FAVOUR MOORE & WILHELMSEN, P.A.
Post Office Box 1391
Prescott, AZ 86302-1391
Ph: (928)445-2444
David K. Wilhelmsen, #007112
Marguerite Kirk, #018054

Attorneys for Plaintiffs

IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF YAVAPAI

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

Plaintiffs,

vs.

DONALD COX and **CATHERINE COX**, husband and wife,

Defendants.

Case No. CV 2003-0399

Division 1

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PROTECTIVE ORDER AND MOTION TO QUASH SUBPOENA *DUCES TECUM* SERVED BY DEFENDANTS ON NON-PARTY ALFIE WARE; and, RESPONSE TO MOTION TO COMPEL

Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and through undersigned counsel, hereby reply to Defendants' response to Plaintiffs' motion for this Court's order order quashing the subpoena *duces tecum* served by Defendants on a non-party to this action, Alfie Ware, the subpoena demanding the production of documents relating to "the payment of Plaintiffs' attorneys' fees and costs" in this case. Plaintiffs further respond and object to Defendants' motion to compel production of Plaintiffs' fee agreement with their counsel and any agreement Plaintiffs may have with non-party Ware. Again, there is absolutely no basis in law or fact for Defendants to compel production of documents concerning to *Plaintiffs'* payment of *their* attorney's fees and costs in this case in order for Defendants to prepare and submit their attorney fee application. Indeed, opposing counsel has been able to file their motion for attorney's fees without

obtaining this information.

This reply and response is supported by the following memorandum of points and authorities, as well as the entire record in this proceeding.

RESPECTFULLY SUBMITTED this 29th day of August, 2005.

FAVOUR MOORE & WILHELMSEN, P.A.

By: _____
David K. Wilhelmsen
Marguerite Kirk

MEMORANDUM OF POINTS AND AUTHORITIES

I. Plaintiffs' Attorney's Fees is Irrelevant to this Court's Ability to Determine the Reasonableness of Defendant's Claimed Attorney Fees

Defendants incomprehensibly fail to understand is that *their* attorneys' fee application must stand or fall on its own as to reasonableness in hourly rate and reasonableness of time charged. In *Gratz v. Bollinger, 353 F.Supp.2d 929 (D.C. S.D. Mich. 2005)*, a case addressing the very discovery issue before this Court, a fee applicant sought discovery from the opposing party related to the opposing party's attorney's fees and costs incurred in the litigation. The fee applicant argued that this discovery was necessary as it would establish the relevance of the attorney's fees claimed in the petition. *Id. at 947.* The federal district court denied the fee applicant's discovery request as to his opponent's attorney fees, stating:

> ***...the Court finds the hourly rates charged by Defendants' attorneys and the hours those attorneys expended defending against Plaintiffs' lawsuit of no particular value to [the Court's] determination of Plaintiffs' fees award.*** As Defendants point out, a party seeking attorneys' fees pursuant to *§1988* must support their request with sufficiently detailed records to demonstrate the reasonableness of their fees. If the Court cannot determine the reasonableness of the attorneys' fees based on those billing records without reference to the opposing party's records, the party seeking fees has not met its burden under *§1988*....Similarly, an opposing party's *willingness* to pay its lawyers to perform certain tasks (or perhaps a lawyer's billing for certain tasks which the client may refuse to pay) does not render the same tasks by the prevailing party's attorneys reasonable.

Ibid. (italics in original; emphasis added).[1] The same rationale applies in the present case. *Schweiger* imposes upon the applicant the burden of establishing the reasonableness of the fee request, both as to hourly rate and time charged for tasks performed. As litigation is adversarial, what work one party's counsel may perform is not (and cannot) be "mirrored" by opposing counsel, as the latter is relegated to performing responsive work. In other words, one litigant's cost for researching, preparing and filing a motion for summary judgment on an issue cannot be used as "relevant" to the cost of his adversary in preparing and filing a response, or for that matter, a separate summary judgment motion on an unrelated issue. Hence, the *Schweiger* court's focus on the qualities of the *fee applicant's* attorney, the character of the work performed by the *fee applicant's* attorney, the skill of the *fee applicant's* attorney, and similar factors. It would have been a simple matter for the *Schweiger* court to simply instruct trial court's that any fee application was to be compared to fees incurred by opposing counsel, if there was any merit to Defendants' counsel's argument that their adversaries' fees are necessary for this Court to render an informed decision on the fee application.

Moreover, the fact that Plaintiffs' did not object to Ware's testimony at trial on the issue of his loaning money to Plaintiffs does not transmute, as opposing counsel claims, into a stipulation that Defendants' could inquire as to any matter pertaining to Ware's loan to Plaintiffs. Simply put, Plaintiffs have never admitted that Defendants could inquire ***without objection*** of Ware as to his financial assistance to Plaintiffs.

II. Defendants' "Champerty" and "Maintenance" Argument is Grossly Misplaced

In order to justify their subpoena *duces tecum* to non-party Ware, Defendants, <u>without any factual justification</u>, contend that Plaintiffs' borrowing funds from Ware for payment of Plaintiffs' attorney's fees amounts to a champertous agreement. Defendants need only review the very case law

---

[1] As with section 1988 litigation, the "starting point" of any fee application and evaluation by the Court is the reasonableness of the attorney's hourly rate, and the time reasonably expended in furtherance of the litigation. *Schweiger v. China Doll Restaurant, Inc., 138 Ariz. 183, 187-88. 673 P.2d 927, 931-32 (App. 1983).*

they cite to determine that loaning money for a lawsuit is neither champertous nor maintenance. In *Hacket v. Hammel, 185 Minn. 387, 241 N.W. 68 (1932)*, a case cited by opposing counsel in support of their champerty argument, the Supreme Court of Minnesota stated:

> [At common law,] [t]he vice of [the champertous agreement] was that a layman, with no interest in the lawsuit or its subject matter and no relation to defendant, ***advanced money to carry on the litigation, not as a loan, but to speculate upon and purchase a share in the outcome.*** In the case of defeat, plaintiff would have gotten nothing. But, if victory came, he would have ten times his investment. Such speculation in litigation in which the adverturer has no interest otherwise and where he is in no way related to the party he aids, is champertous. The element of intrusion for the purpose of mere speculation in the troubles of others introduces the vice fatal to what otherwise would be a contract.

Id. at 388, 241 N.W. at 69 (emphasis added). In other words, "champerty" or "maintenance" involves one loaning money to a litigant in exchange for a speculative percentage of, or return on, any litigation proceeds. Put another way, "champerty" is an assignment of a litigant's share in proceeds from a lawsuit as consideration for money received from the assignor. For instance, in *O'Farrell v. Martin, 161 Misc. 353, 292 N.Y.S. 581 (N.Y.Cty.Ct. 1936),* the New York court, addressing whether an assignment of potential litigation proceeds in exchange for a percentage of a life insurance policy constituted a champertous agreement, stated:

> The class of cases which the agreement at bar most nearly approaches is that of an assignment to a layman of part of a cause of ***action in consideration of an advancement for payment of the costs thereof.*** At common law such an agreement was void as champerty and maintenance.

Id. at 355, 292 N.Y.S. at 584-85 (emphasis added). Indeed, the Arizona appellate court's decision in *Lingel v. Olbin, 198 Ariz. 249, 8 P.3d 1163 (App. Div. 2 2000)*, specifically defines champerty as "an agreement that the person providing litigation will share in the proceeds of the litigation." *Id. at 253, 8 P.3d at 1167, n.8 (internal citations omitted).* Thus, without the speculation of investment return realized at conclusion of a lawsuit, there can be no "risk that 'unscrupulous people would purchase causes of action and thereby traffic in lawsuits for pain and suffering'" – the vice sought to be precluded by champerty and maintenance. *Ibid. (internal citation to quotation omitted).*

In this case, Defendants rely solely on testimony that non-party Ware loaned money to

Plaintiffs to assist Plaintiffs in their paying their counsel's fees and costs. *Defendants have failed to produce any evidence in the record that this financial assistance from a third party was in consideration for a return on the loan upon conclusion of the litigation.* Indeed, it would be impossible for non-party Ware to even receive any money from the outcome of the present litigation as Plaintiffs' primarily sued for injunctive relief. The fact that opposing counsel would even suggest to the Court that Plaintiffs were involved in a champertous agreement – on the sole basis that they borrowed money from a third-party so they could pay litigation expenses – is a stunning misunderstanding of the law of champerty as set forth in the very case law opposing counsel cites to this Court.

III. Defendants' Argument that they are "Third Party Beneficiaries" of the Fee Agreement between Plaintiffs and their Counsel is the Product of a Distorted View of this Contract Principle

Equally specious is Defendants' incredible claim that they are intended third party beneficiaries to the fee agreement between Plaintiffs and their counsel, or between Plaintiffs and non-party Ware.

> Under Arizona law, a person who is not a party to a contract can recover under that contract only if he is a primary beneficiary under the terms of the contract:
>
> > The Arizona rule is that in order for a person to recover as a third-party beneficiary of a contract, ***an intention to benefit that person must be indicated in the contract itself,*** *Irwin v. Murphey, 81 Ariz. 148, 302 P.2d 534 (1956); Basurto v. Utah Contraction & Mining Company, 15 Ariz.App. 35, 485 P.2d 859 (1971).* The contemplated benefit must be both intentional and direct, *Irwin, supra, Treadway v. Western Cotton Oil Etc. Co., 40 Ariz. 125, 10 P.2d 371 (1932),* and ***"it must definitely appear that the parties intend to recognize the third party as the primary party in interest,"*** *Irwin, supra, at 154, 302 P.2d at 538.*
>
> *Nahom v. Blue Cross and Blue Shield of Arizona, Inc., 180 Ariz. 548, 885 P.2d 1113 (App. 1994) quoting Norton v. First Federal Savings, 128 Ariz. 176, 178, 624 P.2d 854, 856 (1981) (internal citations in original; emphasis added).*

That the contract must expressly evidence an intent to "recognize [a] third party as the primary party in interest," is imperative, because an intended third-party beneficiary has the right to enforce

the contract, and bears the burdens of its obligations. *Restatement of the Law, Second, Contracts, §302 "Intended and Incidental Beneficiaries."* Thus, in addition to other factors, the contract must give the intended beneficiary "a right of performance." *Id.; Nahom, supra, 180 Ariz. at 553, 885 P.2d at 1118.* Whether or not the third party beneficiary is expressly identified, or is a member of a class of beneficiaries intended by the contracting parties to benefit from the contract is not the test, as Defendants' apparently contend to this Court.

In this case, neither Plaintiffs' fee agreement with their counsel, or their agreement with non-party Ware intends to benefit Defendants, and neither agreement provides Defendants with a right of enforcement. To agree with Defendants' argument is to find that Plaintiffs are acting as sureties for Defendants' attorney's fees and costs. Obviously, this is a ridiculous scenario that stretches the bounds of law well-beyond the facts on this issue in this case.

IV. Defendants' Argument that *Only* Ware Can Object to the Subpoena is Similarly Misplaced

Defendants' counsel argues that Plaintiffs have no standing to object to the subpoena *duces tecum* issued to Ware because only "persons" may object, not parties. Clearly, Defendants completely ignore Rule 45(c)(3), Ariz.R.Civ.Proc., which expressly permits any person (whether or not a party) to object where that person's interests are affected by the subpoena. *Id. (a court may quash a subpoena "to protect a person subject to or affected by the supboena...."*). Defendants have failed to provide this Court with any legal support for their proposition that a "person" under Rule 45 does not include "a party."

Likewise, opposing counsel ignores Rule 26(c), Ariz.R.Civ.Proc., which further provides the court with authority to issue

> any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including...(1) that the discovery not be had...(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters....

Id. Rule 26(c) clearly applies to both "person" and "party."

V. Conclusion

Defendants' counsel bears the burden of establishing to the satisfaction of this Court the reasonableness of both the hourly rate charged to their clients and the time spent on matters directly related and relevant to the litigation of this case. Defendants' demand for discovery of Plaintiffs' attorney's fees is irrelevant to their task, and as at least one federal court has so held, such information is "of no particular value" to this Court's determination of Defendants' attorney fee application. The reasonableness of the fee charged is based upon attributes of the applicant attorney and the complexity of the case, *not* his adversary's rate or the hours his adversary devoted to the case. Defendants' counsel must independently bear the burden of establishing the reasonableness of the fee application based upon counsel's skill, experience and professional standing, in relation to the facts and complexity of the case. Furthermore, nowhere in the *Schweiger* or *Schwartz* decisions does the Supreme Court or the Court of Appeals provide a comparison test to determine whether the fee application is reasonable, the application of counsel's fees and hours in relation to his adversary, therefore demonstrating the irrelevance of such a comparative approach. The speciousness of opposing counsel's argument lies in the fact that they have failed to produce any recorded decision from this, or any other jurisdiction, in support of their claim. Pointing to other discovery requests in litigation between Plaintiffs' and Defendants' counsel merely takes the facts and circumstances underlying those discovery requests out of context.

Equally disingenuous is Defendants' claim that they are "intended third party beneficiaries" to the fee agreement between Plaintiffs and their counsel, or between Plaintiffs and a third-party lender. This disingenuousness is matched only by the speciousness of opposing counsel's claim that they are entitled to discovery of Plaintiffs' loan agreement with a third-party based upon a hyper-extended, legally fallacious argument of champerty or maintenance.

Therefore, Plaintiffs respectfully request that this Court enter a protective order against Defendants' engaging in discovery concerning Plaintiffs' counsel's fee agreement, hourly rate and hours spent on the case; and, that this Court enter an order quashing the subpoena *duces tecum* served

by Defendants on non-party Alfie Ware. Plaintiffs further request that this Court deny Defendants' motion to compel discovery, and award Plaintiffs their attorney's fees in defending against Defendants' utterly baseless discovery request.

DATED this 29th day of August, 2005.

FAVOUR MOORE & WILHELMSEN, P.A.

By: _____
David K. Wilhelmsen
Marguerite Kirk
Post Office Box 1391
Prescott, Arizona 86302-1391
Attorneys for Plaintiffs

Original of the foregoing
filed this 29th day of August,
2005, with:

Clerk, Superior Court of Arizona
Yavapai County
120 S. Cortez St.
Prescott, Arizona 86302

A copy hand-delivered this
29th day of August, 2005, to:

Honorable David L. Mackey
Division One, Superior Court of Arizona
Yavapai County
120 S. Cortez St.
Prescott, Arizona 86302

and, a copy hand-delivered this
29th day of August, 2005, to:

Mark Drutz
Jeffrey Adams
MUSGROVE, DRUTZ & KACK, P.C.
1135 Iron Springs Road
Prescott, Arizona 86302
Attorneys for Defendants Cox

By: _____
David K. Wilhelmsen