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JEANNE HICKS, CLERK ✓

BY: M. Britton

1 Mark W. Drutz, # 006772
2 Jeffrey R. Adams, #018959
3 Sharon Sargent-Flack, #021590
4 **MUSGROVE, DRUTZ & KACK, P.C.**
5 1135 Iron Springs Road
6 Prescott, Arizona 86305
7 (928) 445-5935

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; 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

**RESPONSE TO OPPOSITION TO
PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER AND MOTION
TO QUASH SUBPOENA DUCES
TECUM SERVED BY DEFENDANTS ON
NON-PARTY ALFIE WARE; AND
MOTION TO COMPEL PRODUCTION
OF DOCUMENTS**

(Oral Argument Requested)

(Assigned to the Honorable David L.
Mackey)

22 Defendants Donald Cox and Catherine Cox (hereinafter "Coxes") respectfully submit this
23 Response in Opposition to Plaintiffs' Motion for Protective Order and Motion to Quash Subpoena
24 Duces Tecum Served by Defendants on Non-Party Alfie Ware ("Plaintiffs' Motion"); and Motion
25 to Compel Production of Documents pursuant to Rules 26, 37(a) and 45(c)(2)(B), Arizona Rules of
26 Civil Procedure.
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1 pursuant to Rule 34, seeking information similar to that in the Subpoena Duces Tecum served on
2 non-party Ware. (See Id., Exhibit "2"). In responding to Plaintiffs' counsel request that the Coxes
3 request be withdrawn, Plaintiffs' counsels' attention was directed to discovery Plaintiffs' own
4 counsel served upon Coxes' counsel in seeking an attorneys' fees award. (See Id., Exhibit "3").
5 Counsel for Coxes offered to withdraw their Request for Production if Plaintiffs would stipulate to
6 the hourly rates for Jeff Adams, Mark Drutz and Sharon Sargent-Flack and the time spent on the case
7 as reasonable. (See Exhibit "3"). Plaintiffs refused to stipulate to the hourly rate and the hours
8 expended on the case as reasonable. (See Exhibit "4"). Coxes' counsel corresponded further with
9 Plaintiffs' counsel and offered to modify their Request for Production by seeking a composite of all
10 attorneys' fees charged to Plaintiffs and/or Alfie Ware and the total number of hours spent by
11 Plaintiffs' counsel on the case. (See Exhibits "5", "6" and "7"). Plaintiffs refused to stipulate to the
12 Coxes' modified discovery request. Instead, Plaintiffs' filed their Motion on August 4, 2005.

13 ARGUMENT

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Coxes do not dispute the basic fact that the Parties conferred concerning the Subpoena Duces
Tecum ("SDT") served upon non-party Alfie Ware and the Request For Production ("Request")
propounded to Plaintiffs—which virtually mirrors Plaintiffs' own subpoena and request for production
served in Yavapai County Case Nos. DO 2005-0552 and CV 2001-0123 (Burnworth v.
Burnworth and Sims v. Harper Family Trust, et. al.), ostensibly made by Plaintiffs' counsel in good
faith pursuant to the Rules of Procedure. (See Exhibits "A" and "B," attached hereto). Plaintiffs'
remaining factual and legal arguments, however, either are flawed or misleading.

1 **A. The Rules of Discovery Are Liberal; Plaintiff Has the Burden of Persuasion in Showing**
2 **Why Discovery Should Not Be Allowed.**

3 A party may obtain discovery through the request for production of documents. The party
4 upon whom the discovery is propounded may not object on the ground that the information sought
5 will be inadmissible if the information sought appears reasonably calculated to lead to the discovery
6 of admissible evidence. Ariz. R. Civ. P. 26(c). Thus, Arizona Rules of Civil Procedure Rule 26
7 defines a very broad scope for discovery. Likewise, Rule 34, which falls within the ambit of
8 Rule 26, is broad in scope. Ariz. R. Civ. P. 34.

9
10 The burden of persuasion is on the objecting party to show that discovery should not be
11 made. State v. Babbitt, 26 Ariz.App. 333, 334, 548 P.2d 426, (App. 1976) (citing Cornet Stores v.
12 Superior Court, 108 Ariz. 84, 492 P.2d 1191 (1972); Tury v. Superior Court, 19 Ariz.App. 169, 505
13 P.2d 1060 (1973)). Plaintiffs have failed in their burden of showing that the production of the
14 documents requested by Coxes warrants any protection under the rules of discovery. Plaintiffs cite
15 no attorney-client or work product privilege, and Coxes have not requested any such documentation
16 from Plaintiffs.

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18 Further, Coxes' Request is not unduly burdensome. It sets forth just three (3) categories of
19 items: (1) fee agreements between Plaintiffs and/or Mr. Ware and Plaintiffs' counsel; (2) hourly
20 rates charged by Plaintiffs' counsel; and (3) a composite of all fees charged by Plaintiffs' counsel
21 to date.

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23 Moreover, pursuant to Rule 37, in an effort to resolve Plaintiffs' discovery dispute and further
24 simplify the production of requested documents, counsel for Coxes offered to modify the Request,
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26 boiled down to a simple formula:
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1 [T]he total number of hours spent by each of the attorneys and paralegals in your firm
2 in prosecuting this case.

3 (See Correspondence dated August 4, 2005 attached as Exhibit "C" hereto). Coxes' Request is being
4 propounded to lend support to undersigned counsels' application for fees in this matter. The
5 information to be gleaned from the Request is highly relevant for both the parties and the Court in
6 determining an award of fees.
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8 **B. The Fee Charged and the Number of Hours Expended By Plaintiffs' Counsel Are**
9 **Relevant Factors in the Determination of a Reasonable Award of Fees.**

10 "The beginning point of development of a reasonable fee is the determination of the actual
11 billing rate which the lawyer charged in the particular matter." Schweiger v. China Doll Restaurant,
12 Inc., 138 Ariz. 183, 187, 673 P.2d 927 – (App. 1983) [emphasis added] (citing Schwartz v.
13 Schwering, 85 Ariz. 242, 336 P.2d 144 (1959) as a "useful starting point," but also recognizing that
14 it "fails to give specific guidance" regarding how its four (4) enumerated factors are to be used in
15 calculating a reasonable fee). The rate charged by the lawyer to the client is the best indication of
16 what is reasonable under the circumstances of the particular case. Id. at 188. The Rules of
17 Professional Conduct, amended after Schweiger, additionally, set forth eight non-exhaustive factors
18 for determining the reasonableness of a lawyer's fee, including:
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- 21 (1) the time and labor required, the novelty and difficulty of the questions
22 involved, and the skill requisite to perform the legal service properly; ***
- 23 (3) **the fee customarily charged in the locality for similar legal services;**
- 24 (4) the amount involved and the results obtained;
- 25 (5) the time limitations imposed by the client or by the circumstances;
- 26 (6) the nature and length of the professional relationship with the client;
- 27 (7) the experience, reputation, and ability of the lawyer or lawyers performing the
28 services; and
- (8) the degree of risk assumed by the lawyer.

Rules of Prof. Conduct, Rule 42, E.R. 1.5, Rules of Supreme Court (2003). (Emphasis added).

1 The 'fundamental rule' for determining attorneys' fees is that the trial court must determine
2 the hours reasonably expended and the reasonable billing rate in defending against, inter alia, the
3 pleadings, motions, and discovery filed and propounded by Plaintiffs. See ABC Supply, Inc. v.
4 Edwards, 191 Ariz. 48, 52, 952 P.2d 286, 291 (App. 1997), opinion granting reconsideration in part
5 (1997), rev. denied (1998) (case involving dispute over reasonableness of hours expended) (citing
6 Schweiger at 187-88, 931-32). Further, a single claim for relief may involve related legal theories.
7 Schweiger, 138 Ariz. at 189. That is, where a party has accomplished the result sought in litigation,
8 as the Coxes have in the case at bar, fees should be awarded for time spent even on unsuccessful
9 legal theories. Id.

12 The Coxes' Request lends itself to a thorough analysis and determination by this Court in
13 applying the foregoing fundamental rule and associated factors as indicators of what constitutes a
14 reasonable fee award in this matter. The complexity of legal issues is evident in the subject of the
15 dispute itself- the interpretation of the Declaration of Restrictions. Significantly, defending against
16 Plaintiffs' claims necessitated a significant amount of time and labor, as dozens, if not hundreds, of
17 properties purportedly bound by the Declaration were at issue. The number of hours defense counsel
18 has expended in order to successfully terminate the case is relevant to the determination of the fee
19 award. In short, the hours that each side has devoted to the litigation is relevant in the determination
20 of the complexity of the case. Further, Plaintiffs' counsel refused to stipulate that the number of
21 hours expended by Coxes' counsel in this litigation was reasonable. (See undersigned counsel's
22 Rule 37(c) Certification, Exhibit "3"). Plaintiffs' counsels' hourly rate also is relevant to a
23 determination of the reasonableness of defense counsels' hourly rate, because Plaintiffs' counsel
24 refused to stipulate that defense counsels' hourly rate was reasonable. (See Id.). See Schweiger, 138
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1 Ariz. 183, 188-89; see also ABC Supply, Inc., 191 Ariz. at 52, 952 P.2d at 291, supra. “[I]deally,
2 of course, litigants will settle the amount of a fee.” Schweiger, 138 Ariz. at 189 (quoting Hensley
3 v. Eckerhart, 103 S.Ct. 1933, 1941 (1983)) [internal quotations omitted].
4

5 It is anticipated that Plaintiffs’ counsel has devoted as much, if not more, time in prosecuting
6 this case as Coxes’ counsel has spent in defending it. Moreover, it is anticipated that Plaintiffs’
7 counsels’ hourly rates are equal to or more than Coxes’ counsels’ hourly rates. A determination of
8 reasonableness is aided by Mr. Ware’s production of documents regarding his maintenance of
9 Plaintiffs’ lawsuit, along with the production of Plaintiffs’ counsels’ hourly rate and the number of
10 hours (“composite of all attorneys’ fees”) Plaintiffs’ counsel have spent working on this case.
11

12 **C. Public Policy and the Law Supports the Coxes’ Discovery Request and Subpoena Duces**
13 **Tecum Served on Non-Party Alfie Ware.**

14 The documents information sought by Coxes through their SDT and Request also is
15 supported by public policy and to aid in the determination of whether Coxes are entitled to any
16 attorneys’ fees or damages as a result of vexatious litigation pursuant to A.R.S. §§ 12-341.01 or 12-
17 349. Arizona Courts recognize the dangers of speculation inherent in maintaining champertous
18 lawsuits. “Maintenance is defined as assisting another in litigation without a personal interest in its
19 outcome. Lingel v. Olbin, 198 Ariz. 249, 253, 8 P.3d 1163, 1167, fn. 8. (citing Karp v. Speizer, 132
20 Ariz. 599, 601, 647 P.2d 1197, 1199, fn. 1 (App. 1982) (involving assignment of proceeds of
21 personal injury claim). “Champerty” exists if there is an agreement that the person providing
22 litigation assistance will share in the proceeds of the litigation. Id. “Barraty” is ‘adjudicative
23 cheerleading’—urging others, frequently, to quarrels and suits. Id. at 259, 1173 (special concurrence).
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27 Such speculation in litigation in which the adventurer has no interest otherwise, and
28 where he is in no way related to the party he aids, is champertous. The element of

1 intrusion for the purpose of mere speculation in the troubles of others introduces the
2 vice fatal to what otherwise would be a contract. 5 R.C.L. 278; 11 C.J. 248.

3 Hackett v. Hammel, 185 Minn. 387, 388, 241 N.W. 68, 69 (Supreme Ct. 1932) (emphasis on portion
4 of opinion cited by Lingel, 198 Ariz. at 253, 8 P.3d at 1167). Mr. Ware's involvement in this
5 lawsuit is an issue of concern for Coxes, and has been since the early stages of discovery in this
6 lawsuit. (See, e.g., Depositions of Plaintiffs Barbara Cundiff, pp. 14-15; John Cundiff, pp. 63-66,
7 120, 125-27, 129; Katheryn Page, pp. 51, 52, 54, 55, 64, 78, 144-46; Kenneth Page, p. 64; Becky
8 Nash, pp. 13-15, 21, 31, 32, attached hereto as Exhibits "D" - "H"). If Mr. Ware *has* engaged
9 Plaintiffs in this lawsuit for his own gain or merely to encourage litigation, then Coxes are entitled
10 to make a request for fees and possibly for damages under A.R.S. §§ 12-341.01 and 12-349.
11 Therefore, their discovery and SDT are appropriate and relevant.

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14 As stated above, Plaintiffs have failed to meet their burden in establishing how they are
15 entitled to any protection from discovery or that the SDT to Ware, to produce the agreement(s)
16 between them, their attorneys and/or non-party Ware, should be quashed. Since Plaintiffs' case is
17 being funded by a nonparty, both the law and public policy militates in favor of disclosure of the fee
18 agreement between Plaintiffs and Mr. Ware. See A.R.S. §§ 12-341.01 and 349; Hackett v. Hammel,
19 185 Minn. at 388, 241 N.W. at 69. Therefore, Plaintiffs' Motion should be denied and Plaintiffs
20 should be compelled to produce the requested documents.

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23 Even Plaintiffs' counsel assert—or at least concede—that Coxes should *not* be prevented from
24 discovering information concerning Mr. Ware's role in maintaining this lawsuit on the issue of an
25 award of attorneys' fees. "Defendants should be precluded from questioning the Wares on those
26 issues save for purposes of an award of Plaintiffs' attorneys' fees." (Plaintiffs' Motion in Limine to
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1 Preclude Defendants' Inappropriate Questioning of Alfie Ware, p. 3:2-4, dated June 29, 2005).

2 Plaintiffs' advocacy—implying that only they would accomplish the result sought in litigation and
3 thereby be awarded fees—does not detract from the plain, unequivocal assertion by Plaintiffs that
4 Mr. Ware plays an integral role in the maintenance of Plaintiffs' lawsuit, and his agreement(s) with
5 Plaintiffs and/or their counsel is highly relevant to the legal position that Coxes will take in
6 requesting an award of fees.
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9 **D. Coxes are Intended Third Party Beneficiaries to The Agreement(s) Between Plaintiffs
and/or Ware and Plaintiffs' Counsel.**

10 Plaintiffs' assertion in their Motion *in Limine* also lends support to the Coxes as intended
11 third-party beneficiaries to the agreement(s) between Plaintiffs and/or Ware and Plaintiffs' Counsel.
12 See Caguas Cent. Federal Sav. Bank v. U.S., 215 F.3d 1304 (Fed. Cir. 2000) (contract may reflect
13 expressly *or* impliedly the intention of the parties to benefit third party). An intended beneficiary
14 need not be specifically or individually identified in the contract; instead the third party must fall
15 within a class clearly intended to be benefitted thereby. *Id.* As the prevailing party, Coxes are
16 'standing in Plaintiffs Cundiffs', Pages', and Nash's shoes,' as the intended beneficiaries. Given
17 that Mr. Ware maintains this lawsuit on behalf of these Plaintiffs, Coxes may look to the
18 agreement(s) between Plaintiffs and/or Ware and Plaintiffs' counsel to ascertain the parties' and non-
19 party's obligations in paying an award of attorneys' fees. See Shreeve v. Greer, 65 Ariz. 35, 40, 173
20 P.2d 641, 644 (1946) (where one person agrees with another, on a sufficient consideration, to do a
21 thing for the benefit of a third person, the third person may enforce the agreement, and it is not
22 necessary that any consideration move from the latter).
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1 **E. Plaintiffs' Counsel Have Propounded the Same Discovery and Served the Same**
2 **Subpoena on Coxes' Counsel in Seeking An Attorneys' Fees Award.**

3 Significantly, Plaintiffs' counsels' discovery requests propounded to defense counsel in the
4 Sims case were made in the same context as the Coxes' Request is in the instant case. In Sims,
5 Plaintiffs' counsel for Cundiff, et. al., represented the Sims, and defense counsel for Coxes
6 represented Harper Family Trust. Partial summary judgment in favor of plaintiffs Sims was granted.
7 Thereafter, counsel for Sims propounded upon undersigned counsel, "Request for Production of
8 Documents and Things dated November 9, 2004" ("**2004 Request**" attached as Exhibit "A" hereto).
9 The 2004 Request and Coxes' Request mirror each other.
10

11
12 Moreover, less than one month ago, Plaintiffs' counsel served a Subpoena Duces Tecum
13 upon counsel for Coxes, requesting "billing statements, financial charges, and financial receipts for
14 such charges (including copies of all checks received) relative to representation in". (See
15 Exhibit "B"). The information sought from non-party Ware seeks similar information, relative to
16 Mr. Ware's obligation for the payment of Plaintiffs' attorneys' fees in this matter. The reasons for
17 subpoenaing this information from Mr. Ware are set forth above.
18

19 **F. Plaintiffs Received Proper Notice of Non-Party Ware's SDT.**
20

21 Finally, there is no basis for quashing the SDT based on a purported 'lack of notice'.
22 Mr. Ware personally was served with the SDT on August 3, 2005. Pursuant to Arizona Rules of
23 Civil Procedure, Rule 45, Mr. Ware has fourteen (14) days to object to the subpoena. Mr. Ware has
24 not filed an objection or otherwise objected to the SDT. Stated another way, Plaintiffs' Motion to
25 Quash Subpoena Duces Tecum was not filed by their counsel on Mr. Ware's behalf. **The time for**
26 **his objection now has passed.** Plaintiffs' counsel simply misstates the true facts which leave no
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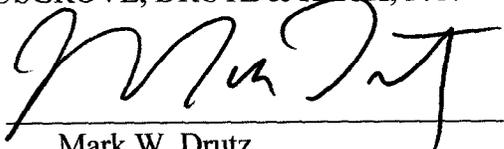
1 doubt that Plaintiffs were timely noticed of the SDT. On the same date that Mr. Ware was served,
2 counsel for Coxes caused copies of a letter dated August 3, 2005 to Mr. Ware and the SDT to be
3 mailed to Plaintiffs' counsel. (See undersigned counsel's Rule 37 Certification, Exhibit "1").
4 Plaintiffs, therefore, have no basis for objecting to the SDT on the grounds of purported lack of
5 notice.
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8 Next, Plaintiffs' cited authority to Arizona Rules of Procedure 45(c)(3) lends no support to
9 their position. Rule 45(c)(3) protects a "person," not a party, "affected by the subpoena." (See
10 Plaintiffs' Motion, p. 4:3-4; and Rule 45(c)(3)). Plaintiffs' misplaced reliance on Rule 45(c)(3) is
11 evident inasmuch as a subpoena is the vehicle for compelling the attendance of witnesses and the
12 production of documents from non-parties, not parties, who are subject to the rules of discovery.
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14 See, generally, Rules 26 and 45, Ariz. R. Civ. P.

15 For the foregoing reasons, Coxes request that Plaintiffs' Motion be denied and Coxes'
16 Motion to Compel be granted, ordering Plaintiffs to respond to the Request for Production. Coxes'
17 also request attorneys' fees and costs in defending against Plaintiffs' Motion.
18

19 RESPECTFULLY SUBMITTED this 23rd day of August, 2005.

20 MUSGROVE, DRUTZ & KACK, P.C.

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22 By 

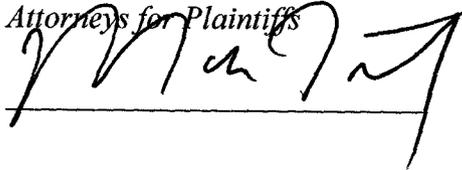
23 Mark W. Drutz
24 Jeffrey R. Adams
25 Sharon Sargent-Flack
26 *Attorneys for Defendants*
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1 COPY of the foregoing hand-delivered
2 this 23rd day of August, 2005 to:

3 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 Post Office Box 1391
13 Prescott, Arizona 86302-13910

Attorneys for Plaintiffs



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The Law Firm of

Favour Moore & Wilhelmsen, P.A.

Mark M. Moore

1580 Plaza West Drive
Post Office Box 1391
Prescott, Arizona 86302

Telephone (928) 445-2444
Facsimile (928) 771-0450
FMWlaw@FMWlaw.net
MarkMoore@FMWlaw.net

July 26, 2005
File No. 10814.001

Custodian of Records
Musgrove, Drutz & Kack, P.C.
1135 Iron Springs Rd.
Prescott AZ 86303



Re: In re the Marriage of: Burnworth
Case No. DO 2005-0552

Dear Custodian:

Attached is a Subpoena Duces Tecum directing you to appear and produce those records specifically described.

Contrary to the wording on the subpoena, I do not wish to take your deposition testimony, but merely want to obtain copies of those records described on the subpoena. The subpoena may be complied with by mailing copies of your records to the undersigned by the deposition date, along with a verification that you have sent copies of all records in your possession.

Arizona Revised Statutes Section 12-351(F)(1)(as amended) establishes the reproduction costs you may charge for these records. These charges are: (1) Ten cents (\$.10) per page for standard reproduction of documents; (2) actual costs for reproduction of documents requiring special process; and, (3) Ten Dollars (\$10.00) per hour per person clerical cost. You will be reimbursed for "reasonable costs," as defined by this statute. Please enclose an appropriate statement of charges with your records.

Custodian of Records
Musgrove, Drutz & Kack, P.C.
July 26, 2005
Page 2

Alternatively, you may prefer to comply with the subpoena by appearing at Favour Moore & Wilhelmsen, P.A. with the records. If you choose this alternative, please call my office so arrangements can be made to have a court reporter present on the date and at the time specified on the subpoena. If original records are produced, they will be copied at the time of your appearance and returned to you.

Very truly yours,



MARK M. MOORE
For the Firm

MMM:dal
Enclosures
cc: Charlotte R. Burnworth (w/encls)

1 FAVOUR MOORE & WILHELMSSEN, P.A.

2 Post Office Box 1391

3 Prescott, AZ 86302

(928) 445-2444

4 MARK M. MOORE, #004346

5 Attorneys for Petitioner

6 SUPERIOR COURT OF ARIZONA

7 YAVAPAI COUNTY

8
9 In Re the Marriage of:

10 CHARLOTTE R. BURNWORTH,

11 Petitioner,

12 and

13 DONALD O. BURNWORTH,

14 Respondent.

No. DO 2005-0552

Division ____

15 SUBPOENA DUCES TECUM

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18 THE STATE OF ARIZONA TO: Custodian of Records
Musgrove, Drutz & Kack, P.C.
19 1135 Iron Springs
20 Prescott AZ 86301

21 YOU ARE COMMANDED to appear at the offices of Favour Moore & Wilhelmsen, P.A.,
22 1580 Plaza West Drive, Prescott, Arizona 86303, on August 9, 2005, at the hour of 9:00 a.m. to testify
23 on deposition at the instance of the Custodian of Records and to remain at the deposition until it is
24 complete.

25 YOU ARE ALSO COMMANDED to bring with you and produce at the above time and
26 place the following:

1
2 You also may file a motion in the superior court of the county in which the case is pending
to quash or modify the subpoena if the subpoena:

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

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

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

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

12 If this subpoena:

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

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

17 (vii) requires a person who is not a party or an officer of a party to incur substantial travel
18 expense;

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

23 In the event this subpoena is for appearance before the court, please contact the court stated
24 about to determine if the trial has been changed. Requests for reasonable accommodation for
persons with disabilities must be made to the court by parties at least three working days in advance
25 of a scheduled court proceeding. A.R.S. §§ 22-217, 12-2211; RCP 45(a) and (g), 53(e).

26 YOU ARE NOTIFIED HEREBY THAT ANY FAILURE TO OBEY THIS SUBPOENA
WITHOUT ADEQUATE EXCUSE MAY BE DEEMED A CONTEMPT OF THIS COURT, AND

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A CIVIL ARREST WARRANT MAY BE ISSUED. A CIVIL ARREST WARRANT IS AN ORDER DIRECTING ANY POLICE OFFICER IN ARIZONA TO ARREST YOU AND BRING YOU BEFORE THIS COURT FOR FUTURE PROCEEDINGS.

SIGNED AND SEALED: _____ JUL 26 2005 _____

YAVAPAI COUNTY SUPERIOR COURT

JEANNE HICKS

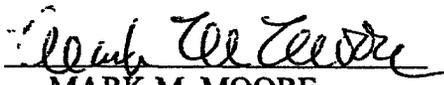
BY _____ C. SUTTON _____

COURT SEAL

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COPY of the foregoing Subpoena Duces Tecum
mailed this 26th day of July 2005, to:

Jennifer Nagel
121 E Birch Ave. Ste. 408H
Flagstaff, AZ 86001
Attorney for Respondent

By: 
MARK M. MOORE

1 FAVOUR MOORE & WILHELMSSEN, P.A.
2 Post Office Box 1391
3 Prescott, AZ 86302
4 (928) 445-2444
5 MARK M. MOORE, #004346
6 Attorneys for Petitioner

7 SUPERIOR COURT OF ARIZONA
8 YAVAPAI COUNTY

9 In Re the Marriage of:

10 CHARLOTTE R. BURNWORTH,

11 Petitioner,

12 and

13 DONALD O. BURNWORTH,

14 Respondent.

No. DO 2005-0552

Division _____

NOTICE OF DEPOSITION

15 The deposition of the CUSTODIAN OF RECORDS FOR MUSGROVE, DRUTZ & KACK,
16 P.C. will be taken at the time and place shown below:

17 Date and time: August 9, 2005 at 9:00 a.m.

18 Place: Law Offices of
19 FAVOUR MOORE & WILHELMSSEN, P.A.
20 1580 Plaza West Drive
21 Prescott, Arizona 86303

22 DATED: July 26, 2005.

23 FAVOUR MOORE & WILHELMSSEN, P.A.

24 By Mark M. Moore
25 MARK M. MOORE
26 P.O. Box 1391
Prescott, AZ 86302-1391
Attorneys for Respondent

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ORIGINAL of the foregoing Notice of
Deposition was mailed this 26 day of
July 2005 to:

Jennifer Nagel
121 E Birch Ave. Ste. 408H
Flagstaff, AZ 86001
Attorney for Respondent

And a copy mailed this date to:

Lott Reporting
316 Alarcon
Prescott AZ 86301
Court Reporter

By: Mark M. Moore
MARK M. MOORE

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**AFFIDAVIT OF CUSTODIAN OF RECORDS
OF MUSGROVE, DRUTZ & KACK, P.C.**

STATE OF ARIZONA)
) ss.
County of Yavapai)

_____, upon oath states:

- 1. I am the duly authorized Custodian of Records for MUSGROVE, DRUTZ & KACK, P.C. and have the authority to certify the records.
- 2. The copies provided are true copies of all the records described in the subpoena duces tecum.
- 3. The records were prepared by the personnel of MUSGROVE, DRUTZ & KACK, P.C., or persons acting under the control of MUSGROVE, DRUTZ & KACK, P.C. in the ordinary course of business at or near the time of the acts, conditions or events described in the records.

CUSTODIAN OF RECORDS

SUBSCRIBED AND SWORN TO before me this ____ day of _____
2005, by _____ the Custodian of Records for MUSGROVE, DRUTZ &
KACK, P.C..

NOTARY PUBLIC

My Commission expires:

1 FAVOUR MOORE & WILHELMSSEN, P.A.
Post Office Box 1391
2 Prescott, AZ 86302-1391
928/445-2444
3 David K. Wilhelmsen, 007112

4 Attorneys for Plaintiffs/Counterdefendants

5 SUPERIOR COURT OF ARIZONA

6 COUNTY OF YAVAPAI

7 DANIEL C. SIMS and NORA E. SIMS,)
husband and wife,)

8 Plaintiffs,)

9 vs.)

10 HARPER FAMILY TRUST DATED)
11 DECEMBER 30, 1982, HAROLD E. GRIES,)
Trustee; SEDONA HIDDEN VALLEY)
12 LIMITED PARTNERSHIP, OLIVER J.)
HARPER and SHARON J. HARPER, husband)
13 and wife, and CINDY H. McCAIN, as Trustee)
of the Cindy Hensley McCain Family Trust)
14 dated November 9, 1988, General Partners.)

15 Defendants.)

16 _____)
17 SEDONA HIDDEN VALLEY LIMITED)
PARTNERSHIP, an Arizona Limited)
18 Partnership; and HAROLD E. GRIES as)
Trustee of the Harper Family Trust dated)
December 30, 1982,)

19 Counterclaimants,)

20 vs.)

21 DANIEL C. SIMS and NORA E. SIMS,)
22 husband and wife,)

23 Counterdefendants.)
24 _____)

25 ---

26 ---

No. CV 820010123

Division 6

**REQUEST FOR PRODUCTION OF
DOCUMENTS AND THINGS**

1 TO: Defendants/Counterclaimants SEDONA HIDDEN VALLEY LIMITED PARTNERSHIP and
2 HAROLD E. GRIES as Trustee of the Harper Family Trust dated December 30, 1982, through
3 their attorneys of record, MUSGROVE, DRUTZ & KACK, P.C. (Mark W. Drutz), Post Office
4 Box 2720, Prescott, AZ 86302-2720

5 Plaintiffs Daniel and Nora Sims ("Simses"), pursuant to ARIZ. R. CIV. P. 34, request
6 Defendants/Counterclaimants above named ("SHV" and "Harper") to produce for Plaintiffs' inspection
7 and copying at the offices of FAVOUR MOORE & WILHELMSSEN, P.A., Plaza West Commerce
8 Center, 1580 Plaza West Drive, Prescott, Arizona 86303, December 21, 2004 at the hour of 10:00 a.m.,
9 the documents and things as described herein.

10 INSTRUCTIONS FOR USE

- 11 1. In producing the documents designated below, you are requested to furnish all documents
12 known or available to you, regardless of whether a document is currently in your possession,
13 custody or control or that of your attorneys, employees, agents, investigators or other
14 representatives or is otherwise available to you.
- 15 2. If, for any reason, you are unable to produce in full any document requested:
 - 16 a. Produce each such document to the fullest extent possible;
 - 17 b. Specify the reasons for your inability to produce the remainder; and
 - 18 c. State in detail whatever information, knowledge or belief you have concerning the
19 whereabouts and substance of each document not produced in full.
- 20 3. If any document requested was at one time in existence but is no longer in existence, please state
21 for each document as to which that is the case:
 - 22 a. The type of document;
 - 23 b. The types of information contained therein;
 - 24 c. The date upon which it ceased to exist;
 - 25 d. The circumstances under which it ceased to exist;
 - 26 e. The identity of all persons having knowledge of the circumstances under which it ceased
to exist; and
 - f. The identity of all persons having knowledge or who had knowledge of the contents
thereof.
4. For each document requested which you are unable to produce and which was at any time within
your possession, custody or control or to which you had access at any time, specify in detail:

- 1 a. The nature of the document (i.e., letter, memorandum, etc.);
- 2 b. The author of the document;
- 3 c. All recipients of the documents and any copy thereof;
- 4 d. A summary of the information contained in the document;
- 5 e. The date on which you lost, relinquished or otherwise ceased to have possession, custody, control of or access to the document;
- 6
- 7 f. Identify all persons having knowledge of the circumstances whereby you lost, relinquished or otherwise ceased to have possession, custody or control of or access to the document; and
- 8
- 9 g. Identify all persons who have or have had knowledge of the contents of the document in full or in part.
- 10 5. In the event you seek to withhold or do withhold any document, in whole or in part, on the basis that it is not subject to discovery, produce a list of all such documents and, as to each such document, state:
- 11
- 12 a. The name of each author, writer, sender or initiator of each document;
- 13 b. The name of each recipient, addressee or party to whom such document was sent or intended to be sent;
- 14
- 15 c. The name of each and every person who received a copy of the document;
- 16 d. The date of the document or, if no date appears on the document, the date the document was prepared;
- 17 e. The title of the document, or if it has no title, then such other description of the document and its subject matter as shall be sufficient to identify the document; and
- 18
- 19 f. The grounds claimed for withholding the document from discovery (e.g., attorney-client privilege, work product, or any other grounds) and the factual basis for such a claim.
- 20 6. In accordance with ARIZ. R. CIV. P. 34(b), as to each document produced, you are requested to designate the paragraph and subparagraph of this request to which each such document is responsive.
- 21
- 22 7. If you dispute the propriety of Instructions 2, 3, 4 and/or 5 as being outside the scope of Rule 34 or otherwise objectionable, then consider such instructions as interrogatories posed pursuant to ARIZ. R. CIV. P. 33 and answer them accordingly.
- 23
- 24 8. This Request is a continuing one and requires that you produce all responsive documents and tangible objects whenever you obtain or become aware of them, even if they are not in your possession or available to you on the date you first produce documents pursuant to this request.
- 25
- 26 ---

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DEFINITIONS

- 1. "Plaintiff," "you" or "your" means the plaintiffs in the above-captioned matter and the past and present employees, representatives, agents and attorneys for plaintiffs.
- 2. "Any," "each" and "all" shall be read to be all inclusive and to require the production of each and every document (as hereinafter defined) responsive to the particular request for production in which such term appears.
- 3. "And" and "or" and any other conjunctions or disjunctions used herein shall be read both conjunctively and disjunctively so as to require the production of all documents (as hereinafter defined) responsive to all or any part of each particular request for production in which any conjunction or disjunction appears.
- 4. "Person" means an individual, firm, corporation, association, organization or any other entity.
- 5. The term "document" includes all electronic media or other tangible forms in which information is stored and includes all written or graphic matter of every kind and description, however produced or reproduced, WHETHER DRAFT OR FINAL, original or reproduction, including, but not limited to, letters, correspondence, memoranda, notes, films, transcripts, contracts, agreements, licenses, memoranda of telephone conversations or personal conversations, microfilm, telegrams, books, newspaper articles, magazines, advertisements, periodicals, bulletins, circulars, pamphlets, statements, notices, reports, rules, regulations, directives, teletype messages, minutes of meetings, interoffice communications, reports, financial statements, ledgers, books of account, proposals, prospectuses, offers, orders, receipts, working papers, desk calendars, appointment books, diaries, time sheets, logs, movies, tapes for visual or audio reproduction, recordings or materials similar to any of the foregoing, however denominated, and including writings, drawings, graphs, charts, photographs, data processing results, printouts and computations (both in existence and stored in memory components), and other compilations from which information can be obtained or translated, if necessary, through detection devices into reasonably usable form. THE TERM "DOCUMENT" INCLUDES ALL COPIES OF A DOCUMENT WHICH CONTAIN ANY ADDITIONAL WRITING, UNDERLINING, NOTES, DELETIONS OR ANY OTHER MARKINGS OR NOTATIONS OR ARE OTHERWISE NOT IDENTICAL COPIES OF THE ORIGINAL.

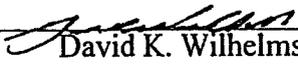
ITEMS REQUESTED

- 1. Each and every agreement, memorandum of understanding, document and/or correspondence reflecting any written fee agreement (including any flat-fee reduction agreement) by and between SHV and/or Harper and the following law firms: (1) MUSGROVE, DRUTZ & KACK, P.C.; (2) MURPHY, LUTEY, SCHMITT & FUCHS, PLLC; and (3) GALBUT & HUNTER, P.C.

- 1 2. Any and all agreements, correspondence, memoranda and/or documents addressing or reflecting
2 the hourly rate or rates at which time was or would be billed or setting forth the effective date
3 of any modification or other terms with respect to the agreed-upon services.
4 3. A composite of all attorneys' fees charged to SHV and Harper by all three law firms to date in
5 the above-encaptioned lawsuit.

6 DATED November 9, 2004.

7 FAVOUR, MOORE & WILHELMSSEN, P.A.

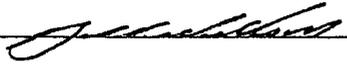
8
9 By 
10 David K. Wilhelmsen
11 Post Office Box 1391
12 Prescott, AZ 86302-1391
13 Attorneys for Simses

13 ORIGINAL AND ONE COPY OF the foregoing
14 Request for Production of Documents and Things
15 hand delivered this 10th day of November,
16 2004 to:

16 Messrs. Mark W. Drutz and
17 Grant K. McGregor
18 MUSGROVE, DRUTZ AND KACK, P.C.
19 Post Office Box 2720
20 Prescott, AZ 86302-2720

21 AND COPY mailed this date to:

22 Messrs. Robert E. Schmitt and
23 Dan A. Wilson
24 MURPHY, LUTEY, SCHMITT & FUCHS
25 Post Office Box 591
26 Prescott, AZ 86302-0591
Co-counsel for Defendants/Counterclaimants

By 

MUSGROVE, DRUTZ & KACK, P.C.
ATTORNEYS AT LAW
POST OFFICE BOX 2720, PRESCOTT, ARIZONA 86302-2720

JAMES B. MUSGROVE
MARK W. DRUTZ
THOMAS P. KACK
GRANT K. MCGREGOR
JOHN G. MULL
JEFFREY R. ADAMS
CATHY L. KNAPP
SHARON SARGENT-FLACK

PRESCOTT OFFICE
1135 IRON SPRINGS ROAD
PRESCOTT, ARIZONA 86305

PRESCOTT VALLEY OFFICE
3001 MAIN STREET, SUITE 2C
PRESCOTT VALLEY, ARIZONA 86314

TELEPHONE
(928) 445-5935
(928) 445-5980 (FAX)

TELEPHONE
(928) 775-9565
(928) 775-9550 (FAX)

August 4, 2005

File No. 9449-1

VIA TELECOPIER - 771-0450

David K. Wilhelmsen, Esq.
Favour, Moore & Wilhelmsen, P.A.
1580 Plaza West Drive
Post Office Box 1391
Prescott, Arizona 86302-1391

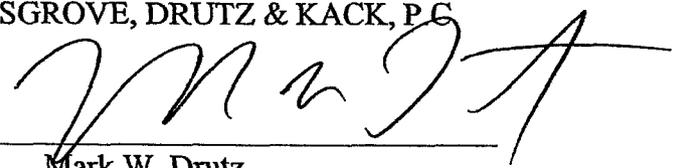
Re: John B. Cundiff and Barbara C. Cundiff, et al. v. Donald Cox and Catherine Cox
Yavapai County Superior Court Cause No. CV 2003-0399

Dear David:

In an effort to avoid a discovery dispute regarding our Request for Production, we will modify our Request No. 3 which sought a composite of all attorneys' fees charged to Plaintiffs and/or Alfie Ware to date in the above-captioned lawsuit to request the total numbers of hours spent by each of the attorneys and paralegals in your firm in prosecuting this case.

Sincerely,

MUSGROVE, DRUTZ & KACK, P.C.

By: 

Mark W. Drutz
Jeffrey R. Adams

MWD/jw

cc: Mr. and Mrs. Donald Cox

D

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)
CUNDIFF, husband and wife;)
ELIZABETH NASH, a married woman)
dealing with her separate)
property; KENNETH PAGE and) No. CV 2003 0399
KATHERYN PAGE, as Trustees of)
the Kenneth Page and Katheryn)
Page Trust,)
)
)
Plaintiffs,)
)
vs.)
)
DONALD COX and CATHERINE COX,)
husband and wife,)
)
)
Defendants.)
)

DEPOSITION OF BARBARA C. CUNDIFF

Prescott Valley, Arizona
August 25, 2004
2:05 p.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

1 husband's in that after the meeting at the church at
2 which Mr. or Mrs. Cox's property was discussed there were
3 three meetings at Alfie Ware's house?

4 A. I can't swear to three. It might be two or
14:16:40 5 three. I can't remember exactly.

6 Q. There was more than one, though, correct?

7 A. Yes, more than one.

8 Q. And those meetings occurred after the meeting
9 at the church --

14:16:48 10 A. Yes.

11 Q. -- is that accurate?

12 A. Yes.

13 Q. Okay. Would your recollection regarding who
14 was in attendance at those meetings be the same as your
14:16:56 15 husband's?

16 MS. KIRK: Object as to form.

17 THE WITNESS: Let's see. Yes.

18 Q. (Continued by MR. ADAMS) Let me ask you this.

19 A. Yes.

14:17:03 20 Q. Who do you recall being at the meetings at
21 Alfie Ware's house?

22 A. The Nashes, the Pages, Alfie and his wife, and
23 Dick Gunther came a couple of times, so there must have
24 been three, because he was there twice.

14:17:20 25 Q. Do you have any idea why Mr. Nash is not a

1 party to the lawsuit?

2 A. I have no idea.

3 Q. Have you ever asked him about it?

4 A. No.

14:17:27 5 Q. Have you ever spoken to him about the lawsuit?

6 A. No.

7 Q. He was in attendance at the meetings at Alfie
8 Ware's house, though; is that your testimony today?

9 A. Yes. Yes.

14:17:43 10 Q. Would it be accurate that at no time have you
11 ever had any personal conversations with Mr. or Mrs. Cox
12 regarding their activities on their property?

13 A. Well, I spoke with Mrs. Cox once, but it
14 wasn't about the activities. She came to see me the day
14:17:57 15 before the meeting to ask if we were going to the
16 meeting. That's all.

17 Q. But that was the first time you had spoken to
18 them, correct?

19 A. Yes.

14:18:05 20 Q. And specifically your conversation was with
21 Mrs. Cox --

22 A. Yes.

23 Q. -- correct? And your conversation with Mrs.
24 Cox, the day before the meeting at the church --

14:18:17 25 A. The day of the meeting.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)
CUNDIFF, husband and wife;)
ELIZABETH NASH, a married woman)
dealing with her separate)
property; KENNETH PAGE and) No. CV 2003 0399
KATHERYN PAGE, as Trustees of)
the Kenneth Page and Katheryn)
Page Trust,)
)
)
Plaintiffs,)
)
vs.)
)
DONALD COX and CATHERINE COX,)
husband and wife,)
)
)
Defendants.)
)

DEPOSITION OF JOHN B. CUNDIFF

Prescott Valley, Arizona
August 25, 2004
9:11 a.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

LOTT

1 A. Let's see. This has been going on 15 months.
2 Probably in 2003, I guess.

3 Q. Was it the winter, spring, summer or fall of
4 2003?

10:48:05 5 A. The weather was nice. I don't remember
6 exactly the date.

7 Q. That meeting occurred prior to the lawsuit
8 that you filed, correct?

9 A. Yes. Yes.

10:48:26 10 Q. Was it shortly before the filing of the
11 lawsuit or a long time before the filing of the lawsuit?

12 MS. KIRK: Object as to form.

13 THE WITNESS: Well, shortly, I suppose.

14 Within a few months, I would say. I don't recall
10:48:43 15 exactly.

16 Q. (Continued by MR. ADAMS) Okay. What do you
17 mean by a few months?

18 A. Shit. Three.

19 Q. Now, do you recall participating or attending
10:49:01 20 any meetings at Alfie Ware's home?

21 A. Yes.

22 Q. How many meetings do you recall participating
23 in or attending at Mr. Ware's house?

24 MS. KIRK: Object as to form.

10:49:17 25 THE WITNESS: Three.

1 Q. (Continued by MR. ADAMS) Were those meetings
2 before or after the meeting at the church that was just
3 prior to the filing of your lawsuit?

4 MS. KIRK: Object as to form.

10:49:29 5 THE WITNESS: It was after.

6 Q. (Continued by MR. ADAMS) The meetings at Mr.
7 Ware's house were after the church meeting?

8 A. Yes.

9 Q. So if I've got my sequence of events right,
10:49:43 10 sometime in the year 2003 there was a meeting at the
11 church that's located within the portion of Coyote
12 Springs Ranch where your property is located. Subsequent
13 to that meeting there were three meetings at Alfie Ware's
14 house, and subsequent to those three meetings your
10:49:59 15 lawsuit was filed against Mr. and Mrs. Cox. Do I have
16 that sequence accurate?

17 MS. KIRK: Object as to form.

18 THE WITNESS: I believe you do.

19 Q. (Continued by MR. ADAMS) Were there any
10:50:07 20 discussions with any property owners concerning Mr. or
21 Mrs. Coxes' property in which you were involved prior to
22 the meeting at the church?

23 MS. KIRK: Object as to form.

24 THE WITNESS: No.

10:50:17 25 Q. (Continued by MR. ADAMS) So was that the

1 very -- Strike that.

2 Was the meeting at the church the very first
3 time you were involved in any discussion involving Mr. or
4 Mrs. Coxes' property?

10:50:28 5 MS. KIRK: Object as to form.

6 THE WITNESS: I don't recall, you know,
7 discussing their property with anyone else prior to the
8 meeting, no. I don't.

9 Q. (Continued by MR. ADAMS) With respect to the
10:50:54 10 meetings at Alfie Ware's home, who else was in
11 attendance?

12 A. Let's see. The Pages, the Nashes, I think
13 Dick Gunther was there. And let's see. The fellow who
14 lives next door to me went to one on the -- one on the
10:51:29 15 south side. I can't recall his name, but I -- you know,
16 he lives next to me on the south side.

17 Q. Would that be directly south of your property?

18 A. Yes, um-hum.

19 Q. Did you take any notes at these meetings at
10:51:56 20 Alfie Ware's house?

21 A. No.

22 Q. Do you know if anybody did?

23 MS. KIRK: Object as to form.

24 THE WITNESS: I don't recall anyone taking
10:52:05 25 notes.

1 Q. (Continued by MR. ADAMS) What was discussed
2 at the meetings at Alfie Ware's house?

3 MS. KIRK: Object as to form.

4 THE WITNESS: We discussed filing a
10:52:24 5 lawsuit.

6 Q. (Continued by MR. ADAMS) Against whom?

7 A. Against the Coxes.

8 Q. Were any other property owners identified as
9 potential parties that the people at the meetings at Mr.
10:52:42 10 Ware's house should include in any lawsuit?

11 MS. KIRK: Object as to form.

12 THE WITNESS: I don't understand your
13 question.

14 Q. (Continued by MR. ADAMS) Were any other
10:52:50 15 properties discussed at the meetings at Alfie Ware's
16 house?

17 A. No.

18 Q. Would it be accurate that no other properties
19 or property owners in the portion of Coyote Springs Ranch
10:53:08 20 where your property is located were identified as
21 violating the Declaration of Restrictions?

22 MS. KIRK: Object as to form.

23 THE WITNESS: Yes, I think that would be
24 accurate. I don't recall discussing anyone but the
10:53:23 25 nursery.

1 being --

2 A. Yes.

3 Q. Now there's someone identified named Alfie in
4 the information published by the Lonesome Valley

13:28:08 5 Newsletter. Do you know who that would be?

6 A. That would be Alfie Ware.

7 Q. Does Alfie Ware live in the portion of Coyote
8 Springs Ranch that you live in?

9 A. No.

13:28:17 10 Q. Do you have any information regarding why he
11 would be a contact person concerning the action you've
12 brought against Mr. and Mrs. Cox?

13 A. Well, he's furnishing a majority of the funds.

14 Q. What do you mean he's furnishing the majority
13:28:46 15 of the funds?

16 A. He's paying the legal expenses.

17 Q. Is he paying all of the legal expenses?

18 A. So far.

19 Q. Are you out-of-pocket anything in connection
13:28:54 20 with the litigation in which you've sued Mr. and Mrs.
21 Cox?

22 A. Not yet.

23 Q. Has anybody contacted you, to your knowledge,
24 in response to the information you've had published in
13:29:11 25 the Lonesome Valley Newsletter?

1 them coming and going.

2 Q. Have you ever seen a truck actually travel to
3 or from Mr. and Mrs. Cox's --

4 A. Yes.

5 Q. -- property?

6 A. Yes.

7 MS. KIRK: Remember to let him finish his
8 question.

9 THE WITNESS: Oh, I'm sorry.

10 13:35:50 Q. (Continued by MR. ADAMS) Now, if you look
11 again at the Lonesome Valley Newsletter --

12 A. Um-hum.

13 Q. -- that I showed you previously. If you look
14 at the front cover, what's the date?

15 13:36:01 MS. KIRK: The front cover.

16 THE WITNESS: September of 2003.

17 Q. (Continued by MR. ADAMS) Since that date,
18 have you had an occasion to speak with Alfie Ware?

19 A. Oh, yes.

20 13:36:17 Q. Has he made any comments to you regarding any
21 responses he has received as a result of that newsletter?

22 A. No, not that I recall.

23 Q. He has never said anything to you regarding
24 any phone calls or correspondence he has received, in

25 13:36:34 response to that newsletter?

1 A. I don't recall him ever mentioning it.

2 Q. How often do you speak with Mr. Ware regarding
3 this lawsuit?

4 A. Oh, every couple of weeks or so.

13:37:36 5 Q. You also made the statement in the September
6 2003 Lonesome Valley Newsletter that, "If you want to
7 keep our CC & R's alive and working on our behalf, please
8 join with us in the effort." Has anybody contacted you
9 and said that they want to assist you in keeping the,
13:37:57 10 quote, "CC & R's alive and working," end quote?

11 A. Yes.

12 Q. Who?

13 A. Dick Gunther.

14 Q. Anybody else?

13:38:10 15 A. I can't recall anyone else contacting me.

16 Q. Anybody else?

17 A. I don't recall anyone else, no.

18 Q. Okay. And then in the September 2003 Lonesome
19 Valley Newsletter, it references a letter that was handed
13:38:28 20 out to various land owners that reads as follows:

21 "Dear Land Owner: A group of land/homeowners
22 in Coyote Springs have banded together to stop the
23 commercial activity of the Prescott Valley
24 Nursery/Growers at the front of our community.

13:38:47 25 Litigation is in progress. They went through the area to

1 find those who are in violation. Your parcel was on
2 their list. We feel that they are grasping at straws on
3 some of these accusations. We will be trying to contact
4 you for more information."

13:39:01 5 "If," and I think this is a typo. It says if,
6 but I think it should read it, "would be greatly
7 appreciated if you would call one of us so that we can
8 rectify this as soon as possible. We have a deadline to
9 meet."

13:39:12 10 You authorized that letter to be circulated;
11 is that correct?

12 A. Yes.

13 Q. You make a reference to a group of land,
14 slash, homeowners, in Coyote Springs that have banded
15 together. Who is that group?

16 A. Let's see. The people involved in the
17 litigation. That would be myself, my wife, the Pages,
18 and, or, yeah, the Pages, and then Nash, Becky Nash and
19 then Alfie is involved.

13:39:48 20 Q. Is there any other person who is involved in
21 that group?

22 A. Well, Dick Gunther went to some of the
23 mediation meetings.

24 Q. Anybody else?

13:39:57 25 A. No, not that I can think of.

1 Q. My question, though, was did you have one?

2 A. I don't know. I can't recall.

3 Q. Do you know if Alfie Ware has received any

4 responses to the letter which was handed out to various

13:41:39 5 property owners?

6 A. No. He hasn't talked to me about that.

7 Q. Your communications with Mr. Ware have

8 occurred outside of the three meetings he had at his

9 house; is that correct?

13:41:53 10 A. Say that again.

11 Q. Well, you testified earlier today that there

12 were three meetings that were held at Mr. Ware's home. I

13 want to know if your communications with Mr. Ware are

14 limited to those three meetings or if you've talked to

13:42:09 15 him outside of those meetings.

16 A. Oh, I've talked to him outside of those

17 meetings.

18 Q. How many times have you talked to him

19 regarding the lawsuit you filed or the claims you've

13:42:17 20 alleged against Mr. or Mrs. Cox?

21 A. I'd have to guess. Is that good?

22 Q. Sure.

23 A. 10.

24 Q. Did you talk about any other property owners

13:42:26 25 during the course of those 10 discussions?



7

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)
CUNDIFF, husband and wife;)
ELIZABETH NASH, a married woman)
dealing with her separate)
property; KENNETH PAGE and) No. CV 2003 0399
KATHERYN PAGE, as Trustees of)
the Kenneth Page and Katheryn)
Page Trust,)
)
)
Plaintiffs,)
)
vs.)
)
DONALD COX and CATHERINE COX,)
husband and wife,)
)
)
Defendants.)
)
_____)

DEPOSITION OF KATHERYN PAGE

Prescott, Arizona
June 23, 2004
9:36 a.m.

COPY

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

1 A. I don't -- We don't invite neighbors to have
2 neighborly talks if they're not standing out in the yard
3 together. We were driving by.

4 Q. Where was this discussion that you had with
10:36:25 5 Mr. Launderers?

6 A. Oh, let's see. We talked to him -- I believe
7 we talked to him several times, but I'm not sure exactly
8 when or who was there, but I know we did have one
9 discussion at Alfie's house.

10:36:48 10 Q. Alfie who?

11 A. Alfie Ware.

12 Q. And who is Alfie Ware?

13 A. He is a resident in Coyote Springs.

14 Q. Is he a resident of the portion of Coyote
10:36:57 15 Springs in which your property is located?

16 A. No.

17 Q. So why would you discuss with Mr. Ware the
18 condition of properties in your portion of the Coyote
19 Springs Ranch when he is not a resident of that portion
10:37:11 20 of the subdivision?

21 A. Because he has the same CC & R's.

22 Q. And Mr. Ware operates a stable operation,
23 correct?

24 MS. KIRK: Objection.

10:37:22 25 THE WITNESS: No, that's not correct.

1 Q. (Continued by MR. ADAMS) You've not heard of
2 Ware Stables?

3 A. I've heard of Weir Stables.

4 MS. KIRK: Just let me interrupt, to avoid
10:37:26 5 confusion. Ware, W-A-R-E, not Weir, W-E-I-R.

6 MR. ADAMS: Okay.

7 Q. (Continued by MR. ADAMS) So Mr. Ware doesn't
8 live in the portion of Coyote Springs governed by your
9 subdivision, correct?

10:37:39 10 A. Correct.

11 Q. Okay. Did Mr. Lauanders, during your
12 discussion with him, ever advise you that he had been
13 sued for violation of the CC & R's himself?

14 A. I'm not aware of him saying that.

10:37:47 15 Q. Has he ever advised you that he's admitted
16 during a deposition that his property is in violation of
17 the CC & R's?

18 MS. KIRK: Objection.

19 THE WITNESS: I'm not aware of that.

10:37:59 20 MR. ADAMS: Okay. There's something I
21 need to grab. Take a break for a minute.

22 (Whereupon, a recess was had.)

23 (Deposition exhibit two marked.)

24 Q. (Continued by MR. ADAMS) We were talking,
10:56:25 25 prior to the break, about the meeting both prior to the

1 Q. Okay.

2 A. It's been such a long time, that I don't
3 remember all the details, but I know that the neighbors
4 were talking. I don't know -- I don't remember.

10:57:51 5 MS. KIRK: Are you asking her, was there a
6 pre-meeting --

7 MR. ADAMS: Yes.

8 MS. KIRK: -- like, everybody gets
9 together in a room or something --

10:57:57 10 MR. ADAMS: Thank you, Counselor. Was
11 there --

12 MS. KIRK: As opposed to a series of
13 discussions. That's what he's asking. Did you have,
14 like, a prior meeting in somebody's office where all
10:58:10 15 these people attended?

16 THE WITNESS: Before that meeting? I
17 don't think so. I don't remember. I remember that there
18 were some meetings. There was a meeting at Bob Launders'
19 office.

10:58:18 20 Q. (Continued by MR. ADAMS) And who was in
21 attendance at that meeting, besides you and Mr. Launders?

22 A. John Cundiff, Barbara Cundiff. I'm not sure
23 if Becky or Tom Nash were there. There was just --
24 There weren't very many. Alfie might have been there.
10:58:42 25 I'm not certain of that. I don't know -- I'm not sure

1 when that meeting occurred. Then there was a meeting at
2 Alfie's house, and --

3 Q. And that's Alfie Ware?

4 A. Yes.

10:58:55 5 Q. Spelled W-A-R-E?

6 A. A-R-E. Alfie and CC Ware.

7 Q. Okay.

8 A. And I'm not sure whether that -- I'm not sure
9 the chronological order of these meetings. I don't
10 remember. I don't -- I can't remember. That's why I
11 keep a journal, because I can't remember things.

12 Q. Okay. So you write down, in chronological
13 order, things as they occur with respect to events out in
14 Coyote Springs Ranch?

10:59:30 15 A. I have --

16 MS. KIRK: Objection. Go ahead.

17 THE WITNESS: I have a habit of writing
18 down in a journal if I have meetings to attend. I don't
19 go into detail. Sometimes I write them down. Sometimes
10:59:42 20 I'll just remember it, if it's that week, and I'll forget
21 to write it down. But as a rule I keep a journal.

22 Q. (Continued by MR. ADAMS) And that journal has
23 date entries, correct?

24 A. Yes, it's got dates, and I just fill in what
10:59:57 25 events that I have to attend and so forth.

1 conversation with Mr. Sanders, there was another meeting
2 in which Mr. Lauanders was present; is that correct?

3 A. After that, yes.

4 Q. And that meeting with Mr. Lauanders was also
11:08:21 5 prior to the meeting at the church, correct?

6 A. I am not sure about the time.

7 Q. Okay. Fair enough. At the meeting that Mr.
8 Lauanders was present at, who else was also present?

9 A. Well, I remember Bob Lauanders at a meeting at
11:08:43 10 Alfie's home, Alfie Ware's.

11 Q. Okay. Would I be safe in assuming that Alfie
12 Ware was present during that meeting?

13 A. Yes.

14 Q. Was her husband present at that meeting?

11:08:59 15 A. Alfie is the guy. His wife, yes, CC, she was
16 there also.

17 Q. Okay. Again, the Wares don't own property in
18 the section of Coyote Springs Ranch that your property is
19 located in, correct?

11:09:07 20 A. Correct.

21 Q. Who else was at the meeting at the Wares'
22 household?

23 A. I believe Dick Gunther was there, Barbara and
24 John Cundiff, myself and my husband, possibly -- I think
11:09:28 25 Becky Nash was there and possibly Tom Nash. I'm not sure

1 A. The names? Becky and Tom Nash, John and
2 Barbara Cundiff, Dick Gunther, myself and Ken, and Alfie
3 Ware. I think that was all. I think, I think that was
4 it.

11:29:59 5 Q. Which people did you -- And you don't have
6 any recollection of specific people that you spoke to in
7 connection with that effort?

8 A. No. I don't remember their names.

9 (Deposition exhibit three marked.)

11:30:43 10 Q. (Continued by MR. ADAMS) I'm showing you what
11 has been marked as exhibit number three. Do you
12 recognize what this is?

13 A. It looks similar to a map of Coyote Springs.

14 Q. Okay. Would you agree that it's a map that
11:30:59 15 includes the portion of Coyote Springs Ranch that you
16 live in?

17 A. Yes.

18 Q. Could you please identify where your property
19 is located?

11:31:08 20 A. Okay. Coyote Springs Road.

21 MS. KIRK: Can she mark it? Can she mark
22 on it?

23 MR. ADAMS: She can just indicate by
24 parcel number.

11:31:19 25 THE WITNESS: Saddle Horn Road right here.

1 we?

2 A. The people in the group, Coyote Springs
3 residents.

4 Q. Okay.

13:53:47 5 A. Or those that own property.

6 Q. And who is in that group that you're talking
7 about there?

8 MS. KIRK: Objection.

9 THE WITNESS: I've already told you.

13:53:55 10 Q. (Continued by MR. ADAMS) Well, you didn't
11 define, you didn't -- You gave me names of a couple of
12 people who were at a meeting at Mrs. Ware's house, but
13 you didn't define that as a group, so I would like to
14 know what group this is and who is in this group that are
13:54:13 15 gaining momentum to, when they become aware of violations
16 like businesses, the group can stop it. Who is the
17 group?

18 A. The meeting people.

19 Q. Okay. And those were only the people who were
13:54:22 20 at Mrs. Ware's house --

21 MS. KIRK: Objection.

22 Q. (Continued by MR. ADAMS) -- or is it only the
23 group that's part of this lawsuit as plaintiffs?

24 MS. KIRK: Objection.

13:54:30 25 THE WITNESS: It's more than the people in

1 the -- that are plaintiffs.

2 Q. (Continued by MR. ADAMS) Okay. Is it more
3 than the people who were at Mrs. Ware's house?

4 A. Yes.

13:54:37 5 Q. Okay. Then who else is in the group, other
6 than the people at Mrs. Ware's house and the people who
7 are plaintiffs in this lawsuit?

8 A. Well, I have had two people tell me that they
9 wanted to be a part of, of -- it -- Okay. It was
13:54:59 10 mentioned in one of our meetings that we need to form
11 a -- I forgot the term that he used but it was a --

12 Q. Who is he?

13 A. Alfie. He wanted to -- Well, it was
14 suggested -- I don't know if he suggested it or who at
13:55:16 15 the meeting. It was, it was Gunthers and the ones I told
16 you that was at the meeting, that we form a group out
17 there, and we'll pay dues. We can't have an association,
18 because you have to form that at the very beginning, and
19 obviously we can't do that, so we have -- We have
13:55:40 20 discussed forming a group that would pay in, into like
21 dues, and then when something comes up like this, we will
22 have the financial ability to do what we need to do to
23 stop the violations.

24 Q. Why are the Wares involved in this group if
13:56:04 25 they don't own any property in the portion of the Coyote

1 Springs Ranch Subdivision that you live in and that the
2 Coxes own property in?

3 MS. KIRK: Objection.

4 THE WITNESS: Because they live in Coyote
13:56:19 5 Springs, and they're under the same code and restrictions
6 that we are. It's all one. And until this came about, I
7 did not know that it was divided down into two sections.
8 So he's protecting himself by doing the same, by joining
9 into the group, and there are others that don't belong on
13:56:34 10 our -- that don't live on our side also that could
11 possibly join us.

12 Q. (Continued by MR. ADAMS) So is this group
13 going to pursue violations in areas of the subdivision
14 that are governed by a different set of Declaration of
13:56:48 15 Restrictions?

16 MS. KIRK: Objection.

17 THE WITNESS: They're all the same
18 restrictions.
19 Q. (Continued by MR. ADAMS) But they're
13:56:54 20 different, they're separate documents recorded on
21 different dates and affecting different property,
22 correct?

23 MS. KIRK: Objection.

24 THE WITNESS: They're all -- They all got
13:57:00 25 this copy --

90000 SERIES
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RECYCLED

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)	
CUNDIFF, husband and wife;)	
ELIZABETH NASH, a married woman)	
dealing with her separate)	
property; KENNETH PAGE and KATHRYN)	No. CV 2003 0399
PAGE, as Trustees of the Kenneth)	
Page and Catherine Page Trust,)	
)	
)	
Plaintiffs,)	
)	
vs.)	
)	
DONALD COX and CATHERINE COX,)	
husband and wife,)	
)	
Defendants.)	

DEPOSITION OF KENNETH PAGE

Prescott, Arizona
June 23, 2004
2:41 p.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

COPY

LOTT REPORTING, INC.

316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

1 conversation occur before or after you filed the lawsuit?

2 A. I think it was before -- to my recollection,
3 and I'm -- As far as I know, I think it was before.

4 Q. Okay. Did that conversation with Mr. James
16:13:20 5 occur before or after there was the meeting at the
6 church?

7 A. Seems like it could have been before.

8 Q. Okay.

9 A. But I'm not sure.

16:13:32 10 Q. Did that conversation occur before or after
11 you had the meeting at Mrs. Ware's house?

12 MS. KIRK: Object as to form.

13 Q. (Continued by MR. ADAMS) Or Alfie Ware's
14 house?

16:13:46 15 MS. KIRK: Object. Form and foundation.

16 THE WITNESS: I would think before.

17 Q. (Continued by MR. ADAMS) Okay.

18 A. But I'm not sure.

19 Q. Okay. You have no idea when that conversation
16:13:52 20 took place?

21 A. Not exactly, no.

22 MS. KIRK: Jeff, he doesn't recall. How
23 many different ways can he tell you?

24 MR. ADAMS: Please don't testify for your
16:13:58 25 client.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

JOHN B. CUNDIFF and BARBARA C.)
CUNDIFF, husband and wife;)
ELIZABETH NASH, a married woman)
dealing with her separate)
property; KENNETH PAGE and)
KATHERYN PAGE, as Trustees of)
the Kenneth Page and Katheryn)
Page Trust,)

No. CV 2003 0399

Plaintiffs,)

vs.)

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

Defendants.)

DEPOSITION OF ELIZABETH NASH

Prescott Valley, Arizona
September 10, 2004
10:08 a.m.

REPORTED BY:
RENA F. LOTT, RPR
Certified Court Reporter
Certificate No. 50495

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316 North Alarcon Street
Prescott, AZ 86301
928.776.1169

CC-1

1 just about you had asked her a question about things she
2 did not know about. She did not tell me anything
3 particular.

10:08:41 4 Q. Okay. Did you have any conversations with any
5 of your other fellow plaintiffs regarding their
6 depositions?

7 A. Not that I remember.

8 Q. Okay. So Mrs. Page was the only person you
9 discussed the depositions in this case with?

10:08:42 10 A. Yes.

11 Q. And in connection with getting ready for
12 today's deposition, all you have done is look at some
13 pictures that you've been provided with; is that
14 accurate?

10:08:42 15 A. Correct.

16 Q. Have you reviewed any of the items of
17 correspondence that have been provided to your attorney
18 previously from other property owners in Coyote Springs
19 Ranch?

10:08:42 20 A. No.

21 Q. Your fellow plaintiffs have testified during
22 their depositions that there were some meetings regarding
23 my clients' property that were conducted at Alfie Ware's
24 house. Do you recall attending any meetings of that
10:08:43 25 nature?

1 A. I believe I went to one meeting at his house.

2 Q. Tell me the date on which you went to that one
3 meeting at Alfie Ware's house.

4 A. I do not remember the date.

10:08:43 5 Q. Do you remember what year that meeting would
6 have taken place?

7 A. No.

8 Q. Do you remember what month that meeting may
9 have taken place?

10:08:43 10 A. No.

11 Q. You have no recollection of when that meeting
12 took place?

13 A. No.

14 Q. Do you recall a meeting being conducted at the
10:08:43 15 church in Coyote Springs Ranch?

16 A. Yes.

17 Q. When, to the best of your recollection, do you
18 recall that meeting being --

19 A. I do not know the date of that either.

10:08:43 20 Q. Do you know what year it was in?

21 A. No.

22 Q. Was it before or after you filed the lawsuit
23 against my clients?

24 A. I think it may have been right before we --
10:08:44 25 that was with Bob Launderers, so I don't know if we had

1 done the lawsuit yet or not. I can't remember for sure.

2 Q. Was the meeting at Alfie Ware's prior to the
3 meeting at the church?

4 A. I think it was after, but I'm not for sure.

10:08:44 5 Q. Was it close -- Strike that.

6 Was it within a month, 2 months, 3 months of
7 the meeting at the church?

8 MS. KIRK: Object as to form.

9 THE WITNESS: I do not remember.

10:08:44 10 Q. (Continued by MR. ADAMS) Could it have been
11 within 2 years, 3 years, 5 years, 10 years?

12 MS. KIRK: Object as to form.

13 Q. (Continued by MR. ADAMS) You have no
14 recollection when the meeting at Alfie Ware's occurred?

10:08:45 15 MS. KIRK: Object as to form.

16 THE WITNESS: I don't remember the exact
17 dates, no, sir. I would say within a year, within
18 6 months maybe. I do not know the dates.

19 Q. (Continued by MR. ADAMS) And after that
10:08:45 20 meeting, again, you didn't have any communications of any
21 kind with Mr. or Mrs. Cox, correct?

22 A. No, I've never spoken to Mr. or Mrs. Cox.

23 Q. And, again, you never corresponded with them,
24 correct?

10:08:45 25 A. No.

1 A. Correct.

2 Q. And your answer would be the same if I were
3 referring to the year 2003 and prior to the time you
4 filed your lawsuit, correct?

10:08:51 5 A. Correct.

6 Q. What was discussed at the meeting at Alfie
7 Ware's house that you attended?

8 A. Boy. I don't even know if I can remember all
9 of it. Just that they were -- It was a commercial
10:08:51 10 business going in there. Nobody lived there, and it was
11 a commercial business was the gist of it. I do not
12 remember verbatim what was spoken.

13 Q. How did you reach the conclusion that nobody
14 was living in Mr. or Mrs. Cox's property?

10:08:51 15 MS. KIRK: Object as to form.

16 THE WITNESS: Because there was no house
17 there. There was a J-john there. That's how I would
18 imagine.

19 Q. (Continued by MR. ADAMS) Would you agree that
10:08:52 20 there's a house on the property now?

21 A. There is something back there. I don't know
22 what it is.

23 Q. Have you --

24 A. I've never been there, so I don't know.

10:08:52 25 Q. You've never been to Mr. or Mrs. Cox's

1 to enforce the Declaration of Restrictions against those
2 property owners?

3 A. No.

4 Q. Why not?

10:18:06 5 A. I believe this was asked before. I have
6 not -- just haven't had the time or the --

7 Q. Tell me about your agreement with Alfie Ware
8 related to the financing of this lawsuit.

9 A. My agreement?

10:18:19 10 Q. Yes.

11 A. I don't have an agreement with Alfie Ware.

12 Q. You're not paying for this litigation, are
13 you?

14 A. I haven't paid anything.

10:18:27 15 Q. Okay. Who has?

16 A. I have no idea who has.

17 Q. You have no idea who is paying for your
18 attorneys in this case?

19 A. I do not know -- I have not spoken about
10:18:39 20 money with my attorneys, no.

21 Q. You've never written a check or given any
22 money to your attorneys for the litigation of this case,
23 have you?

24 A. I haven't, no.

10:18:58 25 Q. But you have no idea who is paying for your

1 attorneys?

2 MS. KIRK: Object as to form.

3 THE WITNESS: I have not spoken with my
4 attorneys regarding money.

10:19:09 5 Q. (Continued by MR. ADAMS) Okay. You have no
6 information regarding who is paying your attorneys to
7 pursue the litigation against my clients?

8 MS. KIRK: Object as to form. That's the
9 fourth time you've asked the same question, Counsel.

10:19:27 10 MR. ADAMS: No, my question is different,
11 Counsel.

12 Please read back my question to her.

13 (Whereupon, the previous question was read
14 back by the court reporter.)

10:19:40 15 THE WITNESS: I have heard that Alfie is
16 paying some, but there are other people who have also
17 paid.

18 Q. (Continued by MR. ADAMS) When you say you
19 heard, who did you hear it from?

10:19:55 20 A. I do not recall.

21 Q. Turn to the first page of the Declaration of
22 Restrictions, please. Explain to me what paragraph two
23 means.

24 MS. KIRK: Object as to form.

10:20:23 25 THE WITNESS: That you cannot have a