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6 *Attorneys for Defendants*

7 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**
8
9 **IN AND FOR THE COUNTY OF YAVAPAI**

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

16 Plaintiffs,

17 v.
18 DONALD COX and CATHERINE COX,
19 husband and wife,

20 Defendants.

Case No. CV 2003-0399

Division No. 1

**DEFENDANTS' REPLY TO
PLAINTIFFS' RESPONSE TO MOTION
TO COMPEL**

21 Defendants Donald and Catherine Cox, by and through undersigned counsel, hereby submit
22 their Reply to Plaintiffs' Response to Motion to Compel.

23 Plaintiffs have failed to meet their burden of showing why discovery should not be made.
24 See Babbitt v. Arnold, 26 Ariz. App. 333, 548 P.2d 426 (1976). Further, Plaintiffs have no standing
25 to object to the Subpoena *Duces Tecum* served upon non-party Alfie Ware. McDonald v. Hyder, 12
26 Ariz.App. 411, 417, 471 P.2d 296, 302 (1970). Plaintiffs' Motions should be denied; and
27 Defendants' Motion to Compel should be granted.
28

✓ Div 1

1 I. THE RESOURCES EXPENDED BY PLAINTIFFS' COUNSEL ALONG WITH THE
2 REASONS UNDERLYING SUCH EFFORTS WILL ASSIST IN THE
3 DETERMINATION OF AN AWARD OF REASONABLE FEES.

4 A. Defendants Are Entitled to Discovery Concerning the Financial Arrangement
5 Between Plaintiffs and Non-Party Alfie Ware.

6 Plaintiffs' most recent assertions regarding their arrangement with Alfie Ware further militate
7 support for the production of the requested documents and compliance with the Subpoena *Duces*
8 *Tecum* (hereinafter "Defendants' Request" and "SDT" respectively). That is, Plaintiffs' assertions
9 that the financial arrangement between Plaintiffs and non-party Alfie Ware is a "loan to Plaintiffs,"
10 is *vastly* different from Plaintiffs' prior deposition testimony. (See Plaintiffs' Reply to Defendants
11 Response dated August 29, 2005, p. 3:16-21). In fact, Plaintiffs have testified otherwise, as follows:

13 [Attorney Adams] Now there's someone identified named Alfie in the information
14 published by the Lonesome Valley Newsletter. Do you know who that would be?

15 [John Cundiff] That would be Alfie Ware.

16 [Attorney Adams] Does Alfie Ware live in the portion of Coyote Springs Ranch that
17 you live in?

18 [John Cundiff] No.

19 [Attorney Adams] Do you have any information regarding why he would be a contact
20 person concerning the action you've brought against Mr. and Mrs. Cox?

21 [John Cundiff] Well, he's furnishing a majority of the funds.

22 [Attorney Adams] What do you mean he's furnishing the majority of the funds?

23 [John Cundiff] He's paying the legal expenses.

24 [Attorney Adams] Is he paying all of the legal expenses?

25 [John Cundiff] So far.

1 [Attorney Adams] Are you out-of-pocket anything in connection with the litigation
2 in which you've sued Mr. and Mrs. Cox?

3 [John Cundiff] Not yet.

4 (See Deposition of John Cundiff, p. 120:3-22, attached as Exhibit "E" to Response to Opposition
5 to Plaintiffs' Protective Order and Motion to Quash Subpoena Duces Tecum served by Defendants
6 on Non-Party Alfie Ware; and Motion to Compel Production of Documents ("**Defendants'**
7 **Response**")).

9 [Attorney Adams] Tell me about your agreement with Alfie Ware related to the
10 financing of this lawsuit.

11 [Elizabeth Nash] My agreement?

12 [Attorney Adams] Yes.

13 [Elizabeth Nash] I don't have an agreement with Alfie Ware.

14 [Attorney Adams] You're not paying for this litigation, are you?

15 [Elizabeth Nash] I haven't paid anything.

16 [Attorney Adams] Okay. Who has?

17 [Elizabeth Nash] I have no idea who has.

18 [Attorney Adams] You have no idea who is paying for your attorneys in this case?

19 [Elizabeth Nash] I do not know -- I have not spoken about money with my attorneys,
20 no.

21 [Attorney Adams] You've never written a check or given any money to your
22 attorneys for the litigation of this case, have you?

23 [Elizabeth Nash] I haven't no.

24 [Attorney Adams] But you have no idea who is paying for your attorneys?

25 [Attorney Kirk] Object as to form.
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1 [Elizabeth Nash] I have not spoken with my attorneys regarding money.

2 [Attorney Kirk] Object as to form. That's the fourth time you've asked the same
3 question, Counsel.

4 [Attorney Adams] No. My question is different, Counsel. Please read back my
5 question to her. (Whereupon, the previous question was read back by the court
6 reporter.)

7 [Elizabeth Nash] I have heard that Alfie was paying some, but there are other people
8 who have also paid.

9 [Attorney Adams] When you say you heard, who did you hear it from?

10 [Elizabeth Nash] I do not recall.

11 (See Deposition of Elizabeth Nash, pp. 31-32, attached as Exhibit "F" to Defendants' Response).

12 Plaintiffs' testimony is, to say the least, at odds with Plaintiffs' assertion that Plaintiffs are
13 'borrowing' money from Mr. Ware in order to pay for their lawsuit against Defendants and implies
14 that they will repay Mr. Ware.¹ If Ware is 'footing the bill', and deposition testimony lends support
15 for this, then it is a gift, and Coxes are entitled to know why Ware is gifting the funding for this
16 lawsuit. The foregoing disparity between Plaintiffs' testimony, *versus* their assertions in their
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19
20 ¹ Contrary to Plaintiffs' Response, there is nothing in the record of this case that supports
21 Plaintiffs' assertions that: "Moreover, the fact that Plaintiffs did not object to Ware's testimony at trial on
22 the issue of his loaning money to Plaintiffs does not transmute, as opposing counsel claims into a stipulation
23 that Defendants' [sic] could inquire as to a matter as to Ware's loan to Plaintiffs. Simply put, Plaintiffs have
24 never admitted that Defendants could inquire *without objection* of Ware as to his financial assistance to
25 Plaintiffs." (Plaintiff's Reply, p. 3:14-18) [emphasis in original]. The foregoing assertion makes no sense,
26 as Mr. Ware never has testified "at trial."

24 Moreover, Defendants have not asserted, because they are without sufficient information -- absent
25 the documents to be produced -- that "Defendants rely solely on testimony that non-party Ware loaned money
26 to Plaintiffs to assist Plaintiffs in paying their counsels attorneys' fees and costs. *Defendants have failed to
27 produce any evidence in the record that this financial assistance from a third party was in consideration for
28 a return on the loan upon conclusion of the litigation.*" (Plaintiffs' Reply, pp. 4:25-5:3) [emphasis supplied].
Defendants, in fact, are relying on testimony by Plaintiffs that Alfie Ware is funding Plaintiffs' lawsuit, and
is not simply loaning money that he expects Plaintiffs to repay at some time in the future. (See, e.g.,
Defendants' Response, pp. 8:4-21; p. 8:23-9:8).

1 Response, underscores one of the primary reasons for Defendants' Request and SDT, all as set forth
2 in Defendants' Response, and attached as Exhibits to Attorney Drutz' Rule 37(c) Certification. Non-
3 party Ware's involvement in this lawsuit may have public policy implications, which will be clarified
4 by the information sought in Defendants' Request and SDT. (See, e.g., Defendants' Response, § C).

6 Next, it is crystal clear that Plaintiffs' concede Mr. Ware's involvement in the lawsuit is
7 relevant to the issue of attorneys' fees. See Plaintiffs' Motion *In Limine* to Preclude Defendants'
8 Inappropriate Questioning of Alfie Ware. Further, while Defendants are unaware at this time of
9 Non-Party Ware's potentially improper maintenance of this lawsuit, Defendants' Request and SDT
10 will shed light on these important public policy questions. If such determination is made, then
11 Defendants are entitled to seek damages pursuant to A.R.S. §§12-341.01(C) and 12-349(A).
12

14 The court **shall award reasonable attorney fees** in any contested action upon clear
15 and convincing evidence that the claim . . . **constitutes harassment, is groundless**
16 **and is not made in good faith**. In making the award, the court **may consider any**
17 **evidence it deems appropriate** . . . regarding the amount of fees it deems in the best
18 interest of the litigating parties.

18 ***

19 [I]n any civil action commenced. . . in a court of record in this state, the court **shall**
20 **assess reasonable attorney fees, expenses and, at the court's discretion, double**
21 **damages of not to exceed five thousand dollars against an attorney or party, . . .**
22 **if the attorney or party does any of the following:**

- 22 1. Brings or defends a claim without substantial justification.
- 23 2. Brings or defends a claim solely or primarily for delay or harassment.
- 24 3. Unreasonably expands or delays the proceeding.
- 25 4. Engages in abuse of discovery.

26 A.R.S. §§12-341.01(C); 12-349(A).
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1 Lingel v. Olbin, 198 Ariz. 249, 253, 8 P.3d 1163, 1167 (App. 2000). The foregoing concerns go well
2 beyond speculating upon others' misfortunes, contrary to Plaintiffs' assertions. (See Plaintiffs'
3 Response, pp.4-5). Champerty is a concern that Defendants cited as one potential reason of non-
4 party Ware's financial involvement in this lawsuit. (Id.). The gravamen of concern also includes
5 churning lawsuits for the sake of litigating. Maintaining a lawsuit 'for the sake of litigating' calls
6 for appropriate sanctions, and non-party Ware's financial support of Plaintiffs arouses reasonable
7 suspicion that should prompt additional discovery to determine the propriety of his arrangement with
8 Plaintiffs' suit against the Coxes.
9

11 Moreover, operating under Plaintiffs' assertion calls for *even greater* scrutiny of non-party
12 Ware's maintenance of this lawsuit. Plaintiffs argue that "[i]ndeed, it would be impossible for non-
13 party Ware to receive any money from the present litigation as Plaintiffs' sued for injunctive relief."
14 (See Plaintiffs' Reply, pp.5:3-5). In a specially concurring opinion, Judge Brammer expressly
15 espoused the 'evils' of an assignment of a cause of action, *versus* merely an assignment of proceeds
16 that may result from the successful prosecution of a lawsuit, as follows:
17

19 Because I see the potential for mischief in the absolute assignment of these causes
20 of action, I would draw a line, admittedly fine, between that type of assignment and
21 the assignment of their proceeds. Acquiring an interest in proceeds should not give
22 the acquiring party any interest in or ability to direct, the litigation that may or may
23 not result in those proceeds.

24 Lingel v. Olbin, 198 Ariz. 249, ---, 8 P.3d 1163, 1174 (App. 2000) (Brammer, J., specially
25 concurring). In other words, directly controlling a lawsuit ostensibly is of *greater* concern than
26 sharing in the proceeds of the outcome of a lawsuit. Id. Thus, even if ultimately there are no
27 'proceeds' in which Alfie Ware may share, the danger remains that a non-party may be encouraging
28 litigation against the Coxes solely for litigation's sake or to advance his own personal interests.

1 Moreover, in this case, injunctive relief would have posed an even greater danger than monetary
2 proceeds, as it would have served as the precedent for pursuing other property owners in Coyote
3 Springs Ranch. Compelling discovery and permitting compliance with the SDT will provide critical
4 insight into these important issues and the Coxes' substantive right to seek fees and/or damages.
5

6 C. Plaintiffs Have Failed to Meet Their Burden and Defendants are Entitled to
7 Discovery.

8 Plaintiffs shoulder the burden of persuading this Court why discovery should not be had.
9 Babbitt v. Arnold, 26 Ariz. App. 333, 548 P.2d 426 (1976). Certainly, Schweiger and Gratz -- a
10 Michigan district court case -- are valid law. Yet, reliance upon such cases by Plaintiffs is myopic
11 and lend no support for the required showing of good cause to deny the Defendants' Request
12 pursuant to Rule 34 and to quash the SDT, which is directed to Non-Party Alfie Ware. Exactly the
13 opposite is true. "[T]he purpose of the Schweiger opinion was to establish guidelines to facilitate"
14 the court's effort in studying a fee application for "reasonableness." ABC Supply, Inc. v. Edwards,
15 191 Ariz. 48, 54, 952, P.2d 286, 292 (App. 1998). Schweiger serves as a guideline, and the 4 factors
16 set forth therein are not meant to be an exhaustive 'list'. Id.; see also Schweiger v. China Doll Rest.
17 Inc., 138 Ariz. 183, 1187 (App. 1983). Arizona courts should take into account factors specifically
18 arising out of the circumstances of the case at bar that will assist it in determining the reasonableness
19 of an award of fees. Here, Plaintiffs' own work on the case will assist the Court in making such a
20 determination.
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25 Witasick and his firm must learn that professional obligations such as Rule 11 and
26 ER 1.5 apply to them in all cases—even when the other lawyer infuriates them.

27 ***

28 . . . we cite with approval and adopt as our own the opinions which David Tierney,
an expert on attorneys' fees, expressed in his affidavit:

1 ***

2 (b) the Witasick request . . . does not comply with the requirements of the Preamble
3 to the Ethics Code (17A A.R.S. page 325, "A lawyer should use the law's procedures
4 only for legitimate purposes and not to harass or intimidate others.").

5 (c) The Witasick request . . . not in compliance with E.R. 1.5 (17A A.R.S., page 337,
6 "A lawyer's fees shall be reasonable,") in the light of 8 factors, including: labor
7 "required;" novelty and difficulty of the questions involved; skill needed; fee
8 customarily charged in Maricopa County for such matters; the amount involved; the
9 results obtained; whether the fee was fixed or contingent; etc. (emphasis supplied).

10 ABC Supply, Inc., 191 Ariz. at 55, 952 P.2d at 293. As the foregoing case holding demonstrates,
11 consideration of E.R. 1.5 is relevant to the determination of an award of attorneys' fees, and
12 includes factors in addition to those set forth in Schweiger, including the "fee customarily charged
13 in [the County] for such matters". See Id. Obviously, Plaintiffs' fee is implicated in this relevant
14 factor, as Plaintiffs counsel practices in this County, and has been doing so for a number of years.
15 Moreover, the case holding also adopts the Preamble to the Ethics Code as follows: "A lawyer
16 should use the law's procedures for only legitimate purposes and not to harass or intimidate others".
17 Id. As discussed above, the discovery and production of documents concerning non-party Alfie
18 Ware's fee arrangement with Plaintiffs and/or their counsel in maintaining the instant lawsuit is
19 critical in the determination of the legitimacy of the lawsuit, and whether statutory damages and/or
20 attorneys' fees pursuant to A.R.S. §§12-341.01(C) and 12-349 (A) are appropriate. In short, Plaintiffs
21 have shown no support, nor is there any prohibition, on Defendants' Request and SDT.

22
23 Next, *unlike* the instant case, Gratz v. Bollinger as relied upon by Plaintiffs is a § 1988 case,
24 involving alleged discrimination by University of Michigan against Caucasians. A § 1988 case is
25 governed by the lodestar 'method', which will not be utilized by this Court in the instant case. Gratz
26 v. Bollinger, 353 F.Supp.2d 929, 937 (E.D. Mich. 2005). "[A] reasonable attorney's fee award is
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1 one that is adequate to attract competent counsel but . . . [that does] not produce windfalls to
2 attorneys." Id. (quoting Blum v. Stenson, 465 U.S. 886, 893, 897, 104 S.Ct. 1541, 1546, 1548, 79
3 L.Ed.2d 891 (1984) [internal quotations omitted]) [internal quotations omitted]. "The starting point
4 for calculating a reasonable attorneys' fees award should be the determination of the fee applicant's
5 lodestar, which is the proven number of hours reasonable expended on the case by an attorney,
6 multiplied by his [or her] court-ascertained reasonable hourly rate." Gratz, 353 F.Supp.2d at 937.
7
8 This Court ostensibly will not be applying the lodestar method.
9

10 A lodestar determination also differs somewhat from the method to be employed by this
11 Court, inasmuch as "it is perfectly appropriate for a district court to award an hourly rate higher than
12 is customarily charged by the plaintiff's attorney or than set forth in the retainer fee agreement."
13 Guam Society of Obstetricians and Gyn. v. ADA, 100 F.3d 691, 697 (9th Cir.1996) (citing, inter
14 alia, Maldonado v. Lehman, 811 F.2d 1341, 1342 (9th Cir.) (counsel's customary rate is not
15 controlling), cert. den., 484 U.S. 990, 108 S.Ct. 480, 98 L.Ed.2d (1987)). Contrast Schweiger, in
16 which the court stated that "it is unlikely that the court will adjust the hourly rate upward" 138
17 Ariz. at 188. Simply put, an extra-jurisdictional § 1988 case discussing the determination of
18 attorneys' fees based on the lodestar method is inapplicable to Defendants' Request, contrary to
19 Plaintiffs' assertions. They have failed in their burden of persuasion of showing any good reason
20 why discovery should not be had; and their Motion should be denied.
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24 **II. THE PERSON UPON WHOM A SUBPOENA *DUCES TECUM* IS SERVED, ONLY,
25 POSSESSES THE RIGHT AND OBLIGATION TO LODGE AN APPROPRIATE
26 OBJECTION; A PARTY HAS NO STANDING TO QUASH A SUBPOENA.**

27 Plaintiffs, Cundiff, Nash, and Page, are mistaken in their assertion that they have any
28 standing whatever to object to the SDT. A subpoena is the vehicle for compelling the attendance

1 of witnesses and the production of documents from non-parties. Ariz. R. Civ. P. 45.

2 Support for Plaintiffs' lack of standing is found in MacDonald v. Hyder, 12 Ariz. App. 411,
3 471 P.2d 296 (1970). "Rule 45 . . . is concerned with the issuance of subpoenas to witnesses,
4 generally. Id. at p. 413, 299. A subpoena *duces tecum* may not be served on a party under Rule 45,
5 Arizona Rules of Civil Procedure, in order to avoid the procedures of Rule 34, request for
6 production. Id. at 416, 301. "**When a limitation order is sought under rule 45(b) or 30 it should**
7 **be made by the person to whom the subpoena duces tecum is directed.** He is the one who suffers
8
9 from any 'annoyance, embarrassment, or oppression', caused thereby, or to be protected under Rule
10 30(b)". Id. [emphasis added].

11
12 It is not suggested in the present case that the State Compensation Fund has any
13 arguable status as a party in the suit pending in the Superior Court between petitioner
14 and the respondents Lanning. That being the case, **it is not incumbent upon the**
15 **respondents Lanning to show good cause for the production sought by their**
16 **subpoena duces tecum** addressed to the Custodian of Records of the Fund.
17 Petitioner also contends here, as he did in the trial court, that the records sought are
18 insufficiently designated. But this, as the Shepherd case makes clear, is not properly
19 petitioner's objection. **The right to object is in the witness to whom the subpoena**
20 **is addressed.**

21 Id. at 417, 302 [emphasis added]. As the foregoing case opinion establishes, Plaintiffs do not have
22 standing to object and Alfie Ware now *must* comply with the SDT. As stated in Defendants'
23 Response, Plaintiffs received notice of the SDT. Plaintiffs filed no objection on behalf of Mr. Ware
24 to the SDT. The time for filing any objection has passed, and Mr. Ware now must comply with the
25 SDT.

26 Next, Defendants' grant of partial summary judgment entitles them to an award of attorneys'
27 fees pursuant to A.R.S. §12-341.01. Defendants' Request and SDT is relevant inasmuch as
28 Defendants stand in Plaintiffs shoes with regard to their arrangement as to non-party Ware's financial

1 obligation. An intended beneficiary need not specifically or individually be identified in a contract;
2 instead the third party must fall within a class clearly intended to be benefitted thereby. Cagaus Cent.
3 Federal Sav. Bank v. U.S., 215 F.3d 1304 (Fed. Cir. 2000), cert. den. 2001 (a contract may reflect
4 expressly or impliedly intention to benefit a third party).
5

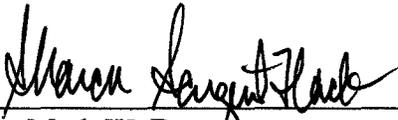
6 Plaintiffs' previous discovery request and SDT served upon Defendants counsel, essentially
7 mirrors Plaintiffs' counsels' own subpoena and request for production served upon Defendants'
8 counsel in Yavapai County Case Numbers DO2005-0552 and CV2001-0123 (Burnworth v.
9 Burthworth; and Sims v. Harper Family Trust). Ostensibly, each of these discovery instruments were
10 served by Plaintiffs' counsel upon Defendants' Cox counsel in good faith and pursuant to the Arizona
11 Rules of Civil Procedure. In fact, Plaintiffs' Request For Production in the Sims case was
12 propounded in the same context as the instant case - - the determination of an award of attorneys'
13 fees in favor of Plaintiffs. Plaintiffs' counsel requested the exact same information as that set forth
14 in Defendants' request for the same purposes, to argue for an award of reasonable attorneys' fees.
15 Plaintiffs' now raise unsupported arguments that ring hollow in light of their own previous requests
16 propounded upon Defendants' Counsel. There is no difference between Sims and the instant case,
17 other than reversal of who has made the request for information and documents. Again, Plaintiffs
18 have shown no reason why discovery should not be made.
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23 For the foregoing reasons, Plaintiffs' Motion for Protective Order and Motion to Quash must
24 be denied, and Defendants' Motion to Compel granted. Further, Defendants request attorneys' fees
25 and costs associated with defending against Plaintiffs unsupported objections to an SDT and
26 discovery request.
27
28

1 fees and costs associated with defending against Plaintiffs unsupported objections to an SDT and
2 discovery request.

3
4 RESPECTFULLY SUBMITTED this 6th day of September, 2005.

5 MUSGROVE, DRUTZ & KACK, P.C.

6
7 By 
8 Mark W. Drutz
9 Jeffrey R. Adams
10 Sharon Sargent-Flack
11 *Attorneys for Defendants*

12 COPY of the foregoing mailed
13 this 6th day of September, 2005 to:

14 Honorable David L. Mackey
15 Yavapai County Superior Court
16 Division 1
17 Yavapai County Courthouse
18 Prescott, Arizona 86301

19 COPY of the foregoing mailed this
20 6th day of September, 2005 to:

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