes, that's one thing, but if it's for some purpose to be  
2 entertained as part of the summary judgment it would be clearly  
3 inappropriate.

4 THE COURT: Mr. Drutz, I think I'm going to avoid  
5 looking at photographs right now. You want me to make a  
6 decision on this motion on the record, and I've reviewed the  
7 record and I'm familiar with it and familiar with what else is  
8 in the file, so I'm going to decline your offer of the  
9 photographs, for this motion. If they're helpful for  
10 demonstrative purposes after the argument on this motion then I  
11 might take you up on that.

12 MR. DRUTZ: Okay, Judge. For the purpose just so we  
13 know and the record is clear, the photographs that I wanted to  
14 show the court were attached as exhibits to our statement of  
15 facts to other motions for summary judgment that are already  
16 part of the record in this case. And the Court's I'm sure  
17 familiar with the statement of facts from the other motions.

18 And what we have out at the Coyote Springs property  
19 is we've got a Christmas tree farm. As an example, we've got a  
20 nursery owned by a person by the name of Debra Gustafson.  
21 We've got an organic farming parcel owned by another party by  
22 name of Gary and Diane Cordes. We've got other activities out  
23 at the Coyote Springs property which are absolutely consistent  
24 with what my clients are doing on their property. And what I'm  
25 pointing out to the court that those are also agricultural

1 activities. There's really no other way to look at them.  
2 They're either agricultural activities consistent with my  
3 client's agricultural activities or you could say it's a  
4 classic case of selective enforcement where they're saying that  
5 those activities are also prohibited by Paragraph 2 of the  
6 declaration but they're not going to try to enforce Paragraph 2  
7 against those people; rather they only want to enforce it  
8 against my clients.

9 I'm going to give them the benefit of the doubt, the  
10 Plaintiffs, and assume they're not trying to do that, that  
11 they're not trying to say that they're only going to enforce  
12 Paragraph 2 against my clients and not against other people;  
13 rather what I'm going to say is that these other activities  
14 support our client's proposition that what we're doing is  
15 agricultural activities out there, just like these people are  
16 doing agricultural activities. And they don't fall within the  
17 scope of Paragraph 2.

18 And if the Plaintiffs wanted agricultural activities  
19 to be prohibited by Paragraph 2 then they should have put it in  
20 there. But because they didn't put agricultural activities in  
21 the scope of Paragraph 2 and because they don't have any  
22 definitions of trade, business, you can't really argue with a  
23 straight face that what my clients are doing out there is  
24 prohibited by Paragraph 2. Rather all you can do is what the  
25 Plaintiffs have tried to do, which is to bootstrap what's going



1 on at the Prescott Valley Nursery, miles away, owned by a  
2 partnership, a different legal entity than Don and Catherine  
3 Cox, and argue that those activities taken in conjunction with  
4 what's occurring at Coyote Springs constitutes a business  
5 activity. And we're saying you can't do that, you have to  
6 separate them out, you've got to look at what's happening at  
7 Coyote Springs.

8           So consequently it's our belief that we're entitled  
9 to summary judgment because it's not an agricultural activity.  
10 If they wanted agricultural activities to be prohibited, they  
11 should have drafted a set of CC&Rs that did that.

12           Thank you, Your Honor.

13           THE COURT: So essentially it's the Defendant's  
14 position that there's no factual disputes, and by that you're  
15 not disputing for the purpose of this motion the factual  
16 allegations raised by the Plaintiff, namely that there's three  
17 employees that work on the property and that ultimately the  
18 trees that are grown are sold at another location.

19           MR. DRUTZ: We would dispute the fact, Judge, and we  
20 didn't get to file a reply, we would dispute the the fact there  
21 are three employees, because Don and Catherine Cox live out  
22 there. We do have a gardener who is out there on the property.  
23 So we would dispute that there are three separate employees  
24 that are working for the Prescott Valley Nursery out there on  
25 the Coyote Springs property, we would dispute that. For

1 purposes of the motion, I won't dispute that the trees that are  
2 grown on the Coyote Springs property, that some of those trees  
3 are sold at the Prescott Valley Nursery. But that nothing is  
4 sold at the Coyote Springs property.

5           You know, I -- when I read the motion before we came  
6 over here today, I thought, are they arguing that we're not  
7 entitled to summary judgment because it's a question of fact?  
8 And I think that other than the fact that I touched on the  
9 facts, you know, aren't in dispute as to the ones that favor  
10 us, nor is it really in dispute that some of the trees are  
11 ultimately sold at a different location, however we do dispute  
12 the fact that we've got three employees out there.

13           A jury I think, if the court denied the motion for  
14 summary judgment on the grounds there's questions of fact in  
15 dispute or inferences, then I guess we would argue to a jury,  
16 much as like we're arguing now, that a tree farm is an  
17 agricultural activity and doesn't fall within the scope of  
18 Paragraph 2. But I think also for our motion for summary  
19 judgment it's a question of law for the court, and I would be  
20 arguing to you as a matter of law, and because we filed the  
21 motion for summary judgment, that we're seeking a determination  
22 that there aren't any facts in dispute and we're entitled to  
23 judgment as a matter of law that the tree farm is an  
24 agricultural activity and it doesn't fall within the scope of  
25 Paragraph 2.

1           If the court denied the motion for summary judgment,  
2 they wouldn't get summary judgment correspondingly, rather it  
3 would just be one of however many other issues to argue to a  
4 jury as to whether or not Paragraph 2 includes this activity.

5           THE COURT: I guess the one factual dispute that I'm  
6 seeing, though, that you just covered, is whether or not there  
7 are three employees or not, and if that were the issue that the  
8 court were getting hung up on I'm wondering whether you and  
9 your client might not concede that for the purpose of this  
10 motion there is no factual dispute that there are three people  
11 working out there that are paid in some way by a business  
12 that's located at another place, so that I can get to the point  
13 that I believe you're trying to make of making a legal  
14 determination that regarding the language.

15           MR. DRUTZ: Could I have a moment, Judge?

16           THE COURT: Yes.

17           MR. DRUTZ: I said I wasn't going to use ten minutes  
18 and look what I've done.

19           THE COURT: And specifically the Paragraph I'm  
20 looking at is in the Plaintiff's controverting statement of  
21 facts on the bottom of Page 2, Defendant Cox testified that at  
22 the time of her deposition the partnership employed three  
23 employees at their Coyote Springs ranch property.

24           MR. DRUTZ: At present, Your Honor, Don and  
25 Catherine Cox, who are partners in Prescott Valley Nursery

1 Growers, reside on the Coyote Springs property and there's one  
2 employee other than the two Coxes who is paid by Prescott  
3 Valley Growers, who is on the Coyote Springs property  
4 maintaining the trees.

5 THE COURT: Thank you.

6 MR. DRUTZ: Thank you, Your Honor.

7 THE COURT: Mr. Wilhelmsen, are you or Ms. Kirk  
8 going to argue this?

9 MR. WILHELMSSEN: I'm going to argue it, Your Honor.

10 THE COURT: You can take it by my comments that I'm  
11 considering that it's really a legal interpretation and that  
12 I'll assume all of your facts are not disputed for the purpose  
13 of this motion. So I guess I need two different things from  
14 you: One, am I wrong in concluding that there are no disputed  
15 facts, taking all of your alleged facts as true for the purpose  
16 of this motion; and two, if I do that, whether or not I should  
17 conclude as a matter of law that the CC&Rs don't include a  
18 prohibition against the activity the Coxes are engaging in at  
19 this time.

20 MR. WILHELMSSEN: I think you may be correct in  
21 characterizing this not being a factual dispute. Quite frankly  
22 I'm baffled by the nature of the motion. The nature of the  
23 motion is this is an agricultural activity and thus it's not  
24 prohibited under the restrictive covenants, and then taking it  
25 logically you may allow it to continue. That has nothing to do

1 with our case.

2           Our case specifically is a case to enforce a  
3 prohibition against a business activity. The fact that it  
4 might be agricultural in nature has no bearing on the decision  
5 that this court is going to make. If you look at Paragraph 2  
6 of the restrictive covenants, it prohibits business and  
7 commercial activities.

8           The Coxes admitted their purpose in purchasing this  
9 property was to have a place to house excess inventory for  
10 their retail and wholesale operations. They admitted at their  
11 depositions that this particular piece of property is embraced  
12 within the partnership which encompasses the retail and  
13 wholesale operations.

14           They admitted during their depositions that they had  
15 three employees out on the property that were all part of their  
16 payroll. As part of their disclosure in this case they have  
17 submitted evidence in their tax returns that they are  
18 depreciating as a business purpose property which is located on  
19 Coyote Springs -- at the Coyote Springs property. They have  
20 admitted that their purpose in purchasing was to enhance their  
21 profitability.

22           They also have obtained an agricultural use permit.  
23 And in order for them to obtain an agricultural use permit by  
24 the county -- because ordinarily you can't have this sort of an  
25 agricultural activity unless you get such a permit -- there

1 must -- you must assure the county, and there's eight separate  
2 categories that must be complied with, that there's a  
3 reasonable expectation of operating at a profit. Okay?

4           So I mean if you look at this file through their own  
5 admissions, it is just replete with their own admissions and  
6 assurances and statements and concessions that this is part and  
7 parcel of their retail and wholesale operation. In essence  
8 they need a place to put their excess inventory so that they  
9 can supply their retail operation which is located on Highway  
10 69, and they need a place to put their excess inventory for the  
11 wholesale operation that's on Viewpoint Road, and they need a  
12 place to grow trees.

13           So those are really the two things. Mrs. Cox  
14 admitted during her deposition they would order bare root trees  
15 once a year and they would plant them and grow them and this is  
16 the place they would do it. This is very similar in a  
17 situation to Intel Corporation producing chips that it later  
18 incorporates into a computer and sells somewhere else. Because  
19 the chips aren't sold on site doesn't make it any less a  
20 commercial activity. The fact that this is of an agricultural  
21 nature doesn't make it any less a commercial activity. An  
22 operating ranch is a commercial activity and it's clearly  
23 agricultural in nature. It's clearly commercial activity even  
24 though bulls and cattle are not sold on site, they're usually  
25 taken to a remote site and sold there.

1           So for the argument to be presented that this is not  
2 commercial activity because there isn't a sale occurring at  
3 Coyote Springs is completely astonishing to me. And if you  
4 look at Mrs. Cox's deposition, which has been appended to our  
5 response, she's clear, she says we agree we had a profit motive  
6 for buying this property, for warehousing our plants, for  
7 growing trees, it's an integral part of the trees, it's part of  
8 the partnership, we have employees there that we pay, we  
9 depreciate business property there, she says, but it's my  
10 opinion that a business is not a business if you don't have  
11 onsite sales.

12           That's what this is all about.

13           Now the argument has been presented for the purposes  
14 of this summary judgment that since it's agricultural that  
15 somehow this case should be decided. Well that doesn't -- that  
16 doesn't address the true issue before this court, and that is  
17 whether it's a business that is being transacted. And this is  
18 an integral part of their wholesale and retail nursery  
19 business, it is precisely the reason that they purchased this  
20 property, and it's clearly a business purpose and it's one that  
21 they had to assure the county was a business purpose for  
22 purposes of getting their exemption.

23           I believe that based on the evidence that has been  
24 submitted in connection with the motion we could countermove  
25 for this court to determine it is commercial in nature. There

1 aren't any facts in dispute.

2           Now I know that their onsite foreman, whose name was  
3 Dusty, and he's been listed as a witness, apparently has left  
4 their employment recently, but as of the date of Mrs. Cox's  
5 deposition he was an employee of hers, and she testified that  
6 there were usually two, sometimes more people that would assist  
7 Dusty in running the operation out on Coyote Springs. That's  
8 in addition to themselves. And that's in her deposition.

9           By the way, that's corroborated by Mr. Cox's  
10 testimony as well.

11           So we would request the court as a matter of law to  
12 determine that this is a business activity that's occurring on  
13 the property, and it's based on uncontested facts and the facts  
14 that I've just presented to the court.

15           By the way, their reporting to the Internal Revenue  
16 Service is another statement under oath in which they assure  
17 the federal government that they're utilizing this property for  
18 purposes of a business. And if you look at the equipment  
19 security agreement, for instance on the Bobcat, that they  
20 submitted to us in response to discovery, they check a box that  
21 says that the Bobcat is used in connection with a commercial  
22 business located at Coyote Springs. So the facts are literally  
23 uncontested with respect to the commercial nature of the  
24 business.

25           Now Mark had addressed certain issues about, well,



1 | there's other -- when he presented me with photographs, I was  
2 | looking at them wondering what does this have to do with the  
3 | Coyote Springs property? Well there are other properties and  
4 | he was migrating his argument into, well, other people are  
5 | doing it. Well that clearly hits the issue of abandonment.  
6 | The court has already determined that abandonment is an issue  
7 | that can't be presented to the jury or the court for deciding  
8 | this case. That's not within the purview of this motion for  
9 | summary judgment. As the court knows, selective enforcement is  
10 | appropriate under the *Burke vs. Voicestream* case, you can  
11 | selectively enforce restrictive covenants, and that case is an  
12 | Arizona Court of Appeals case that is very recent that says  
13 | clearly you can do so, and that nonwaiver language in the  
14 | restrictive covenants enable a party to do so. So it's not  
15 | necessary to look at all the other people that may be engaged  
16 | in some kind of activity that could be characterized as  
17 | agricultural.

18 |                 So based on our response and my comments today we  
19 | would request the court deny the motion for summary judgment.  
20 | We would countermove for summary judgment, however, based on  
21 | the uncontested facts that it is business activity.

22 |                 MR. DRUTZ: Judge, want me to reply at all?

23 |                 THE COURT: Give me just one moment.

24 |                 MR. DRUTZ: Sure.

25 |                 THE COURT: Very brief reply.

1           MR. DRUTZ: Judge, the only thing I would say, their  
2 statement of facts is what they're limited to, it's a statement  
3 of facts, it's not anything David Wilhelmsen today wants to try  
4 to argue or add to.

5           Obviously the court is aware the declaration had to  
6 be narrowly construed. These types of declarations are not  
7 particularly favored in the law. They're asking for a broad  
8 interpretation of the CC&Rs to include an agricultural activity  
9 that's clearly what's going on out here, they're growing trees,  
10 and they want to combine that, bootstrap that with what's going  
11 at the Prescott Valley Nursery, then argue that it's a business  
12 or commercial activity when you combine the two together.

13           And our view is just simply you can't do that, you  
14 just have to look not at what's occurring at the Prescott  
15 Valley Nursery but you have to look at what's just occurring at  
16 the Coyote Springs property that's subject to Paragraph 2, and  
17 the only thing that's occurring at the Coyote Springs Ranch  
18 property is they're growing trees. That's it, nothing more is  
19 occurring. They're not selling trees there, no money changes  
20 hands, customers don't come, nothing. They're growing trees.  
21 It's a classic agricultural activity. Wouldn't be much  
22 different than if they were growing corn and then they took it  
23 out to Young's Farm and Young's Farm was selling the corn.  
24 It's an agricultural activity out at Coyote Springs, and when  
25 you look at Paragraph 2 there isn't any agricultural

1 prohibition.

2           There isn't any definition of trade or commercial,  
3 and when you look at the the Websters definition it just simply  
4 doesn't include a tree farm, it doesn't include growing corn or  
5 growing trees. And that's all that's happening out there. And  
6 his whole argument turns on combining what's occurring out at  
7 Prescott Valley Nursery and saying it's commercial or it's a  
8 business when you combine the fact that they're selling the  
9 trees and customers come out there with the growing of the  
10 trees. And our position is you can't do that. And when you  
11 look at Paragraph 2 again, the last part says within said  
12 property or any portion thereof. Paragraph 2 is specifically  
13 limited to the Coyote Springs property. That's our view.

14 Thanks, Judge.

15           THE COURT: This motion goes to count one of the  
16 Plaintiff's complaint alleging a breach of contract for a  
17 violation of Paragraph 2 of the Declaration of Restrictions,  
18 and I find that there are no factual issues that preclude this  
19 court making a legal determination as to whether or not the  
20 conduct that is taking place at Defendant's property violates  
21 Paragraph 2. And in doing so, I've considered the statement of  
22 facts that have been submitted in conjunction with other  
23 motions and the statement of facts that have been submitted by  
24 both parties with respect to this motion, and that assumes the  
25 fact that there are three paid individuals that take care of

1 trees that are growing on this parcel and that those trees are  
2 ultimately sold at another location.

3 In construing the language of a contract, the court  
4 has to consider the entire contract, and I have reviewed the  
5 entire Declaration of Restrictions, including language in  
6 Paragraph 3 that provides that these are all over nine acre  
7 parcels that are governed by these declarations, that  
8 outbuildings can be -- necessary outbuildings can be erected  
9 pursuant to Paragraph 7(e), and then I look to the case law  
10 that provides that, for one, restrictions are not favored and  
11 restrictions must be strictly construed.

12 Considering the size of the parcels and the types of  
13 activities that would typically go on on parcels of this size,  
14 I find as a matter of law that the conduct of the Coxes on this  
15 parcel does not violate Paragraph 2 of the Declaration of  
16 Restrictions, as it is not a trade, business or profession or  
17 any other type of commercial or industrial activity initiated  
18 or maintained within said property or any portion thereof.

19 The motion for summary judgment is granted. And  
20 that means that I've determined as a matter of law that the  
21 Plaintiffs are not entitled to relief on count one of their  
22 First Amended Complaint.

23 This may impact some of the other motions that are  
24 pending, so I still want to go through those other motions.  
25 The next motion I want to address is the motion *in limine* with

1 respect -- or filed by the Defendants to preclude witnesses  
2 from Yavapai County P&Z as well as exhibits from Yavapai County  
3 Planning and Zoning.

4 Mr. Drutz or Mr. Adams, anything else you want to  
5 tell me on that motion?

6 MR. ADAMS: Not really, Your Honor. I think our  
7 motion pretty much sets forth the file that they used wasn't  
8 previously disclosed, we don't have a copy of it even yet. And  
9 with respect to the unidentified individual, we still don't  
10 know who that individual is or how to contact him; therefore,  
11 we would oppose the use of that alleged person and that file.

12 THE COURT: I noticed in your Pretrial Statement,  
13 though, that the Defendant did intend to present evidence of  
14 the county's allowance of agricultural use, and I haven't had a  
15 chance to think through how my ruling impacts that. In looking  
16 at this motion I'm not sure whether --

17 MR. ADAMS: I don't actually, you know, Your Honor,  
18 in light of the court's ruling today, I do not expect that we  
19 would even need to call Mr. Boive, which is the person we would  
20 have testify regarding the agricultural use of our clients'  
21 property, as well as the additional agricultural exemptions  
22 that exist out in the community, because I think the court's  
23 ruling on that matter is dispositive today.

24 THE COURT: Mr. Wilhelmsen or Ms. Kirk, what would  
25 you like to tell me regarding that motion? I'm not sure you've

1 had a chance to digest whether or not you'd be calling those  
2 individuals in light of my ruling.

3 MR. WILHELMSSEN: Well, in so far as -- I mean I  
4 believe that any of the motions that relate to the evidence  
5 that's going to be presented are probably mooted by your ruling  
6 because it would seem to me if -- if you're making a  
7 determination as a matter of law that the conduct as evidenced  
8 by the record that's been presented to you demonstrates that  
9 there is no violation of Paragraph 2, I suppose where we go  
10 from here is settling a final judgment and moving ahead. I  
11 just don't see any other -- I mean we do have a technical  
12 argument that we threw in that certain other improvements such  
13 as the J-John would violate certain provisions, but it would  
14 seem to me going to trial on that issue is probably not  
15 worthwhile at this point. I would, I think, prefer that we  
16 just settle our Form of Judgment, and to the extent that we may  
17 have review of the issue, then go from there.

18 THE COURT: Do you want just a few minutes to call  
19 your client to see if that's --

20 MR. WILHELMSSEN: Yeah, that might be an appropriate  
21 thing for me to do.

22 THE COURT: Mr. Drutz or Mr. Adams, what's your  
23 position on that?

24 MR. DRUTZ: I would agree with Dave, I think the  
25 court's ruling sort of disposes of the lion's share of their

1 | claims when the court determines that we're not in violation of  
2 | Paragraph 2, and I would have no objection to Mr. Wilhelmsen  
3 | contacting his client for instruction as to how he wants to  
4 | proceed.

5 |           THE COURT: Then we'll take a recess. If you'll let  
6 | my bailiff know when you've had a chance to talk with your  
7 | client.

8 |           We'll be at recess.

9 |           (Recess.)

10 |           THE COURT: Back in court with the attorneys and the  
11 | parties previously announced.

12 |           Mr. Wilhelmsen, how would you like to proceed?

13 |           MR. WILHELMSEN: Well, Mr. Drutz and I have  
14 | discussed the matter and I've got the consent of my client as  
15 | well. What we think would be the most appropriate way to have  
16 | it handled is to have the court enter a partial final judgment  
17 | with Rule 54(b) language which would relate singularly to count  
18 | one, and any other aspect of the case would just remain open  
19 | pending a determination by the Court of Appeals as to the  
20 | correctness of the result. That way if the case comes back  
21 | down, we in the meantime don't have to try as a separate matter  
22 | whether there's an outbuilding that's appropriate or whether  
23 | some other kind of very nominal activity is in derogation of  
24 | the restrictive covenants.

25 |           And in that context, Mr. Drutz would -- we would

1 arrive at some Form of Judgment, Mr. Drutz has assured me he'll  
2 make an application for attorney's fees, which I'm certain he  
3 will, and we'll settle the attorney fee issue and have the  
4 appropriate judgment entered and just allow the case to remain  
5 in abeyance pending the determination by the Court of Appeals.

6 THE COURT: Mr. Drutz?

7 MR. DRUTZ: Judge, I'm in agreement with what Dave  
8 says. The only thing I might look at is how the court's ruling  
9 might impact the other counts as to the partial final judgment.  
10 But certainly we would agree to a partial final judgment on  
11 count one at a minimum.

12 THE COURT: I don't understand how my ruling may  
13 affect the other two counts. I didn't understand that part of  
14 your comment.

15 MR. WILHELMSSEN: You know what, in thinking aloud,  
16 as Mark just mentioned, that one of the other counts we asked  
17 for was purely a claim for relief which is a request for  
18 injunctive relief, and to the extent that another count that  
19 might relate to a remedy that's premised upon count one, yes,  
20 that would be appropriate for any other portions of the  
21 complaint that would bear directly on the fact that the court's  
22 made a determination that this activity is not a business  
23 activity, yeah, that would be appropriate, I would agree with  
24 that.

25 MR. DRUTZ: I just don't have the amended complaint



1 with me, Judge, and I just wanted to look at it before I  
2 stipulated today that it would only be on count one. It very  
3 well might be.

4 THE COURT: Well, and count four was for declaratory  
5 relief, so I've just done that with respect to the relief  
6 requested in count one, so -- and then count five was the  
7 injunctive relief, and by a matter of law I think we can all  
8 agree I wouldn't give injunctive relief having ruled in that  
9 way on count one.

10 So the only issue in my mind was how we went forward  
11 from here, whether the Plaintiff wished to go forward to trial  
12 on count two and three and the declaratory relief and  
13 injunctive relief that was requested regarding those two  
14 counts, and it's apparent you don't so I accept that, so I  
15 guess what we're looking at is vacating the trial with respect  
16 to counts two and three and the portions of counts four and  
17 five that relate to those counts, working on final judgment  
18 with respect to count one, four and five, including any  
19 application for attorney's fees, and then having 54(b) language  
20 so that you can proceed with appellate relief, and then the  
21 rest of the counts would abide whatever decision is made after  
22 the appellate courts have fully reviewed the matter.

23 Is that pretty much what your understanding is of --  
24 am I stating what the two of you agreed on correctly?

25 MR. DRUTZ: I think so Judge.

1 MR. WILHELMSSEN: Yes, I think so, Your Honor.

2 To summarize, anything that might not be decided by  
3 the court's decision which is of very little moment to the  
4 overall case, rather than spending time and incurring costs to  
5 present those matters either to the court or a jury or advisory  
6 jury, we would just hold that in abeyance.

7 THE COURT: All right.

8 Then it's ordered vacating the trial, it's ordered  
9 that count two and three, as well as the declaratory relief and  
10 injunctive relief requested based upon those counts, will be  
11 held in abeyance pending appellate review of this court's  
12 decision regarding count one and the declaratory and injunctive  
13 relief related to that count.

14 At this point Defendants will submit a Form of  
15 Judgment along with an application for attorney's fees and  
16 statement of costs pursuant to the Rules and we'll proceed with  
17 any objections and responses from there.

18 Anything further?

19 MR. WILHELMSSEN: No, Your Honor.

20 MR. DRUTZ: No, Judge.

21 THE COURT: I guess with respect to all the pending  
22 motions, those are moot at this point subject to reurging if  
23 this matter does come back from appellate review.

24 MR. WILHELMSSEN: That's my understanding as well.

25 THE COURT: All right. We're adjourned.

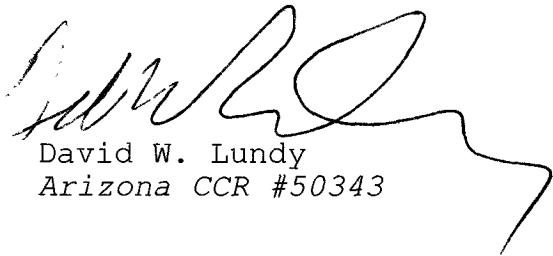
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C E R T I F I C A T E

STATE OF ARIZONA )  
 )  
COUNTY OF YAVAPAI ) ss  
 )

I, David W. Lundy, certify that I am an Official Court Reporter for the Superior Court of Yavapai County, State of Arizona; that I was present and took down in shorthand all proceedings had in the above-entitled matter, and that the foregoing 25 pages contain a full, true and correct transcription of my shorthand notes so taken.

WITNESS my hand this 3rd day of August 2005.

  
David W. Lundy  
Arizona CCR #50343