

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA  
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JEANNE HICKS, CLERK  
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8 **IN THE SUPERIOR COURT OF ARIZONA**  
9 **COUNTY OF YAVAPAI**

*Div 1*

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

16 Plaintiffs, )

17 vs. )

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

20 Defendants. )

**Case No. CV 2003-0399**

Division 1

**PLAINTIFFS' OBJECTION  
TO DEFENDANTS'  
MOTION FOR ATTORNEYS' FEES**

**(Oral Argument Requested)**

21 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and  
22 through undersigned counsel, hereby object to Defendants Cox's motion for attorneys' fees. This  
23 objection is supported by the following memorandum of points and authorities, attached exhibits, as  
24 well as the entire record in this proceeding.

25 RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of August, 2005.

26 FAVOUR MOORE & WILHELMSSEN, P.A.

By: David K. Wilhelmsen  
Marguerite Kirk

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. Any Award of Attorney Fees Must be Reasonable**  
3 **and Defendants' Application for Attorney Fees is Patently Unreasonable**

4 Even assuming for purposes of argument that Defendants are entitled to an award of attorney's  
5 fees, the amount claimed is patently unreasonable. Once the threshold determination has been made  
6 that a party is a "successful party" for purposes of an attorney's fee award, the factors a court is to take  
7 into consideration in rendering the amount of the award were outlined by the Arizona Supreme Court:

8 (1) whether the unsuccessful party's claim or defense was meritorious;

9 (2) whether the litigation could have been avoided or settled and the successful party's  
10 efforts were completely superfluous in achieving the result;

11 (3) whether assessing fees against the unsuccessful party would cause an extreme  
12 hardship;

13 (4) whether the successful party prevailed with respect to all of the relief sought;

14 (5) whether the legal question presented was novel and whether such claim or defense  
15 have previously been adjudicated in this jurisdiction; and

16 (6) whether the award would discourage other parties with tenable claims or defenses  
17 from litigating or defending legitimate contract issues for fear of incurring liability for  
18 substantial amounts of attorney's fees.

19 *Wagenseller, supra*, 147 Ariz. at 394, 710 P.2d at 1049 citing *Associated Indemnity Corp. v. Warner*,  
20 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985).<sup>1</sup> The first two factors are necessarily intertwined.

21 The over-arching principles in a determination of an award of attorney's fees is that the fee is  
22 reasonable, both as to hourly rate and to number of hours devoted to the case. *Schweiger v. China Doll*  
23 *Restaurant, Inc.*, 138 Ariz. 183, 673 P.2d 927, 931 (App.1983). Identifying the factors a court was  
24 to consider in determining the reasonableness of the fee, the *Schweiger* court adopted that portion of  
25 the Arizona Supreme Court's decision in *Schwartz v. Schwerin*, 85 Ariz. 242, 336 P.2d 144, (1959):

26 <sup>1</sup> Although the *Wagenseller* decision was in the context of an award of attorney's fees under A.R.S. §12-341.01(A) on appeal, the factors enumerated by the Arizona Supreme Court in this decision have since been extended to litigation at the trial court level.

1 (1) the qualities of the advocate: his ability, his training, education, experience,  
2 professional standing and skill;

3 (2) the character of the work to be done: its difficulty, its intricacy, its importance,  
4 time and skill required, the responsibility imposed and the prominence and character  
5 of the parties where they affect the importance of the litigation;

6 (3) the work actually performed by the lawyer: the skill, time and attention given to  
7 the work;

8 (4) the result: whether the attorney was successful and what benefits were derived.

9 *Id.* at 245-46, 336 P.2d at 146.

10 Application of the Arizona Supreme Court's and appellate court's decisions in *Schwartz*,  
11 *Schweiger* and *Wagenseller*, to Defendants' application for attorney's fees compels the conclusion that  
12 the attorney's fees requested defy reasonableness because of the enormous unreasonable amount of  
13 time opposing counsel billed for unproductive work that did not or was not connected with the merits  
14 of the case. Defendants' attorney fee application is replete with billing entries that are unjustified,  
15 unreasonable, and groundless in light of the fact that this litigation was not complex, and perhaps most  
16 importantly, spanned an unnecessary length of time as a direct result of Defendants' counsel's  
17 unwarranted delay in filing summary judgment on the principle issue in dispute until the eve of trial.  
18 Furthermore, opposing counsel's billing statements are replete with vague entries that fail to provide  
19 adequate detail as to how the work was relevant and advanced Defendants' case. *Chase Bank of*  
20 *Arizona v. Acosta*, 179 Ariz. 563, 574, 880 P.2d 1109, 1120 (App. 1994).

21 **The Hours Expended by Opposing Counsel in this Matter are Clearly Unreasonable**

22 As a preliminary matter, it is important to note that with limited exception, Defendants'  
23 counsel's billing statements are replete with block billing entries. "Block billing" refers to the a lump-  
24 sum time assessed for multiple unrelated tasks in one billing entry. *Compare e.g., Defendants'*  
25 *counsel's billing entry for Adams, June 22, 2005 ("block billing"), with billing statement for Kack*  
26 *billing entry, July 22, 2005 (delineating time spent on various tasks).* Block billing prevents a court  
from adequately determining whether the fee claimed (based upon the time spent) for a particular  
matter is reasonable. *Gratz v. Bollinger*, 353 F.Supp.2d 929, 939 (D.Ct. S.D. Mich. 2005) ("As a result

1 of such 'block billing,' the Court is not able to determine the number of hours expended on each  
2 discrete task. Thus the Court cannot determine whether the number of hours billed are reasonable.”).

3 The use of block billing has justified federal courts in utilizing an across-the-board percentage  
4 reduction in the requested fees. *Id.* (holding “block billing” practice justified 10% reduction in  
5 attorney fee request in addition to further reductions on other grounds).

6 Furthermore, the sheer number of attorneys employed by Defendants mandates a fee reduction.  
7 “It is well recognized that when more lawyers than are necessary are assigned to a case, the level of  
8 duplication of efforts increases.” *General Electric Co.*, 1997 U.S. Dist. Lexis 19969, 1997 WL 397627  
9 at \*4. In this case, opposing counsel’s billing records demonstrate that during the course of their  
10 representation of Defendants, no less than 5 attorneys at their firm worked on the case (namely,  
11 Adams, Drutz, McGregor, Sargent-Flack and Kack). “It is well recognized that when more lawyers  
12 than are necessary are assigned to a case, the level of duplication of effort increases....” *Gatti v.*  
13 *Community Action Agency of Greene County, Inc.*, 263 F.Supp.2d 496, 518 (N.D.N.Y. 2003). This  
14 is precisely the result in the present case, as demonstrated by the astronomical fees opposing counsel  
15 charged for preparing, for instance, simple disclosure statements, and short memorandum. “While  
16 parties to a litigation may fashion it according to their purse and indulge themselves and their  
17 attorneys...they may not foist their extravagances upon their unsuccessful adversaries.” *Farmer v.*  
18 *Arabian American Oil Co.*, 31 F.R.D. 191, 193 (S.D.N.Y. 1963). In this fee application, as discussed  
19 in greater detail below, Defendants are attempting to foist onto Plaintiffs their indulgence and fancy  
20 in having multiple attorneys represent them when the complexity of the case clearly does not justify  
21 such an extravagance.

22 1. ANSWER, RESPONSE TO APPLICATION FOR PRELIMINARY INJUNCTION

23 AND WORK ON MOTIONS NEVER FILED BY DEFENDANTS

24 From the time current counsel represented Defendants, opposing counsel’s billing statements  
25 reveal incredible charges for work that exceeds what is reasonable for the task, or otherwise was  
26 performed for matters that were never filed. For instance, opposing counsel charged 6.1 hours for

1 preparing the answer: Adams (identified as JRA on the billing statements) charged 4.6 hours for  
2 preparing the answer in this complaint, as well as for a third-party complaint that was never filed in  
3 this case, and his assistant "LJT" charged 1.5 hours for preparing the answer. *See, Defendants'*  
4 *counsel's billing statements for February 26, 2004 (3.0 hours billed by JRA for preparing answer);*  
5 *April 8, 2004 (1.0 hours); April 26, 2004 (0.6 hours); and, May 7, 2004 (1.5 hours charged by LJT).*  
6 Incredibly, Adams billed his clients 0.75 hours for preparing the verification, presumably for the  
7 answer that was filed. *See, Defendant's counsel's billing statement for May 17, 2004.*

8 Adams also charged 1.5 hours on April 28, 2004 for preparing a notice of non-parties at fault.  
9 This is an extraordinary charge for a simple notice, made all the more extraordinary by the fact that  
10 Defendant never filed such a notice. *See, Defendants' counsel's billing statement, April 28, 2004 (1.5*  
11 *hours charged by JRA).*

12 Defendants further claim as reasonable attorney's fees an astonishing 2.3 hours of attorney and  
13 legal assistant time to prepare three perfunctory notices consisting of a *one sentence* demand for jury  
14 trial, a simple controverting certificate to motion to set that comprised one-half page, and, a one-page  
15 form notice of change of judge. *See, Defendants' counsel's billing statement for April 30, 2004 (1.5*  
16 *hours by JRA for preparing these notice); May 4, 2004 (0.6 hours by legal assistant LJT to do the*  
17 *same work again); and, May 4, 2004 (0.2 hours devoted to discussion between Adams and Drutz*  
18 *"regarding filing Notice of Change of Judge.").* These time entries further reveal a duplication of  
19 work between Adams and his legal assistant – both charging for preparing the same three notices,  
20 which combined amount to little more than one page of text, for a total of 2.1 hours.

21 Equally unreasonable, if not outright incredible, is Adams charge of 9.2 hours for preparing  
22 a response to Plaintiffs' application for a preliminary injunction. *See, Defendants' counsel's billing*  
23 *statements at May 5, 2004 (2.0 hours billed by "JRA"); May 6, 2004 (2.7 hours); May 12, 2004 (1.0*  
24 *hour); and, May 18, 2004 (3.5 hours).* Defendants never filed a response to the application for  
25 preliminary injunction, instead proposing and ultimately securing a stipulation to vacate the hearing  
26 set on the issue. *See, Stipulation vacating hearing on Plaintiffs' OSC re verified application for*

1 *preliminary injunction, prepared by Defendants' counsel, June 4, 2004.* For the preparation of that  
2 stipulation, opposing counsel charged 0.8 hours. *See, Defendants' counsel's billing statement for June*  
3 *1, 2004 (0.2 hours by LJT to draft stipulation and letter, and double the time by JRA, 0.4 hours, to*  
4 *"Work on Stipulation." ).*

5 Opposing counsel Adams' affidavit in support of the motion for attorney's fees is intended to  
6 attest to the reasonableness of the work performed. However, Adams' own billing statements  
7 demonstrate that such is not the case. On March 2 and 15, 2004, Adams billed 2.5 and 2.75 hours  
8 respectively for work regarding a potential action against an attorney, apparently for malpractice. *See,*  
9 *Defendants' counsel's billing statements for March 2, 2004 (2.5 hours billed by JRA for "legal*  
10 *research regarding action against Attorney"), and March 15, 2004 (2.75 hours billed by JRA for*  
11 *"Legal research legal liability [sic] of Attorney/Malpractice issues....").* Whatever problems  
12 Defendants may have had with some other or prior counsel, that involved a dispute that was not at  
13 issue in this case and for which any charge is inherently unreasonable.

14 Again, on June 25, 2004, Adams billed 1.40 hours for "work on a motion to compel discovery"  
15 that was never filed. *See, Defendants' counsel's billing statement for June 25, 2004 (1.40 hours billed*  
16 *by JRA).* Defendant bears the burden of establishing the reasonableness of the work. Defendant has  
17 not done so. It is an impossible task for either this Court or undersigned counsel to determine the  
18 reasonableness of any fee when the motion was never filed. Defendants' counsel McGregor also  
19 charged a total of 0.75 hours for research on July 19, 2004 on the topic of "equity and abatement and  
20 revival." Neither of these issues was ever presented or at issue in this litigation. *See, Defendants'*  
21 *counsel's billing statement for July 19, 2004 (0.75 hours charged by GKM).* Defendants' motion fails  
22 to provide any explanation as to the reasonableness of this charge.

23 Defendants' counsel's practice of charging for motions that were never filed continued through  
24 July, 2004. In their billing statements, opposing counsel have charged a total of 2.90 hours of attorney  
25 time for a motion to dismiss; another motion that was never filed. *See, Defendants' counsel's billing*  
26 *statement for July 22, 2004 (0.50 hours by MWD for conference with JRA on motion to dismiss); and*

1 (2.4 hours charged by JRA for "work on motion to dismiss."). Yet again, on July 29, 2004, opposing  
2 counsel Adams charged 1.20 hours for "work on motion regarding depositions of Sanders and  
3 Ware...." See, *Defendants' counsel's billing statement for July 29, 2004*. Adams again charged on  
4 August 13, 2004 1.25 hours for "work on motion to compel depositions regarding A. Ware and D.  
5 Sanders." See, *Defendants' counsel's billing statement for August 13, 2004*. Defendants' counsel  
6 never filed a motion to compel concerning "depositions of Sanders and Ware."

7 The reasonableness of Defendants' claimed attorney's fees is confirmed by Adams suspect  
8 billing entry of July 27, 2004 where he charged 1.4 hours for "legal research regarding waiver  
9 argument." See, *Defendants' counsel's billing statement for July 27, 2004*. This work was done the  
10 day prior to Plaintiffs filing and service on opposing counsel of their motion for summary judgment  
11 re: waiver. See, *Defendants' counsel's billing statement for July 28, 2004 (1.50 hours charged by JRA*  
12 *for, inter alia, "review motion for summary judgment and statement of facts....")*.

13 2. DEFENDANTS' COUNSEL'S TIME SPENT ON DISCOVERY  
14 IS UNREASONABLE

15 Defendants' counsel claims 18 hours for preparing their initial Rule 26.1 disclosure statement  
16 and responses to request for production of documents (the latter merely referencing the former). See,  
17 *Defendants' counsel's billing statements for August 17, 20, 25, 26, 27 and 30, 2005*. A cursory review  
18 of Defendants' initial disclosure statement (*a copy attached hereto as Exhibit "1"*) demonstrates the  
19 unreasonableness of counsel's claim of 18 hours to prepare the document. There is only a cursory  
20 rendition of the facts underlying the case, and no discussion or citation to any case in support of  
21 Defendants' affirmative defenses. To the contrary, Defendants merely disclosed the title for the  
22 affirmative defense (e.g. "Waiver") and then merely stated that "upon request," Defendants would  
23 divulge their legal support to Plaintiffs, (*see, Exhibit 1, Defendants' Initial Rule 26.1 Disclosure*  
24 *Statement, August 30, 2004 at pp.3-4*), even though opposing counsel Adams had already billed 1.4  
25 hours for legal research on waiver on July 27, 2004. Defendants' disclosure as to the subject matter  
26 of various witness testimony was a generalized statement for each witness, repeated for the

1 subsequently named witness. *See, Exhibit 1, Defendants' Initial Rule 26.1 Disclosure Statement at*  
2 *pp.4-9.* While Defendants' listed a large number of documents (which also formed their responses  
3 to a request for production), there is no discussion of the relevance of any of these documents that  
4 would justify any portion of 18 hours of work. *See, Exhibit 1, Defendants' Initial Rule 26.1 Disclosure*  
5 *Statement at pp.9-11.* Indeed, it is doubtful that anyone at opposing counsel's office even reviewed  
6 the disclosed documents that were forwarded to undersigned counsel, as documents listed under tab  
7 (11) were produced with a post-it note stating "Do Not disclose."

8 Adams also billed 2.50 hours for the preparation of a supplemental disclosure on November  
9 24, 2004. *See, Defendants' counsel's billing statement for November 24, 2004.* That disclosure  
10 statement consisted of the disclosure of one lay witness, the identification of 5 other documents (with  
11 no discussion as to their relevance), and a one-sentence quotation from a treatise in support of their  
12 defense of unclean hands. *See, Defendants' second supplemental disclosure statement, November 24,*  
13 *2004 (a copy attached hereto as Exhibit "2").* It defies credibility to suggest that 2.50 hours of an  
14 attorney's time was necessary to prepare such a scanty supplemental disclosure statement.<sup>2</sup>

15 The time billed by opposing counsel – 1.65 hours – for their 5<sup>th</sup> supplemental disclosure  
16

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17 <sup>2</sup> Noticeably absent from opposing counsel's billing statements is any charge for time spent  
18 on preparing a supplemental disclosure statement dated November 11, 2004. As the Court may recall,  
19 undersigned counsel filed a motion *in limine* regarding Defendants' calling several lay witnesses at  
20 the time of trial for failure of opposing counsel to disclose those witnesses prior to the Court imposed  
21 discovery cut-off date. *See, Plaintiffs' motion in limine, July 19, 2005.* Defendants' counsel stated to  
22 the Court that these witnesses had been disclosed, pointing to a disclosure statement dated November  
23 11, 2004. *See, Defendants' response to motion in limine, July 22, 2005 at p.2.*

22 **However, in reviewing opposing counsel's billing statements, there is no record for any**  
23 **work pertaining to a supplemental disclosure statement dated November 11, 2004.** On October 5,  
24 2004, Adams billed 1.0 hours for "work on supplemental disclosure statement...." That supplemental  
25 disclosure statement was forwarded to undersigned counsel on October 6, 2004. No other entry  
26 appears for work by any attorney or legal assistant at opposing counsel's office pertaining to another  
supplemental disclosure statement after October 5, 2004 until November 24, 2004 when Adams billed  
2.50 hours for work on a supplemental disclosure statement. That disclosure statement was forwarded  
to undersigned counsel on that date.

1 statement is, quite frankly, outrageous. *See, Defendants' counsel's billing statements for June 30, 2005*  
2 *(0.4 hours charged by Drutz and 1.25 hours charged by Adams)*. That disclosure statement consists  
3 of one sentence. *See, Defendants' Fifth Supplemental Disclosure Statement, June 30, 2004 (a copy*  
4 *attached hereto at Exhibit "3")*.

5 3. OPPOSING COUNSEL CHARGED AN UNREASONABLE  
6 AMOUNT OF TIME FOR RESPONDING TO PLAINTIFFS'  
7 SUMMARY JUDGMENT MOTIONS

8 In addition to the 3.0 hours charged by Adams on July 29 and August 5 to research the  
9 affirmative defense of waiver, opposing counsel also devoted 19.2 hours to preparing and revising  
10 their response and controverting statement of facts to Plaintiffs' motion for summary judgment re:  
11 waiver. *See, Defendants' counsel's billing statements for September 24, 27, 28, and 29, 2004*. This  
12 totals 22.2 hours charged by Defendants' counsel for responding to Plaintiffs' summary judgment  
13 motion on waiver. Substantively, Defendants' counsel's response to the summary judgment consisted  
14 of 5 pages; an almost equal number of pages were devoted to a re-print of their witness, Sheila  
15 Cahill's, report regarding alleged violations of the recorded restrictive covenants. *Compare,*  
16 *Defendants' response to summary judgment re waiver at pp.6-8, with Cahill Affidavit attached as*  
17 *Exhibit 8 to Defendants' controverting statement of facts*. Moreover, opposing counsel's  
18 controverting statement of facts is almost a duplication of the substantive text contained in the  
19 response. Most glaring – particularly in light of Adams previous billing for 3.0 hours of research on  
20 the issue of waiver – is the complete absence of any case law relevant or pertinent to the issue then  
21 before the Court, *other than* a quotation from the controlling case on which Plaintiffs' based their  
22 motion for summary judgment.

23 Defendants' counsel also impermissibly double-billed for both Drutz and Adams time in  
24 preparing for oral argument on Plaintiffs' motion for summary judgment re waiver. Drutz billed 2.50  
25 hours for preparation and attendance at oral argument, while Adams billed 3.75 hours for the identical  
26 work. *See, Defendants' counsel's billing statements at January 31, 2005*. But only Drutz argued his

1 clients' objection to the motion before the Court.

2       Opposing counsel charged an outlandish 37.0 hours for two attorneys to review Plaintiffs'  
3 motion for summary judgment regarding the affirmative defenses of estoppel, laches, and unclean  
4 hands, research, draft and revise a response. *See, Defendants' billing statements for December 28, 29*  
5 *and 30, 2004; and, January 3, 5, 6, 7, 8, 9, 10 and 11, 2005.* Opposing counsel's research included  
6 time spent on the defense of abandonment – which Plaintiffs' never moved for summary judgment –  
7 as well as “research ‘good for the goose, good for the gander’....” *See, Defendants' counsel's billing*  
8 *statements for January 2, 3 and 9, 2005 (research by attorney “SSF”).* “Good for the goose, good  
9 for the gander” is not a recognized legal argument. More importantly, Plaintiffs' prevailed on their  
10 motion for summary judgment on these affirmative defenses. *See, Minute Entry, April 4, 2005.*  
11 Reasonableness dictates that Defendants cannot recover their attorney's fees for raising futile, if not  
12 legally specious, defenses and arguments.

13                                   4. OTHER INSTANCES OF OPPOSING COUNSEL'S

14                                   CHARGE OF UNREASONABLE HOURS FOR MOTION PRACTICE

15       Opposing counsel seeks reimbursement for 5.05 hours of time to prepare a 3-page response  
16 to a motion *in limine* regarding the introduction of lay witness opinion testimony. *See, Defendants'*  
17 *response to motion in limine, September 23, 2005.* Adams charged 3.60 hours to work on the  
18 response, and for legal research. *See, Defendants' counsel's billing statements for September 22, 2004.*  
19 What was glaringly absent from Defendants' response was the citation and argument of any legal  
20 authority for their position. Opposing counsel's charge of more than 5 hours to prepare essentially  
21 a 3-page response is unreasonable.

22       Defendants' counsel also charged 6.65 hours of time for their work on a response to Plaintiffs'  
23 motion to compel tax returns and a motion for protective order on the same matter. *See, Defendants'*  
24 *billing statements for September 20, 2004, October 6 and 12, 2004.* The response and motion filed  
25 by opposing counsel again comprised a mere 3 pages, while no legal authority was offered other than  
26 a cursory cite to C.J.S. *See, Defendants' response to motion to compel and motion for protective*

1 order, October 12, 2004. Clearly, 6.65 hours of time to compose and file a 3-page rendition of facts  
2 surrounding the discovery dispute is inherently unreasonable. Furthermore, Defendants failed to  
3 prevail on the discovery dispute, the Court ordering the disclosure of their tax returns to Plaintiffs. *See,*  
4 *Minute Entry, January 31, 2005 at p.2.*

5 Two other entirely unsuccessful motion opposing counsel claims fees for was the motion to  
6 join indispensable parties under Rule 19 filed on June 24, 2005, and motion for summary judgment  
7 re declaration vagueness and ambiguity. Opposing counsel filed their motion just days before the  
8 Court ordered dispositive motion cut-off date, even though their billing records reflect that they had  
9 begun working on the indispensable party issue almost a year before, in July, 2004. *See, Defendants'*  
10 *counsel's billing statements for July 21 and 22, 2004 (billing by Adams for research on indispensable*  
11 *parties and work on "motion to dismiss").* In keeping with the established pattern of billing  
12 unreasonable hours for work on the case, opposing counsel claims a total of 49.85 hours to produce  
13 a 10-page motion on joining indispensable parties and a 3-page motion for summary judgment arguing  
14 that the restrictive covenants were vague and ambiguous. The latter motion characteristically  
15 contained no substantive legal argument based on existing case law; only cursory citation to 3 cases.  
16 Both motions were summarily denied by the Court on July 18, 2005. *See, Minute Entry, July 18, 2005*  
17 *at p.1 (denying Defendants' motion to join indispensable parties); see also, Defendants' counsel's*  
18 *billing statements for July 21 and 22, 2004; January 18, 19, 21, 26 and 31, 2005; February 28, 2005;*  
19 *and June 8, 16, 17, 20, 21, 22, 23 and 24, 2005 (work performed by attorneys Adams, Sargent-Flack*  
20 *and Drutz for research, "work on," and revisions to motion to dismiss pursuant to Rule 19 and*  
21 *vagueness/ambiguity summary judgment motion).* Not only are the hours devoted to these specious  
22 arguments beyond any semblance of reasonableness given the motions filed, but the fact that the Court  
23 summarily dismissed both motions mandates that Plaintiffs not be charged for opposing counsel's  
24 misguided motion practice based on ill-founded arguments.<sup>3</sup> Opposing counsel also demands as

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25 <sup>3</sup> In another block billing, dated July 20, 2005, Adams also charged for a motion for  
26 reconsideration of the Court's denial of their motion to join indispensable parties. This motion for

1 “reasonable attorney’s fees” the time each of the 3 attorneys spent reviewing the Court’s July 18, 2005  
2 minute entry denying their motion to join indispensable parties and motion for summary judgment re  
3 ambiguity and vagueness of the recorded declaration of restrictions. *See, Defendants’ counsel’s billing*  
4 *statements for July 18, 2005 (0.25 hours billed by Adams to review Court’s minute entry; 0.10 hours*  
5 *billed by attorney Sargent-Flack to review the same minute entry; and, time billed by attorney Drutz*  
6 *in a block billing segment to review the minute entry denying those motions).*

7 Undaunted by defeat, opposing counsel charged their clients and now seek reimbursement  
8 from Plaintiffs for 16.8 hours in connection with motions for reconsideration of the Court’s denial of  
9 their motion to join indispensable parties, and the Court’s prior dismissal of the affirmative defenses  
10 of laches, estoppel and unclean hands. *See, Defendants’ counsel’s billing statement for July 25, 2005*  
11 *(work performed by Adams, Kack and Sargent-Flack).* Opposing counsel never filed motions for  
12 reconsideration of the Court’s prior rulings on these issues. The time devoted by 3 attorneys on two  
13 motions for reconsideration is outrageous; that opposing counsel would even suggest that this Court  
14 impose attorney’s fees against Plaintiffs for more motions that were never filed by Defendants  
15 stretches the bounds of credibility.

16 Defendants’ counsel demands 3.15 hours for Adams’ and Drutz’s work on their motion to  
17 continue trial, filed July 14, 2005. The motion was a summary of communications between counsel  
18 concerning Defendants’ counsel’s basis for a request for a continuance. The motion was only 4 pages  
19 in length. The Court denied Defendant’s motion for trial continuance. *See, Minute Entry, July 18,*  
20 *2005.* It would be wholly unreasonable to charge Plaintiffs’ with the cost of yet another of  
21 Defendants’ failed motions.

22 Another glaring instance of opposing counsel’s improper demand for attorney’s fees is 2.95  
23 hours charged for work on a special action. *See, Defendants’ counsel’s billing statement for July 26,*  
24 *2005 (special action work performed by Sargent-Flack).* Defendants’ never filed a petition for special

25 \_\_\_\_\_  
26 reconsideration was never filed.

1 action, and they have failed to meet their burden of proof by demonstrating the reasonableness for this  
2 charge.

3 5. OPPOSING COUNSEL'S REQUEST FOR ATTORNEY'S FEES  
4 FOR PRE-TRIAL WORK IS INHERENTLY UNREASONABLE

5 Defendants' counsel seek attorney's fees for 72.65 hours for 4 attorneys work to prepare jury  
6 instructions, opening argument, a pre-trial statement, proposed voir dire, amending their witness list  
7 (their first witness list stricken by the Court pursuant to Rule 11), proposed jury verdict forms,  
8 speaking with witnesses, and for unspecified trial preparation. *See, Defendants' counsel's billing*  
9 *statements for June 29, 2005; July 12, 14, 15, 18, 19, 20, 21, 22, 23, 24, and 26 2005 (work by Adams,*  
10 *Kack, Drutz and Sargent-Flack on jury instructions, "prepare for trial," amended witness list,*  
11 *opening argument, jury verdict forms and voir dire questions).* The most mysterious billing entries  
12 amount to 7.25 hours on July 23 and 24, 2005, where Adams simply "prepare[d] for trial." These  
13 documents were never filed or served on undersigned counsel, and opposing counsel has failed to  
14 provide copies of these documents with their motion for attorney's fees to support the reasonableness  
15 of their request. Therefore, this Court may reject all of the claimed attorney's fees for this work.  
16 Alternatively, 70.20 hours is inherently unreasonable. Opposing counsel has also failed to  
17 demonstrate why none of this work could have been performed by a paralegal. The fact that 4  
18 attorneys were necessary to perform this work also defies credibility.

19 Even if the Court were inclined to provide any attorney's fee award for this work, it is  
20 imperative to note that opposing counsel bears responsibility for incurring these attorney's fees in the  
21 first instance. The basis for this Court vacating trial in this matter was Defendants' motion for  
22 summary judgment re agricultural activities. Opposing counsel filed this motion for summary  
23 judgment on June 24, 2005 – *less than a week* before the Court ordered cut-off date for filing  
24 dispositive motions; *a month* from the due date for filing jury instructions, voir dire and the like as set  
25 forth in the Court's April 4, 2005 minute entry; and, little more than *a month* before trial was  
26 scheduled to commence. Yet, opposing counsel had actual knowledge of their "legal" claim alleging

1 that the restrictive covenants prohibition against business and commercial activities did not preclude  
2 agricultural activities when their own client raised the argument during his deposition on June 22,  
3 2004 – a year before opposing counsel filed the motion for summary judgment. See, Defendant  
4 Donald Cox Deposition, June 22, 2004 at p.39, lines 8-13 (a copy attached hereto as Exhibit “4”).  
5 Opposing counsel has failed to provide any rational basis why they delayed more than a year, instead  
6 waiting until the eve of trial, to file a dispositive their dispositive motion on this issue. As a result,  
7 opposing counsel’s own dilatory conduct precludes them from recovering attorney’s fees for 72.65  
8 hours expended on pretrial work.

9 6. DEFENDANTS’ DEMAND FOR ATTORNEY’S FEES

10 ON POST-JUDGMENT WORK IS UNREASONABLE

11 Defendants’ counsel claims 5.75 hours to prepare the motion for attorney’s fees and costs. See,  
12 Defendants’ counsel’s billing statements for July 29 and August 8, 2005 (5.75 hours billed by Adams).  
13 Defendants’ motion is a typical *pro forma* application demanding re-imbusement of attorney’s fees,  
14 supported by a billing statement print-out. The time spent by opposing counsel in preparing the  
15 motion is clearly not justified by the end product.

16 Opposing counsel’s motion also includes time totaling 6.1 hours (again, by 3 attorneys) for  
17 work on issuing a subpoena *duces tecum* to non-party Alfie Ware, serving a request for production of  
18 documents on undersigned counsel to obtain information on Plaintiffs’ attorney’s fees, and work on  
19 reviewing Plaintiffs’ motion for a protective order arising from opposing counsel’s discovery requests.  
20 See, Defendants’ counsel’s billing statements for August 1, 2, 3, 4, 6, 10 and 12, 2005 (charges by  
21 Adams, Drutz and Sargent-Flack). As this issue is currently pending before the Court, and  
22 Defendants’ have not prevailed on this matter, opposing counsel has no basis in law to run an end-  
23 game around this Court by requesting their attorney’s fees on a collateral discovery issue in the instant  
24 motion.

25 ///

26 ///

1                    7. DEFENDANTS ARE NOT ENTITLED TO ATTORNEY'S FEES

2                    FOR WORK THAT IS SUPPORTED ONLY BY VAGUE BILLING ENTRIES

3                    Similar to the problem posed by block billing, vague billing entries, "such as "telephone  
4 conference," "office conference," "research" [and the like]," *Gratz, supra, 353 F.Supp.2d at 939*,  
5 preclude a court from determining whether the work was reasonably related to the litigation, and  
6 whether the time spent on the task was also reasonable. *Id. citing In re Pierce (Abrams Fee*  
7 *Application), 338 U.S. App. D.C. 97, 190 F.3d 586, 593-94 (D.C. Cir. 1999)* ("To establish that he  
8 is entitled to reimbursement for particular items of attorneys' fees...the fee petitioner must provide  
9 the court with the attorneys' billing records that describe the work performed in sufficient detail to  
10 establish that the work is reasonably related [to the litigation]."). The *Schweiger* Court also held  
11 that: "It is insufficient to provide the court with broad summaries of the work done and time incurred."  
12 *Schweiger, supra, 138 Ariz. at 188, 673 P.2d at 932*. The Eighth Circuit Court of Appeals has  
13 justified an across-the-board percentage fee reduction based upon a fee applicant's submission of  
14 vague billing entries in support of the claimed attorney's fees. *H.J. Inc. v. Flygt Corp., 925 F.2d 257,*  
15 *260 (8<sup>th</sup> Cir. 1991) (reducing hours billed by 20% because of vague billing entries).*

16                    Defendants' counsel's motion for attorney's fees is rife with vague billing entries that opposing  
17 counsel has not demonstrated to be relevant or necessary to the litigation of this case. For instance,  
18 Defendants' counsel charges 13.55 hours related to "telephone conference with client"; "letter to  
19 client"; "fax from client"; and 2 site visits to Defendants' property totaling 5.0 hours. *See, Defendants'*  
20 *counsel's billing statements for May 20, June 15, 16, 19, July 28, August 24, September 9 and 13,*  
21 *October 4, 7, 19, November 9, 2004; January 10, February 15, April 12 and 20, June 9, 14 and 21,*  
22 *and July 6, 2005*. Defendants provide no description of the topic of the conversation or letter, and thus  
23 this Court cannot intelligently decipher whether the work was necessary. Consequently, opposing  
24 counsel's fee request must be reduced for these unsupported hours.

25                    Former counsel for Defendants, Michael Bourke's billing statements are a catalog of vague  
26 time entries that fail in any way to demonstrate how the work done was reasonably related to the

1 litigation. *See, Exhibit 2 to Defendants' motion for attorney fees.* Therefore, it is appropriate for this  
2 Court to disallow all attorney's fees claimed by Defendants' former counsel.

3 Worse, opposing counsel claims 23.9 hours for conferences with each other. *See, Defendants'*  
4 *billing statements for February 26, May 4 and 7, June 23, 24, 25 and 30, July 22, September 13, 20,*  
5 *21 and 28, October 6, December 8, 15 and 27, 2004; January 5, 9 and 31, February 2 and 28, April*  
6 *7 and 25, May 9 and 20, June 1, 13, 16 and 29, July 1, 5, 11, 13, 15, 18, 19, 20, 21, 22, 25, 27 and 29,*  
7 *August 2 and 10, 2005 (due to opposing counsel's persistence in utilizing block billing, undersigned*  
8 *counsel assumed 0.2 hours for block billing entries dated September 28, 2004, January 31, June 16,*  
9 *July 1, 15, 19, 21 and 29, and, August 2, 2005; and, 0.4 hours for block billing entries dated July 22*  
10 *and 25, 2005 by Adams).* "Obviously, more lawyers leads to more 'conference' time...." *Gillberg v.*  
11 *Shea, 1996 U.S. Dist. Lexis 21847, 1996 WL 39762 (S.D.N.Y. 1996) at \*5.* The U.S. Supreme Court  
12 has held that multiple attorneys leads to case "overstaffing," in turn leading to unwarranted attorney's  
13 fees. *Hensley v. Eckerhart, 461 U.S. 424, 434, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).*

14 Defendants' counsel's 23.9 hours for "conferences" is an incredible number of hours for  
15 Defendants' counsel to be speaking amongst themselves regarding the case, and it is wholly  
16 unreasonable that simply because Defendants' chose to be actively represented by 4 attorneys at  
17 opposing counsel's firm (Adams, Drutz, Kack and Sargent-Flack) who are responsible for all these  
18 inter-office conferences, that this charge be shifted to Plaintiffs. In *Gratz v. Bollinger, supra*, the  
19 federal court stated, on an application for an award of attorney's fees, that counsel bears the burden  
20 of showing his own contribution when two or more attorneys work on a matter. *353 F.Supp.2d at 942*  
21 *(internal citation omitted).* The *Gratz* court significantly reduced the attorney fee request because of  
22 fees charged by multiple attorneys. The federal district court stated:

23 [A] significant number of billing entries show multiple attorneys charging for the same  
24 tasks ***or for tasks only made necessary because of the large number of attorneys***  
25 ***involved in the litigation.*** For example, many entries relate to telephone conferences  
26 and meetings between the attorneys and to preparation of notes, e-mails, and  
memoranda for the sole purpose of keeping [the] other attorneys apprised of progress  
in the case.

1 *Ibid.* (emphasis added). The same rationale applies in this case. As discussed throughout this  
2 objection, and particularly in regard to opposing counsel's constant conferencing among themselves,  
3 Defendants' multiple attorney representation has led to an unnecessary increased cost in their  
4 attorney's fees, without counsel demonstrating their "specific contribution." Absent such a showing,  
5 there is no basis to shift Defendants' option to engage multiple attorneys (and increased cost  
6 associated with that representation) to Plaintiffs.

7       Opposing counsel's conferencing among themselves also impermissibly includes double-  
8 billing for the same conference by each participating attorney. *See, Defendants' counsel's billing*  
9 *statements for December 15, 2004 (Adams and Sargent-Flack each apparently billing for the same*  
10 *conference); June 29, 2005 (conference between Drutz and Adams billed for by each); July 18, 2005*  
11 *(conference between Adams and Drutz); and July 21, 2005 (again, conference between Adams and*  
12 *Drutz that each billed).* Double-billing violates the "good billing judgment" rule. As the federal  
13 district court has explained: "When attorneys hold a telephone or personal conference, good 'billing  
14 judgment' mandates that only one attorney should bill that conference to the client, not both attorneys.  
15 The same good 'billing judgment' requires attorneys not to bill for more than two attorneys to review  
16 pleadings or to attend oral argument." *National Warranty Ins. Co., RRG v. Barnett, 1998 U.S. Dist.*  
17 *Lexis 20659 (D.Or. 1998).*

18       Defendants' counsel Adams and Drutz also double-billed for their preparation and attendance  
19 at oral argument on July 26, 2005 on their motion for summary judgment re agricultural activities.  
20 As noted when both prepared for and attended oral argument on Plaintiffs' motion for summary  
21 judgment on January 31, 2005, Adams did not participate in the oral argument on July 26, 2005, thus  
22 making his charge for preparation for the argument unnecessary and unwarranted. Opposing counsel  
23 double-billed 2.50 hours for preparation, attendance and conference with clients at oral argument on  
24 July 26, 2005. *See, Defendants' billing statements for July 26, 2005 (Adams preparation for other*  
25 *motions that were not argued that day mandate that the attorney fee request be reduced by 2.75 hours*  
26 *representing Adams charges for that day).* *In re Rite Way Reproductions, 1998 Bankr. Lexis 1080*

1 (“The court will not compensate professionals for attendance at meetings or court hearings by  
2 multiple members of the same firm when one or more of those professionals does not take an active  
3 part, and there has been no showing of the necessity for the second member to participate in a given  
4 meeting or hearing.”); see also, *Brake v. Murphy*, 736 So.2d 745 (Fla. Dist. Ct. App. 1999) (citing  
5 to Tenth Circuit for proposition that “If the same task is performed by more than one lawyer, multiple  
6 compensation should be denied....”).

7 **II. Imposition of An Award of Defendants’ Attorney’s Fees**

8 **Against Plaintiffs Constitutes a Hardship**

9 **and Would “Chill” Other Homeowners in the Subdivision from**

10 **Suing for Violations of the Recorded Covenants**

11 Defendants erroneously assert that the imposition of an award of attorney’s fees would not  
12 impose a hardship to Plaintiffs. Defendants argue that a third party is incurring the cost of this  
13 litigation. Defendants are incorrect. Plaintiffs’ borrowing the money to pay undersigned counsel’s  
14 attorney’s fees does not mean that they do not remain ultimately liable for re-payment of those fees  
15 to the third party. The fact that Plaintiffs are forced to seek the financial assistance of a third party  
16 only demonstrates the hardship that payment of their own attorney’s fees places on them, much less  
17 the onerous burden of paying Defendants’ cadre of attorneys that have worked on the case. Opposing  
18 counsel’s own billing statements underscore that their client is the proverbial deep-pocket, willing to  
19 pay any sum for any work on this litigation, whether or not the work or the amount billed is  
20 reasonable. To shift Defendants’ inflated attorney’s fees to Plaintiffs, when Plaintiffs have to borrow  
21 the funds to pay their *own* attorney, imposes a clear and obvious hardship on Plaintiffs. *Wagenseller*,  
22 *supra*, 147 Ariz. at 394, 710 P.2d at 1049 citing *Associated Indemnity Corp. v. Warner*, 143 Ariz. 567,  
23 570, 694 P.2d 1181, 1184 (1985).

24 Additionally, as this Court is aware, there is no organized homeowner’s association in Coyote  
25 Springs Ranch that can bring suit for violations of the recorded covenants. This Court’s imposition  
26 of attorney’s fees against Plaintiffs’ would serve to chill any litigation by other homeowners that

1 would seek to enforce the Declaration of Restrictions against other violators. *Wagenseller, supra.*

2 **III. Conclusion**

3 Defendants' counsel's attorney fee application is riddled with block billing, double-billing,  
4 vague billing entries, and unreasonable charges for work performed and for work on motions and  
5 pleadings never filed. Defendants' counsel's preference for block billing justifies this Court in  
6 reducing any fee award by an across-the-board percentage, a practice utilized in federal courts to  
7 ensure the fee applicant does not receive a windfall. To the extent the Court is able to decipher  
8 opposing counsel's billing statements, the overwhelming unreasonableness in amount of fees  
9 requested for work product that was either not filed or exceeded the amount of time a reasonable and  
10 prudent attorney would spend, for instance, on a one-sentence supplemental disclosure statement or  
11 a 3-page motion, warrants that this Court drastically reduce Defendants' attorney fee request.  
12 Furthermore, the vast majority of attorney's fees (for trial preparation) were generated as a result of  
13 opposing counsel's own dilatory conduct in filing the dispositive motion for summary judgment which  
14 effectively dispensed with the litigation. Opposing counsel knew more than a year before filing for  
15 summary judgment of the potential argument that ultimately prevailed in this Court. Yet, Defendants'  
16 counsel inexplicable delay in pursuing the issue until only weeks before trial precipitated their  
17 generation of incredible numbers of hours devoted to trial preparation. In further support of a  
18 reduction of the fee request, Defendants' indulgence in several attorneys working on their case, an  
19 "extravagance" they obviously could afford, does not warrant shifting to Plaintiffs those additional  
20 fees attributable to the multiple attorneys working on the case and conferencing with each other on  
21 the status of each motion, pleading or letter exchanged by counsel.

22 At a maximum, the only attorney's fees Defendants may seek reimbursement for is on their  
23 summary judgment motion re agricultural activities, and discovery related to that summary judgment,  
24 because Defendants only prevailed on that dispositive motion. A review of opposing counsel's time  
25 records for this work reveals that opposing counsel billed an inordinate and unreasonable amount of  
26 time for work on this narrow, limited issue.

1 Finally, and most importantly, the imposition of Defendants' attorneys fees to Plaintiffs  
2 imposes an undue hardship on Plaintiffs. Unlike Defendants, Plaintiffs have limited financial means,  
3 as evidenced by the fact that they could not afford their own attorneys without recourse to borrowing  
4 the money. Burdening Plaintiffs with Defendants' attorney's fees would also operate to chill any other  
5 homeowner in the subdivision from pursuing a legitimate claim for breach of the recorded covenants,  
6 a fact that weighs heavily against the imposition of fees in this case because there is no homeowner's  
7 association that can enforce the restrictive covenants.

8 DATED this 29<sup>th</sup> day of August, 2005.

9 FAVOUR MOORE & WILHELMSSEN, P.A.

10  
11  
12 By:   
13 David K. Wilhelmsen  
14 Marguerite Kirk  
15 Post Office Box 1391  
16 Prescott, Arizona 86302-1391  
17 Attorneys for Plaintiffs

18 Original of the foregoing  
19 filed this 29<sup>th</sup> day of August, 2005  
20 with:

21 Clerk, Superior Court of Arizona  
22 Yavapai County  
23 Prescott, Arizona

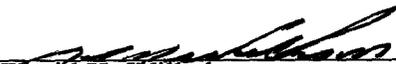
24 A copy hand-delivered this 29<sup>th</sup> day  
25 of August, 2005 to:

26 Honorable David L. Mackey  
Division One  
Superior Court of Arizona  
Yavapai County  
Prescott, Arizona 86302

///  
///  
///

1 and, a copy hand-delivered this  
29<sup>th</sup> day of August, 2005 to:

2 Mark Drutz  
3 Jeffrey Adams  
4 MUSGROVE, DRUTZ & KACK, P.C.  
5 1135 Iron Springs Road  
6 Prescott, Arizona 86302  
7 Attorneys for Defendants Cox

8 By:   
9 David K. Wilhelmsen

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EXHIBIT 1

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

4 Attorneys for Defendants  
5

6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF YAVAPAI**

8 JOHN B. CUNDIFF and BARBARA C.)  
CUNDIFF, husband and wife;  
9 ELIZABETH NASH, a married woman)  
dealing with her separate property;)  
10 KENNETH PAGE and KATHRYN)  
PAGE, as Trustee of the Kenneth Page)  
and Catherine Page Trust,

11 }  
12 Plaintiffs,

13 v.

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

15 }  
16 Defendants.  
17

CASE NO. CV 2003-0399

DIVISION 3

**DEFENDANTS' INITIAL RULE  
26.1 DISCLOSURE STATEMENT**

18 Defendants, Donald Cox and Catherine Cox, ("Defendants") by and through undersigned  
19 counsel, disclose the following information pursuant to Rule 26.1 of the Arizona Rules of Civil  
20 Procedure.

21 **I. FACTUAL BASIS FOR DEFENSES.**

22 Defendants are the owners of property located in Coyote Springs Ranch at 7325 N. Coyote  
23 Springs Road, Prescott Valley, Arizona ("Subject Property") that was purchased in April, 1998.  
24 Beginning in the year 2000, Defendants began making improvements to the Subject Property for  
25 purposes of using it as a tree farm on which trees and shrubs were to be grown and which were to be  
26 relocated at various times to Defendants retail and wholesale business locations on Highway 69 and  
27 Viewpoint Drive. Since the year 2000, Defendants constructed improvements to the Subject Property  
28 that have included constructing a driveway, drilling a well, establishing electricity and placing thereon

1 a mobile home, which has since been replaced by a manufactured home, establishing and installing  
2 irrigation lines and tree lines, support posts and cables along the tree lines, planting boundary trees,  
3 construction of a pump-house and meter for the well, construction of boundary fencing, construction  
4 of a tack room and corrals and substantial grading of the Subject Property. The majority of  
5 improvements to the Subject Property were completed in 2002, which coincided with Defendants' first  
6 use of the Subject Property as a tree farm. Not including the inventory of trees for the tree farm, the  
7 Defendants' cost of the Subject Property, improvements constructed thereon and equipment purchased  
8 for use at the Subject Property have cost Defendants approximately Five Hundred Fifteen Thousand  
9 Six Hundred Six Dollars and Seventy-Two Cents (\$515,606.72).

10 Prior to purchasing the Subject Property Defendants drove around the Coyote Springs Ranch  
11 area and saw evidence of many types of business and commercial activities that were not residential  
12 in nature including a church, Christmas tree farm, llama farms, alpaca farms, horse breeding, boarding  
13 and training facilities, a hay sales facility, a general contractor's warehouse, a shipping company and  
14 numerous commercial vehicles. Defendants do not recall ever seeing the Declaration of Restrictions  
15 that is subject of this lawsuit prior to their purchase of the Subject Property. Based upon their  
16 observations of Coyote Springs Ranch and the uses being made of properties in the area by other  
17 property owners, they had no reason to believe that their anticipated use of the Subject Property as a  
18 tree farm was not permitted. In January, 2001, Defendants filed their application with Yavapai  
19 County for an agricultural exemption for the Subject Property. The exemption was granted (and is  
20 still valid and effective today) and further led Defendants to believe that their use of the Property as  
21 a tree farm was allowed. In the spring of 2001, visited attorney, Bob Launders, who resided in the  
22 Coyote Springs Ranch area regarding their proposed use of the Subject Property. During their  
23 meeting, Mr. Launders advised them that while he would not want a tree farm next to his property,  
24 he stated that Defendants should have no problems with their use of the Subject Property as long as  
25 their neighbors had no objection. Thereafter, Defendants discussed their anticipated use of the  
26 Subject Property with their neighbors who owned property in the portion of Coyote Springs Ranch  
27 where the Subject Property is located. Each of those people consented to, and registered approval of,  
28

1 Defendants expected use of the Subject Property, which again led Defendants to believe that they  
2 could use the Subject Property as a tree farm.

3 Prior to filing their lawsuit on May 16, 2003, Plaintiffs made no effort to enforce the  
4 Declaration of Restrictions against Defendants. In fact, prior to filing this lawsuit, Plaintiffs never  
5 even had a personal or telephonic conversation with Defendants advising them that they believed the  
6 use of the Subject Property violated any restrictive covenant. This is the case despite the fact that  
7 every time they drove on Coyote Springs Road between 2000 and May, 2003, Plaintiffs observed  
8 Defendants' improvement and use of the Subject Property. Further, while Plaintiffs have claimed  
9 during their depositions that their reason for not objecting to Defendants' use of the Subject Property  
10 prior to filing their lawsuit was a lack of funds, that argument fails because their action against  
11 Defendants is not costing them any money. Rather, the lawsuit filed against Defendants is being  
12 funded in its entirety by an individual, namely Alfie Ware, who lacks any legal standing to bring the  
13 lawsuit. As such, the poverty claim lacks merit. Therefore, Plaintiffs have no viable answer to  
14 Defendants' laches and waiver defenses.

15 Furthermore, an investigation of the Coyote Springs Ranch subdivision has revealed that less  
16 than ten percent (10%) of the property owners have complied with the Declaration of Restriction. The  
17 violations of the Declaration of Restrictions is broad based and includes violations of virtually every  
18 restrictive covenant set forth in the Declaration of Restrictions including numerous violations of the  
19 provision dealing with business and commercial activities that have existed, in many cases, for  
20 decades. Plaintiffs are included amongst those in violation of the Declaration of Restrictions. Based  
21 on the sheer volume of violations of the Declaration of Restrictions, especially those numerous  
22 violations of the prohibition of business and commercial activities, it is rather obvious that the  
23 Declaration of Restrictions was long ago abandoned by the owners of properties in Coyote Springs  
24 Ranch.

## 25 **II. LEGAL THEORIES UPON WHICH CLAIMS AND DEFENSES ARE BASED**

- 26 1. The Declaration of Restrictions that are at issue have been abandoned.
- 27 2. Estoppel.
- 28 3. Waiver.

- 1           4.     Laches.
- 2           5.     Unclean Hands.
- 3           6.     Defendants/Counterclaimant further assert as defenses against Plaintiff's claims those
- 4 defenses set forth in their Answer to Plaintiffs' First Amended Complaint. Upon request, counsel for
- 5 Defendants will provide Plaintiffs with applicable legal authority supporting the Defendants' defenses
- 6 and will supplement this disclosure as applicable in the event additional defenses are identified
- 7 through the course of discovery.

8 **III.   26.1(a)(3) WITNESSES WHOM DEFENDANTS EXPECT TO CALL AT TRIAL**

9           **Catherine Cox**  
10           **c/o Jeffrey R. Adams**  
11           **MUSGROVE, DRUTZ & KACK, P.C.**  
12           **Post Office Box 2720**  
13           **Prescott, Arizona 86302-2720**

14           Catherine will testify as to her knowledge of the Subject Property and the Declaration of

15 Restrictions affecting the Subject Property at the time of Defendants purchase of Subject Property as

16 well as Defendants' use of the Subject Property. Catherine will also testify as to her knowledge

17 regarding other properties in the Coyote Springs Ranch area and the use of those properties and her

18 observations regarding the use of those properties.

19           **Donald Cox**  
20           **c/o Jeffrey R. Adams**  
21           **MUSGROVE, DRUTZ & KACK, P.C.**  
22           **Post Office Box 2720**  
23           **Prescott, Arizona 86302**

24           Donald will testify as to his knowledge of the Subject Property and the Declaration of

25 Restrictions affecting the Subject Property at the time of Defendants purchase of same as well as

26 Defendants' use of the Subject Property. Donald will also testify as to his knowledge regarding other

27 properties in the Coyote Springs Ranch area and the use of those properties and her observations

28 regarding the use of those properties.

1           **James Cox**  
2           **c/o Jeffrey R. Adams**  
3           **MUSGROVE, DRUTZ & KACK, P.C.**  
4           **Post Office Box 2720**  
5           **Prescott, Arizona 86302**

6           Donald will testify as to his knowledge of the Subject Property and any Declaration of  
7           Restrictions affecting the Subject Property at the time of Defendants purchase of same as well as  
8           Defendants' use of the Subject Property. James will also testify as to his knowledge regarding other  
9           properties in the Coyote Springs Ranch area and the use of those properties and her observations  
10           regarding the use of those properties.

11           **John B. Cundiff and Barbara C. Cundiff**  
12           **Kenneth Page and Katheryn Page, as Trustee of the Kenneth Page and**  
13           **Catherine Page Trust**  
14           **Elizabeth Nash**  
15           **c/o David K. Wilhelmsen**  
16           **FAVOUR, MOORE & WILHELMSSEN, P.A.**  
17           **Post Office Box 1391**  
18           **Prescott, Arizona 86302**

19           They will testify as to their knowledge of the Declaration of Restrictions affecting the Subject  
20           Property as well as their knowledge of the Defendants and their use of the Subject Property prior to  
21           their filing of this lawsuit. They will also testify as to other properties in Coyote Springs Ranch which  
22           may be affected by enforcement of the Declaration of Restrictions, the use of those properties and  
23           their knowledge regarding other violations of the Declaration of Restrictions including their own.

24           **Robert J. Launders**  
25           **LAUNDERS - LAW OFFICES OF ROBERT J. LAUNDERS**  
26           **8186 East Florentine Road, Suite B**  
27           **Prescott Valley, Arizona 86314**  
28           **(928) 775-5409**

29           Robert Launders will testify as to his knowledge of Coyote Springs Ranch and the Declaration  
30           of Restrictions. Robert will also testify regarding (i) his meeting with Defendants during which he  
31           provided Defendants with legal advice authorizing them to utilize the Subject Property in the manner  
32           currently employed, (ii) his conduct during a meeting at the Church located in Coyote Springs Ranch  
33           involving Coyote Springs Ranch homeowners, and (iii) his knowledge regarding violations of the  
34           Declaration of Restrictions including his own.

1           **Alfie Ware and Jane Doe Ware**  
2           **Dan Sanders and Jane Doe Sanders**  
3           **Address to be provided upon receipt**

4           They will testify as to their knowledge of the events leading up to the filing of the above-  
5           referenced matter, his motive for, and arrangements with the Plaintiffs for, the Wares' payment of  
6           Plaintiffs' attorneys' fees, costs and expenses, their knowledge of the Declaration of Restrictions and  
7           violations thereof, their participation in meetings conducted at the Wares' home concerning this  
8           lawsuit, their contacts and communications with owners of property governed by the Declaration of  
9           Restrictions governing the Subject Property.

10           **Karrie Decker**  
11           **10800 Coyote Springs Road**  
12           **Prescott Valley, Arizona 86314**  
13           **(928) 775-0946**

14           Karrie Decker will testify as to her knowledge of the Coyote Springs Ranch subdivision and  
15           any violations of the Declaration of Restrictions affecting said properties.

16           **Frank Lamberson and Laura Lamberson**  
17           **8920 Easy Street**  
18           **Prescott Valley, Arizona 86314**

19           Frank and Laura Lamberson will testify as to her knowledge of the Coyote Springs Ranch  
20           subdivision and any violations of the Declaration of Restrictions affecting said properties including  
21           the business use of their property.

22           **Mike Wargo and Karen Wargo**  
23           **9200 E. Spurr Lane**  
24           **Prescott Valley, Arizona 86314**  
25           **(928) 772-5915**

26           Mike and Karen Wargo will testify as to her knowledge of the Coyote Springs Ranch  
27           subdivision and any violations of the Declaration of Restrictions affecting said properties including  
28           the business use of their property.

1           **Christin L. Bowra**  
2           **9000 E. Turtle Rock Road**  
3           **Prescott Valley, Arizona 86314**

4           Christin Bowra will testify as to her knowledge of the Coyote Springs Ranch subdivision and  
5 any violations of the Declaration of Restrictions affecting said properties including the business use  
6 of those properties.

7           **Jeff Westra and Mychel Westra**  
8           **9000 E. Turtle Rock Road**  
9           **Prescott Valley, Arizona 86314**

10          Jeff and Mychel Westra will testify as to their knowledge of the Coyote Springs Ranch  
11 subdivision and any violations of the Declaration of Restrictions affecting said properties including  
12 the business use of those properties.

13          **R T Contracting Specialists, LLC**  
14          **10555 N. Orion Way**  
15          **Prescott Valley, Arizona 86314**

16          R T Contracting Specialists, LLC will testify as to her knowledge of the Coyote Springs Ranch  
17 subdivision and any violations of the Declaration of Restrictions affecting said properties including  
18 the business use of those properties including its own property.

19          **Wendy Ditterman**  
20          **Address to be provided when obtained and confirmed.**  
21          **(928) 848-0267**

22          She will testify as to her knowledge of the Coyote Springs Ranch subdivision and any  
23 violations of the Declaration of Restrictions affecting said properties including the business use of  
24 those properties. She will further testify as to her knowledge of meetings in the Coyote Springs Ranch  
25 area regarding the use of the Subject Property and articles she has written about this subject in the  
26 Lonesome Valley News.

27          **Bill Jensen**  
28          **Address to be provided when obtained and confirmed.**  
              **(928) 779-7631**

              He will testify as to his knowledge of the Coyote Springs Ranch subdivision and any violations  
of the Declaration of Restrictions affecting said properties including the business use of those  
properties.

1           **Kevin Eickleberry**  
2           **Address to be provided when obtained and confirmed.**

3           He will testify as to his knowledge of the Coyote Springs Ranch subdivision and any violations  
4 of the Declaration of Restrictions affecting said properties including the business use of those  
5 properties.

6           **Charles A. Hildebrant**  
7           **8420 Pronghorn Lane**  
8           **Prescott Valley, Arizona 86314**  
9           **(928) 772-4599**

10          Charles will testify as to his knowledge of the Coyote Springs Ranch subdivision and any  
11 violations of the Declaration of Restrictions affecting said properties including the business use of  
12 those properties.

13          **Sheila Cahill**  
14          **Palmer Investigative Services**  
15          **P.O. Box 10760**  
16          **Prescott, Arizona 86304**  
17          **(928) 778-2951**

18          She will be called to testify regarding (i) her investigation of violations of the Declaration of  
19 Restrictions in the portion of Coyote Springs Ranch where the Subject Property is located including  
20 (ii) her findings showing that more than 90 percent of the properties located in the portion of Coyote  
21 Springs Ranch governed by the subject Declaration of Restrictions, including those owned by  
22 Plaintiffs, that are currently in violation of the Declaration of Restrictions and (iii) her findings  
23 regarding the number of properties presently violating Paragraph 2 of said Declaration of Restrictions.

24          **Robert D. Conlin**  
25          **Margaret Dell Conlin**  
26          **David A. Conlin**  
27          **Address to be provided when obtained and verified.**

28          They will be called to testify regarding their knowledge surrounding the creation of the  
Declaration of Restrictions and that they did not intend the Declaration of Restrictions to prohibit the  
type of use of the Subject Property currently employed by Defendants.

Defendants intend to call as witnesses all parties identified during Plaintiffs' depositions as  
persons or entities conducting business and/or commercial activities on their properties located in  
Coyote Springs Ranch whose contact information was already provided to Plaintiffs during their

1 depositions. Upon request, Defendants will supplement this disclosure regarding such persons or  
2 entities as additional information becomes available.

3  
4 **IV. 26.1(a)(4) NAMES OF PERSONS WHO MAY HAVE RELEVANT KNOWLEDGE OR INFORMATION**

5 See Response to 26.1(a)(3) above.

6 **V. 26.1(a)(5) NAMES OF PERSONS WHO HAVE GIVEN RECORDED OR WRITTEN STATEMENTS**

7 Defendants are unaware of any statements, either written or recorded. Defendants reserve  
8 their right to supplement this disclosure statement as necessary. Defendants specifically assert that  
9 any written communications of a confidential nature between them and their undersigned attorneys  
10 are protected from discovery by the attorney/client privilege, and that the written work product  
11 prepared by their undersigned attorneys is protected from discovery by the work product doctrine.

12 **VI. 26.1(a)(6) NAMES OF EXPERT WITNESSES**

13 Defendants have not yet chosen any expert witness(es). Defendants will supplement this  
14 disclosure and disclose the findings, opinions and conclusions of any experts witness(es) once they  
15 are identified and he/she completes his/her investigation and renders his/her opinions.

16 **VII. 26.1(a)(7) COMPUTATION AND MEASURE OF DAMAGES**

17 Defendants have been forced to place a hold on their expansion of the use of the Subject  
18 Property during the pendency of this lawsuit and will ask for reimbursement for damages related to  
19 their loss of use of the Subject Property. Defendants likewise ask for reimbursement of attorneys' fees  
20 and costs pursuant to A.R.S. §§ 12-341.01 and 12-349 together with interest thereon at the highest  
21 legal rate. Further, Defendants seek an order from the Court declaring the Declaration of Restrictions  
22 abandoned and an order allowing them the right to continue the use of the Subject Property as they  
23 have used it since the year 2000.

24 **VIII. 26.1(a)(8) TANGIBLE EVIDENCE/RELEVANT DOCUMENTS AND/OR INSURANCE AGREEMENTS WHICH PLAINTIFFS PLAN TO USE AT TRIAL**

25  
26 1. Photographs of Coyote Springs Ranch property with indications of violations of the  
27 Declaration of Restrictions;

28 2. Articles regarding Coyote Springs Ranch from the August, 2003 through August, 2004  
editions of the Lonesome Valley Newsletter;

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- 3. Yavapai County Property Information Sheets for Coyote Springs Ranch properties;
- 4. Capital Title Agency Title Policy No. FTY 422356.
- 5. Prescott Valley Growers Prescott Valley Business License;
- 6. Prescott Valley Nursery Prescott Valley Business License;
- 7. Agricultural Land Use Application;
- 8. Inventory records for the Subject Property;
- 9. Documents pertaining to any and all improvements, structures, or developments made on the Subject Property from 1998 to present;
- 10. Documents pertaining to all machinery, equipment, fixtures, supplies, tools maintained or used in any fashion on the Subject Property from 2000 to present;
- 11. Documentation received by Defendants prior to and at close of escrow of the Subject Property;
- 12. Defendants "Schedule B" documents from Owner's Policy;
- 13. Employee Records for year 2000;
- 14. Employee Records for year 2001;
- 15. Employee Records for year 2002;
- 16. Employee Records for year 2003;
- 17. Employee Records for year 2004;
- 18. Correspondence from various residences of Coyote Springs Ranch;
- 19. Any depositions taken in this case of Plaintiffs, together with exhibits attached thereto;
- 20. Any depositions taken in this case of Defendants, together with exhibits attached thereto;
- 21. Any depositions taken in this case of witnesses, together with exhibits attached thereto;
- 22. Any or all tangible evidence or relevant documents identified by Plaintiffs or Defendant in this action;
- 23. Any written/recorded written statements of Plaintiff, Defendant or any witnesses;
- 24. Any additional documents identified during discovery subsequent to this date;
- 25. Any and all exhibits listed by Plaintiffs;
- 26. Enlargements of and/or excerpts from other documents or exhibits (the identities of which have not yet been determined);

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- 27. All pleadings, memoranda, orders or other documents entered in this matter;
  - 28. All depositions of any parties in this action;
  - 29. All responses to interrogatories, requests for production of documents and requests for admissions;
  - 30. Any disclosure statements submitted by Plaintiffs and supplements, thereto;
  - 31. All disclosure statements submitted by Defendants or supplements, thereto; and
  - 32. Plaintiffs will seasonably supplement this portion of its disclosure statement as necessary;

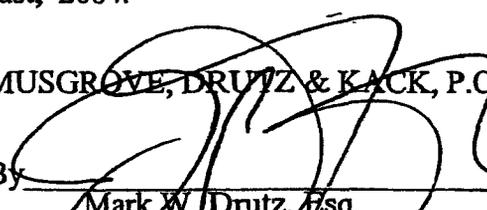
9 **IX. 26.1(a)(9) DOCUMENTS KNOWN TO EXIST**

10 See response to 26.1(a)(8) above. Other than the copies of documents attached hereto or  
11 presently being procured by Defendants, it is believed that all parties have either been provided with  
12 copies of the above-described documents or are in possession of the documents. However, upon  
13 request, Defendants will furnish copies of any documents referred to herein which are not protected  
14 from discovery by the attorney-client privilege and/or work product doctrine.

15 Discovery in this matter is ongoing and Defendants make this disclosure as fully as is now  
16 possible. Defendants reserve the right to supplement this disclosure in a timely fashion as other facts  
17 and evidence become known or available.

18 Respectfully submitted this 30 day of August, 2004.

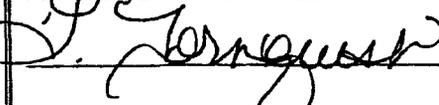
19 MUSGROVE, DRUTZ & KACK, P.C.

20 By 

21 Mark W. Drutz, Esq.  
22 Jeffrey R. Adams, Esq.  
Attorneys for Defendants

23 The original and one copy  
24 of the foregoing was mailed this  
25 30 day of August, 2004 to:

26 David K. Wilhelmsen  
27 Marguerite M. Kirk  
FAVOUR, MOORE & WILHELMSSEN, P.A.  
Post Office Box 1391  
Prescott, Arizona 86302-1391  
Attorneys for Plaintiffs

28 

VERIFICATION

STATE OF ARIZONA        )  
  ) ss.  
County of \_\_\_\_\_ )

Catherine Cox, being first duly sworn upon her oath, deposes and says:

That she is one of the Defendants in the above-captioned matter; that she has read the foregoing Defendant's Rule 26.1 Disclosure Statement and that the contents contained therein are true in substance and in fact, except as to those matters stated upon information and belief, and as to those, she believes them to be true.

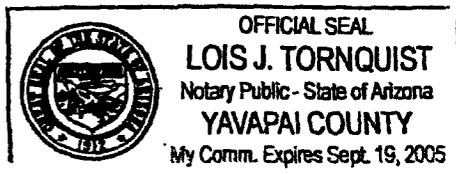
*Catherine Cox*  
\_\_\_\_\_  
CATHERINE COX

SUBSCRIBED AND SWORN to before me this 30<sup>th</sup> day of August, 2004, by Catherine Cox.

*Lois J. Tornquist*  
\_\_\_\_\_  
Notary Public

My Commission Expires:

9/19/05





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

4 Attorneys for Defendants  
5

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

8 JOHN B. CUNDIFF and BARBARA C.)  
CUNDIFF, husband and wife;  
9 ELIZABETH NASH, a married woman)  
dealing with her separate property;  
10 KENNETH PAGE and KATHRYN)  
PAGE, as Trustee of the Kenneth Page)  
and Catherine Page Trust,

11 )  
12 Plaintiffs, )

13 v. )

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

15 Defendants. )  
16 )  
17 )

CASE NO. CV 2003-0399  
DIVISION 3

**DEFENDANTS' SECOND  
SUPPLEMENTAL RULE 26.1  
DISCLOSURE STATEMENT**

18 Defendants, Donald Cox and Catherine Cox, ("**Defendants**") by and through undersigned  
19 counsel, disclose the following information pursuant to Rule 26.1 of the Arizona Rules of Civil  
20 Procedure.

21 **II. LEGAL THEORIES UPON WHICH CLAIMS AND DEFENSES ARE BASED**

22 1. Unclean hands. "Ordinarily, an owner of a lot in a tract who has violated the building  
23 restrictions cannot enforce them against others." 20 AmJur2d Covenants, § 276 at 695 (citations  
24 omitted); see also, 20 AmJur2d Covenants, § 284 at 704 (citations omitted), Restatement of Property  
25 §§ 550 and 560, Atwood v. Walter, 714 N.E.2d 165 (Mass. 1999), 42 Am.Jur. Proof of Facts 3<sup>rd</sup> at  
26 463, Circumstances Establishing Equitable Defense to Breach of Restrictive Covenant.

27 / / /

28 / / /

1 **III. 26.1(a)(3) WITNESSES WHOM DEFENDANTS EXPECT TO CALL AT TRIAL**

2 **Noreen Vaughan**  
3 **9235 N. Caoyote Springs Road**  
4 **Prescott Valley, Arizona 86314**

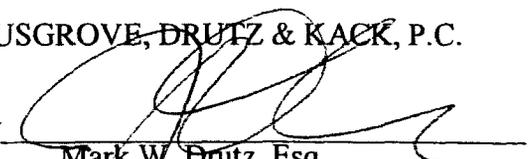
5 Ms. Vaughan is expected to testify as to her use and intended use at the time of her purchase  
6 of property in the Coyote Springs Ranch subdivision in 1993, as well as her knowledge of businesses  
7 located in the Coyote Springs Ranch subdivision, and her knowledge and belief that the Declaration  
8 of Restrictions at issue has been abandoned.

9 **VIII. 26.1(a)(8) TANGIBLE EVIDENCE/RELEVANT DOCUMENTS AND/OR**  
10 **INSURANCE AGREEMENTS WHICH PLAINTIFFS PLAN TO USE AT TRIAL**

- 11 33. Correspondence from Noreen Vaughan;
- 12 34. Articles of Incorporation of Coyote Springs Ranch, Inc.;
- 13 35. 2003 Annual Report for The Glenarm Land Company, Inc.;
- 14 36. Correspondence from Kathleen Wickman;
- 15 37. Telephone directory for Johnson Landscape & Property Maintenance business being  
16 operated at 8700 Morrow Way, Prescott Valley, Arizona.

17 Respectfully submitted this 24 day of November, 2004.

18 **MUSGROVE, DRUTZ & KACK, P.C.**

19 By   
20 Mark W. Drutz, Esq.  
21 Jeffrey R. Adams, Esq.  
22 Attorneys for Defendants

23 The original and one copy  
24 of the foregoing was mailed this  
25 24 day of November, 2004 to:

26 **David K. Wilhelmsen**  
27 **Marguerite M. Kirk**  
28 **FAVOUR, MOORE & WILHELMSSEN, P.A.**  
Post Office Box 1391  
Prescott, Arizona 86302-1391  
Attorneys for Plaintiffs



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VERIFICATION

STATE OF ARIZONA )  
COUNTY OF YAVAPAI ) ss.

JEFFREY R. ADAMS, being first duly sworn upon his oath, deposes and says:

That he is one of the attorneys for Plaintiffs in the above-captioned matter and as such is duly authorized to make this verification; that he has read the foregoing Second Supplemental Rule 26.1 Disclosure Statement and that the contents contained therein are true in substance and in fact, except as to those matters stated upon information and belief, and as to those, he believes them to be true.

*[Handwritten Signature]*  
JEFFREY R. ADAMS

SUBSCRIBED AND SWORN to before me this 24 day of NOvember, 2004, by JEFFREY R. ADAMS.

*[Handwritten Signature]*  
Notary Public

My Commission Expires:  
9/19/05

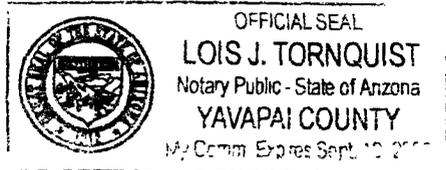


EXHIBIT 3

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 OF THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 **JOHN B. CUNDIFF and BARBARA C.**  
12 **CUNDIFF, husband and wife; ELIZABETH**  
13 **NASH, a married woman dealing with her**  
14 **separate property; KENNETH PAGE and**  
15 **KATHRYN PAGE, as Trustee of the Kenneth**  
16 **Page and Catherine Page Trust,**  
17 **Plaintiffs,**  
18 **v.**  
19 **DONALD COX and CATHERINE COX,**  
20 **husband and wife,**  
21 **Defendants.**

Case No. CV 2003-0399

Division No. 1

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

22 Defendants Donald Cox and Catherine Cox ("**Defendants**"), by and through undersigned  
23 counsel, disclose the following information pursuant to Rule 26.1 of the Arizona Rules of Civil  
24 Procedure.

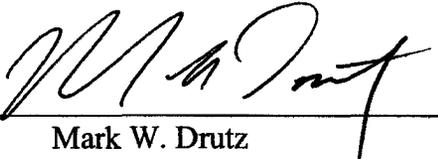
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1 I. 26.1(a)(8) TANGIBLE EVIDENCE/RELEVANT DOCUMENTS AND/OR  
2 INSURANCE AGREEMENTS WHICH PLAINTIFFS PLAN TO USE AT TRIAL.

3 1. Deposition of Robert J. Launder taken on March 20, 2001, together with all exhibits  
4 attached thereto, in Rodney G. Smith and Jill L. Smith v. Al F. McRoberts and Joann McRoberts,  
5 et al., Yavapai County Superior Court Case No. CV 2000-0472. See Exhibit "1".  
6

7 DATED this 30<sup>th</sup> day of June, 2005.

8 MUSGROVE, DRUTZ & KACK, P.C.

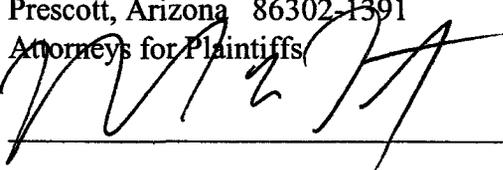
9  
10 By 

11 Mark W. Drutz  
12 Jeffrey R. Adams  
13 Sharon Sargent-Flack  
14 Attorneys for Defendants

15 ORIGINAL of the foregoing was hand-delivered  
16 this 30<sup>th</sup> day of June, 2005 to:

17 David K. Wilhelmsen, Esq.  
18 Marguerite M. Kirk, Esq.  
19 Favour, Moore & Wilhelmsen, P.A.  
20 P.O. Box 1391  
21 Prescott, Arizona 86302-1391  
22 Attorneys for Plaintiffs

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VERIFICATION

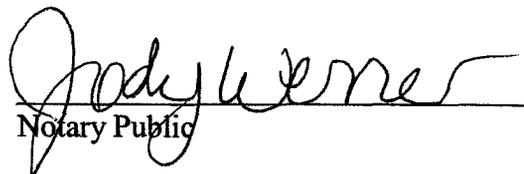
STATE OF ARIZONA )  
 ) ss.  
COUNTY OF YAVAPAI )

MARK W. DRUTZ, being first duly sworn upon his oath, deposes and says:

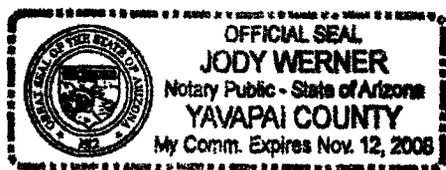
That he is one of the attorneys for Defendants in the above-captioned matter and as such is duly authorized to make this verification; that he has read the foregoing Fifth Supplemental Rule 26.1 Disclosure Statement and that the contents contained therein are true in substance and in fact, except as to those matters stated upon information and belief, and as to those, he believes them to be true.

  
MARK W. DRUTZ

SUBSCRIBED AND SWORN to before me this 30<sup>th</sup> day of June, 2005, by MARK W. DRUTZ.

  
Notary Public

My Commission Expires:  
Nov. 12, 2008





SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

DEPOSITION OF:

**DONALD COX**

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

Plaintiffs, )

vs. )

DONALD COX and CATHERINE COX )  
husband and wife, )

Defendants, )

Case No. CV 2003-0399

**COPY**

PURSUANT TO NOTICE, the deposition of DONALD COX, called for examination by Counsel for the Plaintiffs, was taken at the offices of FAVOUR, MOORE & WILHELMSSEN, 1580 Plaza West Drive, Prescott, Arizona, beginning at the approximate hour of 2:43 p.m. on Tuesday, June 22, 2004, before Ashlee Mangum, Certified Court Reporter #50612, a Registered Professional Reporter, within and for the state of Arizona.

**LOTT REPORTING, INC.**

316 North Alarcon Street

Prescott, Arizona 86301

928.776.1169

1 everybody out there is wrong. If we are a part of that,  
2 I guess we are a part of that. As we see the CC&R's,  
3 they are hardly applicable because of the situation out  
4 there.

5 Q. So is --

6 A. They seem to be abandoned because they are not  
7 enforced and haven't been.

8 Q. So it is your position then that you are not in  
9 violation of the CC&R's, not because of the way they are  
10 written?

11 A. We really feel that we are agricultural and there  
12 is no place in the CC&R's that prohibits agricultural  
13 projects.

14 Q. Okay.

15 A. It is not mentioned and that is coming from ranch  
16 land to begin with. It seems very apparent that those  
17 people didn't want to exclude agricultural projects or  
18 endeavors. They seemed to not want to exclude them or  
19 they surely would have included those in prohibiting  
20 this and prohibiting that and so forth. So it seems to  
21 stand to reason.

22 Q. What do you mean when you say agricultural  
23 endeavor or project?

24 A. Raising trees, just like what you read from the  
25 Yavapai County Guidelines, raising trees, shrubs. That