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8 *Attorneys for Defendants*

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

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

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

17 Plaintiffs,

18 v.

19 DONALD COX and CATHERINE COX,
20 husband and wife,

21 Defendants.

Case No. CV 2003-0399

Division No. 1

**DEFENDANTS' REPLY TO
PLAINTIFFS' OBJECTION TO
DEFENDANTS' MOTION FOR AWARD
OF ATTORNEYS' FEES**

(Oral Argument Requested)

(Assigned to the Honorable David L.
Mackey)

22 Defendants Donald and Catherine Cox, by and through undersigned counsel, hereby submit
23 their Reply to Plaintiffs' Objection to Defendants' Motion for an Award of Attorneys' Fees
24 ("Plaintiffs' Objection") in the above-captioned matter and further urge this Court to award
25 Defendants their fees requested as they are reasonable and allowable. This request for an award of
26 attorneys' fees is supported by the following Memorandum of Points and Authorities, the Affidavits
27 of Counsel and supporting documents filed with the Motion for Award of Attorneys' Fees, and the
28 record on file herein.

√ Div 1

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION.**

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4 In Plaintiffs' Objection, Plaintiffs state and characterize Defendants' counsel's work in this
5 case as: "patently unreasonable", "defies reasonableness", "unproductive", "unjustified",
6 "groundless", "spanned an unnecessary length of time", "unwarranted", "perfunctory", "inherently
7 unreasonable", "cursory", "outrageous", "glaring", "outlandish", "futile", "legally specious",
8 "misguided", "ill-founded", "stretches the bounds of credibility", "wholly unreasonable", "defies
9 credibility", "irrational", and "dilatatory". In light of Plaintiffs' counsel's characterization of
10 undersigned's work, it is difficult to comprehend that Defendants prevailed in this case.
11 Notwithstanding the foregoing, a review of the Motion for Award of Attorneys' Fees reveals that
12 Plaintiffs' Objection lacks merit.

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15 **II. DEFENDANTS' ATTORNEYS DID NOT ENGAGE IN IMPERMISSIBLE**
16 **"BLOCK BILLING"; FURTHER, ALL OF THEIR BILLING SUMMARIES**
17 **COMPLY WITH THE MANDATES OF THE CHINA DOLL CASE.**

18 Plaintiffs argue that Defendants' attorneys engaged in impermissible "block billing" and that
19 Defendants' counsels' billing summaries are vague. See Plaintiffs' Objection at p. 3, ln. 20 - p. 4,
20 ln. 5 and p. 15, ln. 1- p. 18, ln. 6. However, Defendants' counsels' billing summaries do not suffer
21 from any defects and comply with the controlling Arizona authority.

22
23 Defendants rely upon a Federal District Court case from the Eastern District in the State of
24 Michigan, Gratz v. Bollinger, 353 F.Supp.2d 929 (E.D. Mich. 2005), to support their "block billing"
25 argument. However, a Federal District Court decision does not control attorneys' fees awards in
26 the State of Arizona. The reason for this is simple – the Federal Rules governing attorneys' fees
27 awards govern the manner in which time entries must be kept in Federal Court. For example, the
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1 Arizona Federal District Court expressly prohibits “block billing”. Specifically, Local Rules
2 54.2(d)(3) and 54.2(e)(1)(B) of the Arizona Federal District Court require that fee applications
3 submitted to that Court include “[a] task-based itemized statement of time expended” that shows,
4 in chronological order, the “time devoted to each individual unrelated task performed on such day.”
5 Unlike the Federal Rules, however, the Arizona Rules of Civil Procedure do not contain such
6 requirements.
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9 Further, undersigned could find only one case in Arizona, Orfaly v. Tucson Symphony
10 Society, 437 Ariz.Adv.Rep. 20, 209 Ariz. 260, 99 P.3d 1030 (Ct. App. 2005), that even references
11 “block billing”. Therein, appellants contended that appellees’ fee applications should be denied, in
12 part, due to the allegation that they “contained only broad summaries (or “block billing”) of work
13 performed ... [which allegedly] made it impossible for the trial court and [appellants] to analyze the
14 reasonableness of time spent” in violation of the mandates of Schweiger v. China Doll Restaurant,
15 Inc., 138 Ariz. 183, 673 P.2d 927 (App.1983). Orfaly at 23 (emphasis added). In rejecting the
16 appellants’ block billing argument, Division 2 of the Court of Appeals held merely that the billing
17 summaries submitted in connection with a fee application “should indicate the type of legal service
18 provided, the date the service was provided, the attorney providing the service, . . . and the time spent
19 in providing the service ... [as] [t]hose requirements allow the court to determine whether the hours
20 claimed are justified. Therefore, the fee application must contain sufficient detail so as to enable the
21 court to assess the reasonableness of the time incurred.” Id. citing China Doll at 188. (emphasis
22 added).
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26 A review of the time entries included on the billing summaries submitted to this Court by
27 Defendants in connection with the Motion for Award of Attorneys’ Fees reveals that they precisely
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1 set forth the types of legal services provided, who provided those legal services, the time spent
2 providing the legal services and the amount for which Defendants were billed. A review of those
3 billing summaries also reveals that they are sufficiently descriptive to enable the Court to exercise
4 its discretion to award fees in a case in which Defendants prevailed. Arguably, even if Defendants'
5 fee application was submitted to the Arizona Federal District Court, it appears to comply with Rules
6 54.2(d)(3) and 54.2(e)(1)(B) of the Local Rules of Civil Procedure for the Arizona Federal District
7 Court, as they contain no time entries detailing unrelated tasks performed on the same day. To the
8 contrary, all tasks detailed on a particular day reflect that the tasks performed all relate to each other.
9 More importantly, the time entries provide the mandated detail necessary to assist the Court in
10 ascertaining the reasonableness of the fees charged. Finally, the billing summaries submitted to this
11 Court were a result of thoughtful and deliberate review of Defendants' attorneys to ensure that (i)
12 there was no duplicate billing and (ii) that billing summaries contained only entries directly related
13 to the issues, claims and defenses that were before this Court.
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17 Finally, as Plaintiffs failed to identify any specific billing entries that do not meet the
18 foregoing requirement and instead constitute impermissible "block billing," even if that were
19 prohibited, it is clear that Defendants' attorneys' billing summaries meet the requirements
20 established by the Orfaly and China Doll Courts. For the foregoing reasons, Plaintiffs' Objection
21 must be denied.
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23
24 Plaintiffs object to, and describe as vague, those entries on Musgrove, Drutz & Kack, P.C.'s
25 ("MDK") billing summaries that describe telephone and office conferences with the clients and co-
26 counsel, and research. See Plaintiffs' Objection at p. 15, lns. 16-24. Plaintiffs object also to all of
27 Michael Bourke's billing summaries, alleging they are vague and "fail in any way to demonstrate
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1 who the work done was reasonably related to the litigation.” See Plaintiffs’ Objection at p. 15, ln.
2 25-p. 16, ln. 2. However, Plaintiffs’ objections lack merit.

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4 Plaintiff objects to time entries that describe 8.55 hours Defendants’ counsel spent either
5 meeting with Defendants, reviewing facsimiles from Defendants or sending letters to Defendants on
6 matters concerning this case. As should be obvious, meeting or corresponding with clients is
7 necessary and as can be gleaned from the other activities described in Defendants’ counsels’ billing
8 summaries on or around the time of those meetings and correspondence, all of those meetings and
9 correspondence related to this case. Just as obvious is the fact that describing in detail, on the billing
10 summaries provided to the Court and opposing counsel, what was actually discussed and/or
11 communicated would involve a breach of the attorney-client privilege. Nevertheless, it is difficult
12 to imagine that 8.55 hours spent meeting or corresponding with clients in a case spanning more than
13 two years is not within the bounds of reason. Plaintiffs’ objection should be denied.

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16 Plaintiffs object also to five hours spent by Defendants’ counsel visiting Defendants’ property
17 and attending a meeting concerning that property and this lawsuit. To Defendants’ counsel it
18 certainly seems reasonable that the property that is the subject of the litigation would be viewed and
19 inspected by the attorneys responsible for representing Defendants, which is what occurred on June
20 19, 2004. It is difficult to decipher what additional description Plaintiffs require for the entry on
21 November 9, 2004, because at least one of the Plaintiffs and the person responsible for paying their
22 attorneys’ fees, Alfie Ware, was present at the meeting described and if it was reasonable for them
23 to attend that meeting, it was certainly reasonable for Defendants’ counsel to bill for attendance at
24 that same meeting. Thus, Plaintiffs’ objection should be denied.

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1 Finally, regarding Plaintiffs' objection to Michael Bourke's attorneys fees and his billing
2 summaries, a review of those billing summaries reveals that they contain an abundant amount of
3 detail describing what he did. Needless to say, it is difficult to comprehend that Plaintiffs' counsel
4 cannot understand Mr. Bourke's billing summaries, especially since numerous time entries involve
5 activity in which Plaintiffs' counsel was involved. As such, Defendants should be entitled to recover
6 the fees incurred with Michael Bourke.
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9 In summary, it is evident that all of the billing summaries submitted to the Court comply with
10 the mandates of the China Doll case and will allow the Court to exercise its judicial discretion to
11 reach a determination of the amount of fees to which Defendants are entitled. Plaintiffs have failed
12 to assert any viable objections and, rather, they all should be denied.
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14 **III. DEFENDANTS DID NOT EMPLOY THE USE OF AN IMPERMISSIBLE**
15 **NUMBER OF ATTORNEYS, WHO PRIMARILY EACH WORKED ON**
16 **DISCRETE TASKS OR PROJECTS.**

17 Plaintiffs argue that Defendants used too many lawyers to advance their defense against
18 Plaintiffs' claims resulting in "astronomical fees", asserting that Defendants were "actively
19 represented by 4 attorneys at [MDK]" that billed for an impermissible 23.9 hours of office
20 conferences amongst them. See Plaintiffs' Objection at p. 4, lns. 6-21 and p. 16, lns. 16-17.
21 (emphasis added). However, Plaintiffs fail to recognize and acknowledge that the use of more than
22 one attorney is proper when necessary to protect and advance the client's interests. See e.g., S&R
23 Props. v. Maricopa County, 178 Ariz. 491, 505, 875 P.2d 150, 164 (Ct. App. 1993). Further,
24 Plaintiffs fail to apprise the Court that two MDK lawyers that worked on this case – namely, Tom
25 Kack and Grant McGregor – performed discrete tasks involving a relatively small amount of time
26 and, in several instances, their time never was billed to Defendants.
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1 In point of fact, Mr. Kack's involvement in this case was limited to (i) issues surrounding
2 Plaintiffs' counsel's improper deposition conduct and Plaintiffs' unsuccessful efforts to disqualify
3 Defendants' counsel, see June 23, 2004 time entry from the MDK billing summaries at page 3; (ii)
4 his assistance with the preparation of Jury Instructions, Jury Voir Dire, the Joint Pretrial Statement,
5 the Verdict Forms, and certain response motions, see July 20, 21 and 22, 2005 time entries from the
6 MDK billing summaries at pages 19-20); (iii) his review of the Motion for Reconsideration on the
7 Court's ruling on Defendants' Rule 19 Motion to Join Indispensable Parties or, in the Alternative,
8 Motion to Dismiss. See July 23, 2005 time entries from the MDK billing summaries at page 20.
9 In fact, during the time Defendants' attorneys worked on this case, Mr. Kack's time totals 6.05 hours,
10 which was 1.2 percent (1.2%) of the total hours spent on the case by MDK. Importantly, MDK's
11 billing summaries show that on two separate occasions, Mr. Kack's time was not charged to
12 Defendants and as a result, no attorney's fees related to those time entries has been requested. See
13 July 23, 2005 time entries from the MDK billing summaries at pages 3-4.

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18 The late Grant McGregor's involvement in this case was even more remote and limited than
19 that of Mr. Kack. For example, Mr. McGregor performed some initial research on various defenses
20 in July 2004. See July 19-20, 2004 time entries from the MDK billing summaries at page 4. Several
21 months later, Mr. McGregor was consulted regarding an issue related to one of Plaintiffs' Motions
22 for Summary Judgment and provided some guidance. See October 6, 2004 time entry from the
23 MDK billing summaries at page 9. Mr. McGregor performed no further work on this case. The
24 hours Mr. McGregor worked in this case and for which Defendants were billed total only 5.15 hours.
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26 Plaintiffs likewise ignore the undisputable fact that virtually all of Defendants' discovery and
27 initial legal research in this case was performed and completed by Mr. Adams. Mr. Drutz's initial
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1 involvement in the case was limited to case management and supervision during which he spent
2 minimal amounts of time. Ms. Flack became involved in this case only after Plaintiffs commenced
3 with their aggressive Motion practice at which time she assisted Mr. Adams with preparing response
4 motions and the related legal research associated with those response motions. Thereafter, it made
5 sense that Ms. Flack assist with the preparation of all of the pleadings required to prepare this case
6 for the August trial as there was much to do and provide to the Court and/or limited amount of time
7 in which to complete it.
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10 The foregoing establishes that contrary to Plaintiffs' claim, Defendants' counsel did not have
11 a "sheer number of attorneys" working on this case that resulted in "astronomical fees". See
12 Plaintiffs' Objection at p. 4, lines 6 and 14. Rather, undersigned involved a sufficient number of
13 attorneys necessary to advance their clients' interests and, when necessary, did not charge for
14 duplication as is evident from the MDK billing summaries. Speaking for themselves, those billing
15 summaries describe anything but "extravagance" and, rather, reflect sound case management,
16 delegation of duties and tasks, and efficient use of Defendants' litigation resources as this case
17 progressed and which required a balancing of the work to achieve a successful result for Defendants
18 against Plaintiffs' claims. As such, Plaintiffs' argument that MDK used too many lawyers in
19 representing Defendants rings hollow.
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23 Finally, with respect to Plaintiffs' claim that 23.9 hours of conferences amongst the lawyers
24 working on this case was too much, one must recognize that the 23.9 hours to which Plaintiffs object
25 spanned 27 months and amounted to less than 2.4 minutes per day or 12 minutes per week on a case
26 involving clients that had an investment of over \$500,000.00 at stake. Taken in context, by any
27 measurable standard Defendants' counsel did not over bill or double bill Defendants for office
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1 conferences. Defendants' counsel did not engage in "constant conferencing among themselves."
2 See Plaintiffs' Objection at p. 17, ln. 2. Nor did Defendants' counsel increase the cost of this case
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4 by speaking to each other about the case occasionally. Rather, Defendants' counsel acted in a
5 manner that allowed for the effective allocation of tasks, clarification of issues, elimination of
6 duplication of work and reduction of the amount of time expended by the attorneys working on this
7 case thereby reducing the amount of attorneys' fees incurred. Consequently, Plaintiffs' objection
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9 in this regard should be denied.

10 **IV. PLAINTIFFS' OBJECTIONS TO TIME SPENT ON DEFENDANTS'**
11 **ANSWER, RESPONSE TO APPLICATION FOR PRELIMINARY**
12 **INJUNCTION AND MOTIONS THAT ULTIMATELY WERE NOT FILED**
13 **LACK MERIT.**

14 Plaintiffs object to the amount of time Defendants' counsel spent preparing (i) the Answer,
15 (ii) a Third-Party Complaint, (iii) a Notice of Non-Parties at Fault, (iv) a Response to Plaintiffs'
16 Application for Preliminary Injunction, and (v) other various motions and pleadings that were not
17 filed. Defendants will address each objection above *seriatim*. See Plaintiffs' Objection at p. 4, ln.
18 24-p. 7, ln. 12.

19 Plaintiffs' object to Defendants' counsel spending a total of 6.1 hours on the Answer, Third-
20 Party Complaint and Verification and 2.3 hours preparing a Request for Jury Trial, a Controverting
21 Certificate and a Notice of Change of Judge. In doing so, Plaintiffs claim that Defendants' counsel's
22 time spent on the foregoing was unreasonable. However, Plaintiffs make no effort to explain why
23 the time spent was unreasonable or how the amount of time preparing those pleadings and motions
24 could have been reduced. What Plaintiffs do not provide the Court is their estimate of what would
25 be a reasonable amount of time to prepare the foregoing.
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1 The fact is, Defendants' counsel and their legal secretary each did the work necessary to
2 prepare and file the foregoing pleadings and motions and billed Defendants accordingly. While
3 Plaintiffs attempt, on several occasions, to characterize the work on the foregoing items by
4 Defendants' counsel and their legal secretary(ies)/assistants as the same because the description of
5 the work performed related to the same matters, it is axiomatic that a legal secretary's or legal
6 assistant's work is necessarily different from that completed by an attorney. Rather, it is the practice
7 of undersigned's firm, and that of each of the law firms for which Defendants' attorneys' have
8 worked, that while legal secretaries and legal assistants may do the initial set-up of pleadings and
9 motions and even prepare basic factual sections, the substantive legal work, research and analysis
10 are completed by the attorneys working on the case as it is the attorneys who are ultimately
11 responsible for representing the Firm's clients, not the legal secretaries and assistants. Importantly,
12 there was no duplication of work between undersigned's legal assistants/secretaries and the attorneys
13 that completed the work. Further, by allocating the work in this case as demonstrated above,
14 undersigned historically has been able to limit the amount of attorney time spent and actually reduces
15 the attorneys' fees billed to clients including the Coxes.

16 In completing the foregoing work, it is noteworthy that Defendants' counsel conducted a
17 detailed review and analysis of the pleadings filed up to that time, reviewed the documentary
18 evidence then in their possession that was at issue, consulted with the clients, their former counsel
19 and several witnesses and evaluated the legal and factual merits of all of the defenses that were
20 considered by Defendants. All of the foregoing was necessary to ensure that those pleadings were
21 factually and legally accurate and supported by the evidence. With respect to what Plaintiffs'
22 characterize as three "perfunctory" notices, it was incumbent upon Defendants' counsel to ensure

1 that those notices complied with the applicable Rules of Civil Procedure and the law in the State of
2 Arizona, which was done in this case. By way of example, in evaluating the merits of filing the
3 Request for Jury Trial, we were required to evaluate the impact such a request would have on this
4 case in light of the fact that Plaintiffs' lawsuit sought equitable relief as opposed to monetary
5 damages. Likewise, filing the Controverting Certificate required an evaluation of the discovery that
6 had taken place to date, an evaluation of what discovery was yet to be completed, and an analysis
7 of the time undersigned believed it would take to complete that discovery, which because this case
8 involved an enormous number of potential witnesses and the assembly of a substantial amount of
9 documentary evidence, was a lengthy period of time. The foregoing work was completed to ensure
10 that Defendants' rights and interests were protected and their defenses properly advanced. And each
11 of the foregoing tasks took time that was billed to Defendants.
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15 Regarding Plaintiffs' contention surrounding the Third-Party Complaint, it is true that that
16 pleading was not filed. However, it was prepared and, initially, was going to be filed against one of
17 Defendants' former attorneys that provided Defendants with legal advice concerning the use of their
18 property prior to the time they commenced with their improvements. That effort likewise took time.
19 However, due to concerns related to the protection and perfection of the attorney-client privilege,
20 it was not filed. Nevertheless, the preparation of that pleading necessarily involved work that
21 ultimately was utilized throughout this case and which would have been used to cross-examine
22 several of Plaintiffs' witnesses had this Court not granted summary judgment in Defendants' favor.
23 Consequently, while the Third-Party Complaint was not filed, it involved work that proved beneficial
24 and advanced the merits of Defendants' case. As such, Defendants are entitled to recover those fees
25 incurred as a result.
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1 Plaintiffs object to the charges related to the preparation of a Notice of Non-Parties At Fault
2 that was never filed. This Notice was prepared in light of the undisputed facts that (i) Plaintiffs
3 obviously were discriminating against Defendants in seeking to enforce restrictive covenants against
4 them that Plaintiffs knowingly refused to enforce against others in direct violation of the same
5 restrictive covenants, and (ii) never before, in the 30+ years since the restrictive covenants were
6 established, had Coyote Springs Ranch property owners sought to enforce those restrictive
7 covenants. The fact is, Plaintiffs were using Defendants as a test case with the intention of
8 “get[ting] some momentum going” to take action against other Coyote Springs Ranch property
9 owners. See deposition transcript of Katheryn Page at p. 66, Ins. 4-12 attached hereto as
10 Exhibit “1”. Further, as was the case with respect to the Third-Party Complaint, the time spent and
11 work performed on that Notice ultimately was utilized throughout this case and would have been
12 used to cross-examine several of Plaintiffs’ witnesses had this Court not granted summary judgment
13 in Defendants’ favor. Consequently, while the Notice of Non-Parties At Fault was not filed, it
14 involved work that proved beneficial and advanced the merits of Defendants’ case. As such,
15 Defendants are entitled to recover those fees incurred as a result.

20 Plaintiffs object to the 9.2 hours spent on a Response to Plaintiffs’ Application for
21 Preliminary Injunction, again arguing that it was never filed. That is an interesting argument for two
22 reasons. First, it was Plaintiffs who filed the Application for Preliminary Injunction seeking to have
23 the Court order that Defendants discontinue using their property in the manner they had used it for
24 several years and *after* they had invested more than \$500,000.00 in improvements. Defendants’
25 counsel was obligated to respond to that effort and did so in preparing a responsive pleading that had
26 to be filed within a limited amount of time given the Court’s setting of a Show Cause hearing.
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1 Second, following the preparation of the Response to Plaintiffs' Application for Preliminary
2 Injunction, which included an evaluation of the evidence and facts supporting that response motion,
3 undersigned believed that it would be unlikely that this Court would grant Plaintiffs' request.
4 Therefore, to avoid the expenditure of substantial litigation resources by both Defendants and
5 Plaintiffs to litigate the merits, or lack of merit, of a preliminary injunction in this case, Defendants,
6 not Plaintiffs, proposed that the parties stipulate to Defendants' use of their property pursuant to
7 which the parties would maintain the status quo allowing Defendants' current use of their property
8 without further expansion. Following discussion with Plaintiffs' counsel of the likelihood of the
9 Court granting a preliminary injunction in the face of the facts of this case, Plaintiffs' counsel agreed
10 to the proposed stipulation. As a result, both parties – namely Plaintiffs and Defendants – actually
11 saved a substantial amount of attorneys' fees that otherwise would have been spent on additional
12 motion practice and what could have been a very lengthy OSC hearing. Having prevailed in this
13 case, Defendants should recover those necessary attorneys' fees incurred on the foregoing.
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16 Plaintiffs object to the 5.25 hours Defendants' counsel spent on a potential malpractice claim
17 against one of their former attorneys, which Plaintiffs characterize as a dispute “that was not an issue
18 in this case...”. See Plaintiffs' Objection at p. 6, lns. 5-13. Conveniently, and as referenced above,
19 Plaintiffs ignore the fact that the foregoing work not only related directly to the issues in this case
20 but also was used to prepare for the cross-examination of one of Plaintiffs' witnesses who actually
21 provided legal advice to Defendants that directly related to their proposed use of their property. See
22 above, *infra*. However, due to concerns related to the protection and perfection of the attorney-client
23 privilege, the malpractice action, which was going to be filed as a Third-Party Complaint, was not
24 filed. Again, the preparation of that pleading necessarily involved work that ultimately was utilized
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1 throughout this case and which would have been used to cross-examine several of Plaintiffs'
2 witnesses had this Court not granted summary judgment in Defendants' favor. Consequently, while
3 the Third-Party Complaint was not filed, it involved work that proved beneficial and advanced the
4 merits of Defendants' case. As such, Defendants are entitled to recover those fees incurred as a
5 result.
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7 Plaintiffs next complain about a Motion to Compel that was not filed. See Plaintiffs'
8 Objection at p. 6, lns. 14-18 and p. 7, lns. 1-6. The work performed on the Motion to Compel related
9 to Defendants' request to take the depositions of two witnesses, Alfie Ware and Dan Sanders, who
10 were identified by Plaintiffs during their depositions and involved meetings between Plaintiffs and
11 those two witnesses that directly related to this case. See July 27, 2004 letter to Plaintiffs' counsel
12 attached as Exhibit "2". Plaintiffs' counsel refused to stipulate to those depositions and
13 consequently, the Motion to Compel was prepared. Id. However, before it was filed, we were
14 (i) able to acquire evidence that we believed was sufficient to establish what was discussed during
15 those meetings and (ii) able to determine that those depositions were unnecessary. Notwithstanding
16 the fact that the Motion to Compel was not filed, the work performed in connection with the
17 preparation of that motion ultimately benefitted Defendants and aided in the defense of this case.
18 Defendants therefore are entitled to recover the fees associated with those efforts.
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23 Plaintiffs complain about Grant McGregor's 45 minutes spent in analyzing and researching
24 the potential defenses of equity, abatement and revival, arguing that the fees for that time should not
25 be recovered because those defenses were never actually asserted. See Plaintiffs' Objection at p. 6,
26 lns. 18-22. That is an interesting argument because if the Court were to adopt such a position, and
27 it was likewise adopted by every judge in Arizona, no attorney would be able to recover attorneys'
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1 fees for evaluating claims, defenses, or legal and factual theories that ultimately are not formally
2 asserted. This is a preposterous position because a prudent attorney is always going to explore the
3 merits of all available claims and/or defenses as well as all potential legal and factual theories to
4 advance the representation of their client's interests. In fact, if an attorney does not engage in the
5 foregoing exercise, it is possible and very likely that a client's interests will not be adequately
6 represented with the consequence being the commission of malpractice or worse, the loss of a
7 client's case. Clearly, it was proper for Defendants' counsel to explore alternative defenses in this
8 case. And spending 45 minutes to undertake that effort in a case spanning more than two years
9 certainly was reasonable.

12 Plaintiffs next complaint concerns time spent on a Motion to Dismiss, arguing that it was
13 never filed. See Plaintiffs' Objection at p. 6, lns. 23-26. However, Plaintiffs' claim is erroneous.
14 The work on the Motion Dismiss in July 2004 was initial work that ultimately made it into
15 Defendants' Motion to Join Indispensable Parties Pursuant to Rule 19(a), Ariz. R. Civ. P., or, in the
16 Alternative, Motion to Dismiss Pursuant to Rule 12(b)(7), Ariz. R. Civ. P., for Failure to Join
17 Indispensable Parties. The foregoing is discussed in more detail below, *infra*, in addressing
18 Plaintiffs' argument that attorneys' fees should not be awarded for work related to that motion
19 because it was not granted.

22 Finally, Plaintiffs object to the 1.4 hours spent by Defendants' counsel on their research
23 of the defense of waiver, their objecting seemingly based upon the fact that that research happened
24 to occur the day before Plaintiffs filed their first Motion for Summary Judgment. Defendants'
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1 counsel are at a loss as to the impropriety of conducting research on a legal defense the Court has
2 ruled twice was a viable defense in this case.¹

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4 Based on the foregoing, it is clear that Plaintiffs' objections to time and attorneys' fees billed
5 and that related to the (i) the Answer, (ii) Third-Party Complaint, (iii) Notice of Non-Parties at Fault,
6 (iv) Response to Plaintiffs' Application for Preliminary Injunction, and (v) the cited examples of
7 motions and pleadings that were not filed lack merit. Consequently, all of the fees questioned by
8 Plaintiffs should be awarded to Defendants.
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10 V. **DEFENDANTS' COUNSEL SPENT A REASONABLE AMOUNT OF TIME**
11 **PREPARING ITS DISCLOSURE STATEMENTS AND CONDUCTING**
12 **DISCOVERY.**

13 Plaintiffs complain about the time Defendants' counsel spent conducting discovery and
14 preparing disclosure statements. See Plaintiffs' Objection at p. 7, ln. 15-p. 9, ln. 4. As an initial
15 comment, as a review of the date entries to which Plaintiffs object will reveal that Defendants'
16 counsel simply did not spend 18 hours preparing Defendants' Initial Rule 26.1 Disclosure
17 Statement. Rather, the time entries to which Plaintiffs' object reveal that in addition to working on
18 Defendants' Initial Rule 26.1 Disclosure Statement, Defendants' counsel and legal assistant reviewed
19 deposition transcripts, reviewed correspondence from Plaintiffs' counsel, conducted legal research
20 in response to that correspondence, worked on a Response to a Request for Production, prepared a
21 letter to Defendants, and reviewed documentary evidence. Furthermore, what Plaintiffs fail to
22 illuminate for this Court is the fact that 14 of the 18 hours to which they object was time spent by
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26 ¹The Court first ruled that Defendants could assert waiver as a defense in denying Plaintiffs'
27 first Motion for Summary Judgment. The Court's second ruling in favor of Defendants on this issue
28 occurred when it denied Plaintiffs' Motion for Reconsideration of their first Motion for Summary
Judgment.

1 a legal assistant billing at \$65.00 per hour because it involved tasks that did not have to be performed
2 by an attorney thereby reducing the amount of attorney time spent on this case. The fact is, the
3 preparation of Defendants' various disclosure statements in this case took the time that it took.
4 Neither Defendants nor Defendants' counsel set a pre-determined time limitation for preparing their
5 disclosure statements. Rather, Defendants' counsel conducted the work necessary to ensure that
6 Defendants were in compliance with Rule 26.1, Ariz. R. Civ. P., and performed the discovery
7 necessary to advance Defendants' case. In this case that meant (i) reviewing literally hundreds of
8 pages of documentary evidence, which included, *inter alia*, photographs, newspaper advertising,
9 yellow-page advertising, corporate records, title and escrow documents, correspondence and
10 statements from potential witnesses, and the documentation supporting Defendants' development
11 of, and improvements to, their property and much of which Plaintiffs actually used during their
12 extensive motion practice in this case; and (ii) interviewing all of the potential witnesses disclosed.
13 In this regard, it is axiomatic that while an actual pleading, motion or discovery device may be
14 limited in the number of pages of written material, much more goes into the preparation of those
15 written products. The foregoing was precisely what occurred in this case and Defendants, as the
16 prevailing parties, should recover their attorneys' fees incurred as a result.

21 Plaintiffs' objection to the 2.5 hours spent preparing Defendants' November 4, 2004
22 supplemental disclosure statement likewise ignores the fact that more work went into that disclosure
23 statement than is reflected in simply having that document typed. The work in preparing that
24 pleading involved discussions with the one lay witness that was disclosed as well as a review and
25 evaluation of the documentary evidence that was disclosed. It further required conducting legal
26 research supporting the defense of unclean hands to accommodate Plaintiffs' request for legal
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1 support for that defense. With respect to Plaintiffs' commentary regarding Defendants'
2 November 11, 2004 supplemental disclosure statement, the circumstances surrounding that
3 disclosure were fully briefed in Defendants' Response to Plaintiffs' Opposition to Defendants'
4 Amended Witness List and, Motion *in Limine*. As was explained to Plaintiffs' counsel on several
5 occasions, both telephonically and in writing, the November 11, 2004 supplemental disclosure
6 statement was prepared by a legal secretary that did not normally work on this case due to multiple
7 discovery requests being prepared on the same date and which involved other cases. That legal
8 secretary not being a paralegal did not bill her time on this case as she does not normally bill her time
9 on any case. Hence, the fact that there were no billing entries for putting together the November 11,
10 2004 supplemental disclosure statement. Candidly, Defendants' counsel has grown weary of
11 Plaintiffs' counsel's insinuations that Defendants' counsel has acted in anything other than an honest
12 manner in an effort to gain some sort of strategic advantage.

16 Plaintiffs' object to the time spent on Defendants' Fifth Supplemental Disclosure Statement,
17 calling 1.65 hours "outrageous". See Plaintiffs' Objection at p. 8, ln. 15-p. 9, ln.4. In characterizing
18 that disclosure statement as consisting only of one sentence, Plaintiffs fail to apprise the Court that
19 the documentation disclosed consisted of the deposition transcript of Robert J. Launders taken on
20 March 20, 2001, together with all exhibits attached thereto, in Rodney G. Smith and Jill L. Smith
21 v. Alf. McRoberts and Joann McRoberts, et al., Yavapai County Superior Court Case No. CV 2000-
22 0472. Without going into an enormous amount of detail regarding the precise testimony from that
23 deposition that Defendants intended to use during the trial of this case, suffice it to say that it was
24 incumbent upon Defendants to actually read that deposition transcript before disclosing it as
25 evidence in this case. That effort took time. And because it was read in connection with the

1 preparation of Defendants' Fifth Supplemental Disclosure Statement, it was billed as such. By any
2 standard, the time spent to perform the foregoing task was necessary, prudent and reasonable and
3 anything but "outrageous" as characterized by Plaintiffs' counsel.
4

5 As a final comment regarding Plaintiffs' objection to the time spent preparing Defendants'
6 disclosure statements, Defendants' counsel takes issue with Plaintiffs' statement implying
7 wrongdoing, stating that "there is no discussion of the relevance of any of [the documents referenced
8 in Defendants disclosure statement that would justify any portion of the []work. Nowhere in
9 Rule 26.1, Ariz. R. Civ. P., does it require that a party describe the relevance of every piece of
10 evidence or documentation disclosed. Furthermore, Plaintiffs did not conform to such a practice,
11 failing to describe in their Rule 26.1 Disclosure Statement the relevance of each item of
12 documentation they disclosed. See Exhibit "3", attached hereto. Plaintiffs' counsel certainly is
13 being disingenuous in seeking to gain favor with the Court by implying wrongdoing by Defendants'
14 counsel for not engaging in a practice that Plaintiffs' counsel themselves did not follow. Finally,
15 Defendants' counsel are unaware of any alleged post-it attached to any documentation served on
16 Plaintiffs that contained the language "Do Not Disclose" and therefore have no comment other than
17 to state that Defendants fully complied with their disclosure obligations in accordance with
18 Rule 26.1.
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23 **VI. DEFENDANTS' COUNSEL SPENT AN APPROPRIATE AMOUNT OF TIME**
24 **RESPONDING TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**
25 **ON THE ISSUE OF WAIVER.**

26 Plaintiffs object to the amount of time Defendants' counsel spent preparing their response
27 to Plaintiffs' Motion for Summary Judgment Re: Waiver. See Plaintiffs' Objection at p. 9, ln. 8 -
28 p. 10, ln. 1. In asserting this objection, Plaintiffs fail to point out to the Court exactly why the time

1 spent was unreasonable; nor do they provide the Court with any estimate of the amount of time they
2 believe would have been reasonable under the circumstances of this case. Rather, they simply draw
3 the unsupported conclusion that Defendants' counsel should have spent less time in responding to
4 Plaintiffs' Motion for Summary Judgment.
5

6 However, as stated above, *supra*, Defendants' counsel spent the time necessary to prepare
7 what they believed to be a legally and factually supported response motion that sufficiently and
8 adequately protected Defendants' interests in this case. Those efforts ultimately proved successful
9 as Plaintiffs' Motion for Summary Judgment on the issue of waiver was denied following oral
10 argument and again following Plaintiffs' submission of a Motion for Reconsideration.
11

12 In further evaluating the amount of time Defendants' counsel spent in responding to the
13 above-referenced Motion for Summary Judgment, this Court must understand and realize that
14 responding to that Motion required not only preparing a response Motion, but also included having
15 to respond to Plaintiffs' Separate Statement of Facts filed in support of their Motion for Summary
16 Judgment as well as a Statement of Facts in support of the Response Motion. Each of the foregoing
17 took considerable amounts of time and effort. While Plaintiffs give short shrift to the contribution
18 of Sheila Cahill to Defendants' Response to the Motion for Summary Judgment and Defendants'
19 counsel's work done in connection with that of Ms. Cahill, the fact is that Defendants' counsel was
20 required to spend a considerable amount of time discussing with Ms. Cahill her findings and
21 observations and incorporating those findings and observations into her Affidavit, the Response
22 Motion and Separate Statement of Facts that ultimately were filed with the Court. That work
23 included a review not only of Ms. Cahill's findings, but also a review of all the evidence obtained
24 by Ms. Cahill. That evidence included a substantial number of photographs and other evidence from
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1 Based on the foregoing, it is clear that Defendants' counsel spent a reasonable amount of time
2 defending against Plaintiffs' Motion for Summary Judgment Re: Waiver. Consequently, they are
3 entitled to recover their fees accordingly.
4

5 **VII. PLAINTIFFS' OBJECTION TO FEES ASSOCIATED WITH THE WORK**
6 **PERFORMED IN DEFENDING AGAINST PLAINTIFFS' MOTION FOR**
7 **SUMMARY JUDGMENT RE: DEFENSES OF ESTOPPEL, LACHES AND**
8 **UNCLEAN HANDS SHOULD BE DENIED AS IT LACKS MERIT AND**
9 **VIOLATES THE ORFALY AND CHINA DOLL STANDARDS.**

10 Plaintiffs object to the amount of time spent preparing a response to Plaintiffs' Motion for
11 Summary Judgment Re: Defenses of Estoppel, Laches and Unclean Hands. Again Plaintiffs fail to
12 (i) point out to the Court exactly why the time spent was unreasonable or (ii) what would have been
13 a reasonable amount of time to do the work that was completed. Rather, Plaintiffs simply draw the
14 unsupported conclusion that Defendants' counsel should have spent less time in responding to
15 Plaintiffs' Motion for Summary Judgment. Without citing to any legal authority, Plaintiffs' argue
16 also that Defendants should be denied recovery of their fees associated with responding to Plaintiffs'
17 Motion for Summary Judgment Re: Defenses of Estoppel, Laches and Unclean Hands because
18 Plaintiffs prevailed on that Motion. This contention is baseless for two reasons.

19
20 First, Plaintiffs' position is simply not supported by the law. This precise issue recently was
21 addressed less than a year ago by the Arizona Court of Appeals in Ofaly v. Tucson Symphony
22 Society, 209 Ariz. 260, 99 P.3d 1030 (2004). Relying upon and quoting Schweiger v. China Doll
23 Restaurant Inc., 138 Ariz. 183, 673 P.2d 927 (App. 1983), the Court held:

24
25 Still relying on China Doll, appellants contend the fee award was
26 excessive because appellees ***were not successful in all aspects of the***
27 ***litigation***. As the court in China Doll stated, "[w]here a party has
28 achieved only partial or limited success, ... it would be unreasonable
to award compensation for all hours expended, including time spent

1 on the unsuccessful issues or claims.” But appellants disregard the
2 court's other statement in China Doll (emphasis added). that, “***where***
3 ***a party has accomplished the result sought in the litigation, fees***
4 ***should be awarded for time spent even on unsuccessful legal***
5 ***theories.***”

6 Ofaly at 266 quoting China Doll at 189.

7 As a practical matter, Plaintiffs’ Motion for Summary Judgment Re: Defenses of Estoppel,
8 Laches and Unclean Hands and the related Statement of Facts was more than 26 pages long and
9 consisted of literally hundreds of pages of exhibits, each of which had to be examined, evaluated
10 and/or analyzed. Defendants were forced to respond to the foregoing. Defendants’ counsel did so
11 in good faith and with legal authority supporting Defendants’ position. More importantly, during
12 the course of responding to Plaintiffs’ Motion, Defendants secured substantive evidence
13 demonstrating that (i) Plaintiffs themselves were engaging in business and commercial activities in
14 Coyote Springs Ranch and (ii) Plaintiffs’ own properties were in violation of the Declaration of
15 Restrictions at issue. Thus, much of the work performed in responding to Plaintiffs’ Motion proved
16 beneficial as it produced evidence that supported Defendants’ abandonment defense. And while
17 Defendants did not prevail in defending against Plaintiffs’ Motion for Summary Judgment Re:
18 Defenses of Estoppel, Laches and Unclean Hands, they nonetheless accomplished the result sought
19 in this case – namely defeating Plaintiffs’ lawsuit.

20 Second, contrary to Plaintiffs’ blanket statement, Plaintiffs were not the sole prevailing
21 parties on the Motion. Rather, as noted by the April 4, 2005 Minute Entry, the defenses of estoppel,
22 laches and unclean hands remained viable:

23 THEREFORE, IT IS ORDERED Plaintiffs’ Motion for Summary Judgment Re:
24 Defendants’ Violations of Restrictive Covenants ; Affirmative Defenses of Estoppel,
25 Laches and Unclean Hands is GRANTED, in part. ***However, to the extent the***

1 **motion seeks a summary declaration as to the enforceability of the Declaration of**
2 **Restrictions, the motion is DENIED.**

3 See April 4, 2005 Minute Entry at p. 2 (emphasis added). Based on the foregoing, Defendants still
4 had the right to present, as defenses during trial and before summary judgment was granted in
5 Defendants' favor, the defenses of estoppel, laches and waiver as those defenses applied to the
6 enforceability of the Declaration of Restrictions. In prevailing, in part, on the Motion for Summary
7 Judgment, Defendants should be entitled to recover the fees incurred in preparing their Response
8 Motion.
9

10 While discussing the foregoing, it is worth addressing Plaintiffs' objection to the fees
11 associated with preparing a Motion for Reconsideration of the April 4, 2005 ruling granting in part
12 and denying in part Plaintiffs' Motion for Summary Judgment Re: Defenses of Estoppel, Laches and
13 Unclean Hands. Specifically, Plaintiffs object to the time spent on the aforementioned Motion for
14 Reconsideration on the basis that it was never filed.
15

16 In addressing Plaintiffs' objection, this Court should be advised that the Motion for
17 Reconsideration was premised upon the following language from the April 4, 2005, Minute Entry:
18 "However, the facts upon which Defendants rely to support their affirmative defenses do not rise to
19 estoppel, laches and unclean hands as a matter of law." Id. at p. 2. The foregoing appeared to
20 Defendants' counsel to indicate that the Court weighed the evidence before it in making its ruling
21 on Plaintiffs' Motion for Summary Judgment. If the Court engaged in the weighing of the evidence
22 before it, which included evidence that did, in fact, support the defenses of estoppel, laches and
23 unclean, hands, the Court should not have granted summary judgment in favor of Plaintiffs on those
24 defenses. See e.g., Orme School v. Reeves, 166 Ariz. 301, 311, 309, 802 P.2d 1000, 1010 (1990)
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1 (“Summary judgment is inappropriate, however, where the trial judge would be “required to pass on
2 the credibility of witnesses with differing versions of material facts, ...required to weigh the quality
3 of documentary or other evidence, and ... required to choose among competing or conflicting
4 inferences.”). Consequently, the Motion for Reconsideration was prepared. However, as the Court
5 ruled in Defendants’ favor on their Motion for Summary Judgment Re: Agricultural Activities, filing
6 the Motion for Reconsideration was not necessary. Nevertheless, the work that went into that
7 Motion was done to advance Defendants’ case, protect their interests and to protect the record on
8 appeal.
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11 Based on the foregoing, Defendants are entitled to recovery of fees spent on presenting their
12 defenses of estoppel, laches and unclean hands.
13

14 **VIII. DEFENDANTS’ COUNSEL SPENT A REASONABLE AMOUNT OF TIME**
15 **RESPONDING TO PLAINTIFFS’ MOTION IN LIMINE RE: LAY WITNESS**
16 **TESTIMONY.**

17 Plaintiffs assert that Defendants’ counsel spent an unreasonable amount of time responding
18 to Plaintiffs’ Motion *in Limine* Re: Lay Witness Testimony. Plaintiffs’ objection is premised upon
19 (a) their implication that the Response Motions were brief, and (b) their contention that the Response
20 Motion did not contain a sufficient amount of legal authorities or argument. Plaintiffs’ objection
21 simply lacks legal or factual support.
22

23 To support their argument, Plaintiffs themselves fail to cite to any legal authority supporting
24 the proposition that a party should be denied recovery of fees because their work resulted in a brief
25 final product. Nor do they cite to the legal contention that recovery of fees is contingent upon citing
26 to what the opposing party deems to be a sufficient number of legal authorities. Those arguments
27 are absurd and disingenuous.
28

1 The fact is, Defendants' counsel responded to Plaintiffs' Motion *in Limine* after completing
2 what they perceived to be a sufficient amount of legal research. The specific sources researched
3 included Rules 602, 701 and 702, Ariz. R. Evid., and the case law governing the application of the
4 foregoing rules. Furthermore, contrary to Plaintiffs' mischaracterization, those Rules of Evidence
5 were specifically cited in Defendants' Response Motion. The foregoing efforts resulted in the
6 submission of a Response Motion, albeit one that consisted only of a few pages, that ultimately
7 defeated Plaintiffs' Motion *in Limine*. See April 4, 2005, Minute Entry. Clearly, Defendants'
8 counsel performed the work necessary to adequately represent Defendants in this case.
9 Consequently, Defendants should recover the fees incurred as a result.

12 **IX. DEFENDANTS' COUNSEL SPENT A REASONABLE AMOUNT OF TIME**
13 **RESPONDING TO PLAINTIFFS' MOTION TO COMPEL DEFENDANTS'**
14 **TAX RETURNS.**

15 Plaintiffs object to the time spent responding to Plaintiffs' Motion to Compel Defendants'
16 Tax Returns and in filing a Motion for Protective Order. As was the case with respect to Plaintiffs'
17 objection to the time spent preparing a Response to Plaintiffs' Motion in Limine Re: Lay Witness
18 Testimony, their objection to the time spent responding to Plaintiffs' Motion to Compel Defendants'
19 Tax Returns and in filing a Motion for Protective Order is premised upon (a) their implication that
20 the Response Motion/Motion to Compel was brief and (b) their contention that they did not contain
21 a sufficient amount of legal authorities. Plaintiffs also object on the basis that Plaintiffs prevailed
22 in their effort to secure Defendants' tax returns. However, Plaintiffs' objections lack merit.

25 Again, there is no legal authority supporting the proposition that a party should be denied
26 recovery of fees because their work resulted in a brief final product. Nor is there any legal authority
27 to support Plaintiffs' argument that recovery of fees should be denied because Plaintiffs do not
28

1 believe that they contain a sufficient number of legal authorities. As was the case with respect to the
2 time spent preparing a Response to Plaintiffs' Motion in Limine Re: Lay Witness Testimony,
3 Defendants performed the work that was necessary to protect the privacy of Defendants and to
4 prevent Plaintiffs from having access to private, confidential financial and tax information that was
5 unrelated to this case. While Plaintiffs characterize as "cursory" the legal authority cited by
6 Defendants in their Response Motion/Motion for Protective Order, it was anything but, and in fact
7 was legal authority followed by virtually every jurisdiction in the United States. Further,
8 Defendants' counsel spent a sufficient amount of time preparing their Response Motion/Motion for
9 Protective Order, conducted legal research to ascertain the substantive legal authorities that were or
10 could have been relevant to Defendants' position and cited to those legal authorities accordingly.
11 A simple review of those Response Motion/Motion for Protective Order will bear this fact out.
12 Further, the billing summaries adequately detail the work that was performed and how long the tasks
13 took.

14
15 Also, while Plaintiffs claim they prevailed, that claim is not entirely true. As reflected in the
16 January 31, 2005 Minute Entry, while Defendants were ordered to produce their personal tax returns,
17 the Court nonetheless observed that privacy issues were relevant and at stake thus warranting the
18 following Order: "Production is made pursuant to protective order. Counsel are not to disseminate
19 to Plaintiffs or anyone else without further Court order."

20
21 Finally, with respect to Plaintiffs' argument that Defendants did not prevail on the Motion,
22 Defendants merely refer the Court and Plaintiffs again to the ruling in Ofaly v. Tucson Symphony
23 Society, 209 Ariz. 260, 99 P.3d 1030 (2004), which holds that "fees should be awarded for time
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1 spent even on unsuccessful legal theories.” Id. at 266. Clearly, Plaintiffs’ argument in this regard
2 ignores the substantive law in the State of Arizona.

3
4 Based on the foregoing, Defendants are entitled to recover all of their attorneys’ fees
5 associated with defending against the Motion to Compel Production of Tax Returns.

6 **X. PLAINTIFFS’ OBJECTION TO THE REQUEST FOR FEES ASSOCIATED**
7 **WITH DEFENDANTS’ MOTION TO JOIN INDISPENSABLE PARTIES**
8 **PURSUANT TO RULE 19(a), ARIZ. R. CIV. P., OR, IN THE ALTERNATIVE,**
9 **MOTION TO DISMISS PURSUANT TO RULE 12(b)(7), ARIZ. R. CIV. P.,**
10 **FOR FAILURE TO JOIN INDISPENSABLE PARTIES AND THE MOTION**
11 **FOR RECONSIDERATION OF THAT MOTION LACK MERIT.**

12 Plaintiffs argue that Defendants should not be awarded the attorneys’ fees associated with
13 Defendants’ Motion to Join Indispensable Parties Pursuant to Rule 19(a), Ariz. R. Civ. P., or, in the
14 Alternative, Motion to Dismiss Pursuant to Rule 12(b)(7), Ariz. R. Civ. P., for Failure to Join
15 Indispensable Parties (“**Motion to Join**”) and the Motion Reconsideration of the Motion to Join.
16 In making this argument, Plaintiffs assert that fees should not be awarded for the Motion to Join
17 because it was not granted, because it was filed shortly before the last day for filing dispositive
18 motions, because the time spent allegedly was unreasonable, and because the Motion for
19 Reconsideration of the Motion to Join was never filed. However, none of Plaintiffs’ arguments are
20 supported by the law.
21

22 Regarding Plaintiffs’ argument that the Motion to Join was not granted, Defendants merely
23 incorporate by reference the discussion above, *supra*, of the decisions in Orfaly and China Doll.
24 Regarding Defendants’ argument concerning the timing of the Motion to Join and the amount of
25 work and time that went into that Motion, Defendants’ counsel has the following points for the
26 Court’s consideration.
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1 First, Defendants ask that the Court take notice of the fact that Defendants were entitled to
2 file the Motion to Join when they did because the deadline for filing dispositive motions had not yet
3 passed. Second, upon the request of Plaintiffs' counsel, the Court ordered that the parties participate
4 in a settlement conference. The settlement conference was not scheduled until April 6, 2005, after
5 which the parties stipulated that the deadline for filing dispositive motions be extended until June 24,
6 2005. Based on the foregoing, Defendants and their counsel put the filing of the Motion to Join on
7 hold as we hoped that the settlement conference would prove successful. However, it was not as
8 Plaintiffs refused to agree to any reasonable settlement proposal. In fact, Plaintiffs' settlement
9 position at the settlement conference was no different than that taken during the two previous
10 mediations.

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14 Third, following the settlement conference, Plaintiffs' counsel and Defendants' counsel
15 stipulated that the deadline for dispositive motions should be extended to June 24, 2005. Thus, on
16 June 24, 2005, Defendants filed the Motion to Join.

17
18 Finally, while Plaintiffs would prefer to characterize the Motion to Join and the time spent
19 on it as "specious arguments beyond any semblance of reasonableness", it was premised upon the
20 fact that (i) every property owner in Coyote Springs Ranch was and is affected by the Court's
21 decision in this case, (ii) the issues presented were ones of first impression in the State of Arizona,
22 and (iii) the issues presented were fully supported by the law in other jurisdictions that had ruled on
23 exactly the same issues present in this case. Only after Defendants' counsel determined that the facts
24 and law supported the filing of the Motion to Join and after the settlement conference proved
25 unsuccessful was that Motion filed. Furthermore, the Motion for Reconsideration was prepared only
26 after the Court denied the Motion to Join without requiring (i) Plaintiffs to file a responsive motion
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1 or (ii) oral argument, and before the Court had ruled, in Defendants' favor, on the Motion for
2 Summary Judgment Re: Agricultural Activities. Because the Court ruled in Defendants' favor on
3 that Motion for Summary Judgment, the Motion for Reconsideration no longer was necessary.
4

5 Based on the foregoing facts and law, it is clear that Defendants acted reasonably and are
6 entitled to the fees associated with both the Motion to Join and the Motion for Reconsideration of
7 the Motion to Join. Plaintiffs' objections therefore should be overruled.
8

9 **XI. PLAINTIFFS' OBJECTION TO THE TIME SPENT ON THE MOTION FOR**
10 **SUMMARY JUDGMENT RE: DECLARATION VAGUENESS AND**
11 **AMBIGUITY IS INVALID UNDER THE ORFALY AND CHINA DOLL**
12 **CASES.**

13 Plaintiffs object to the time spent on Defendants' Motion for Summary Judgment Re:
14 Declaration Vagueness and Ambiguity arguing that it was filed too late and that Plaintiffs prevailed.
15 In responding, Defendants merely incorporate by reference their arguments made in response to the
16 objections to the Motion to Join and assert that the Motion was filed timely and prior to the deadline
17 for filing dispositive motions, and as the Orfaly and China Doll decisions permit Defendants to
18 recover their attorneys' fees incurred in pursuing unsuccessful legal theories.
19

20 **XII. THE TIME SPENT ON DEFENDANTS' MOTION TO CONTINUE AND THE**
21 **WORK ON A SPECIAL ACTION WAS MANDATED BY THE**
22 **PROCEDURAL POSTURE OF THIS CASE AND THE PREVIOUS RULING**
23 **OF THE COURT ON THE MOTION TO JOIN.**

24 Plaintiffs object to the time Defendants' counsel spent on Defendants' Motion to Continue
25 Trial and on a Special Action. However, Plaintiffs support their objection with nothing more than
26 the claim that the time spent was "wholly unreasonable" and nothing more.
27

28 The Motion to Continue was prepared due to procedural events beyond Defendants' and
Defendants' counsel's control and included the late request for a settlement conference by Plaintiffs'

1 counsel, a request to continue discovery and dispositive motion cut-off until a little more than a
2 month before trial and because, at the time it was filed, responses to Defendants' two Motions for
3 Summary Judgment and the Motion to Join had not yet been filed or received. Furthermore, the
4 Court had yet to rule on those Motions.
5

6 As the Court's ruling on those Motions would have materially and significantly affected the
7 manner in which Defendants' counsel proceeded at trial and the jury instructions that would be
8 submitted to the jury, the Motion to Continue was filed. As such, it was filed in good faith and was
9 justified by the circumstances existing at the time it was filed. More importantly, as set forth above,
10 *supra*, Orfaly and China Doll mandate the recovery of attorneys' fees by the prevailing party, even
11 for filing unsuccessful motions filed to advance and protect that party's interests. Based on the
12 foregoing, Plaintiffs' objections must be denied.
13
14

15 Regarding Plaintiffs' objection to the time spent on a Special Action, the Court must be
16 advised that that work was performed as a result of the Court's denial of the Motion to Join, the
17 merits of which are discussed briefly above, *supra*. Had this Court not granted summary judgment
18 in Defendants' favor, Defendants would have filed a Special Action seeking to include as parties in
19 this case each of the property owners in the portion of the Coyote Springs Ranch subdivision
20 purportedly governed by the Declaration of Restrictions at issue as they each are affected by the
21 Court's decision in this case. The work done in this regard was completed to further protect and
22 advance Defendants' interests as well as the interests of all affected Coyote Springs Ranch property
23 owners. The time and fees associated with the foregoing are anything but unreasonable and were
24 necessary. Plaintiffs' objection therefore should be denied.
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1 **XIII. DEFENDANTS' COUNSEL SPENT AN APPROPRIATE AND**
2 **REASONABLE AMOUNT OF TIME ON PRE-TRIAL PLEADINGS AND**
3 **PREPARATION.**

4 Plaintiffs' object to the amount of time Defendants' counsel spent preparing jury instructions,
5 the opening statement, the pre-trial statement, jury voir dire, the witness list, jury verdict forms
6 preparing witnesses for trial and trial preparation. In asserting their objection, Plaintiffs characterize
7 the billing entry "prepare for trial" as mysterious and state that the foregoing pleadings were neither
8 filed with the Court nor delivered to Plaintiffs. Plaintiffs argue that all of Defendants' counsels' time
9 spent on the foregoing should be disallowed, asserting that the foregoing work should have been
10 conducted by a paralegal. Plaintiffs likewise criticize the fact that four lawyers from MDK worked
11 on the foregoing, implying that they all did not make individual contributions to the foregoing for
12 which Defendants may recover fees. Finally, Plaintiffs argue that all of the foregoing work was
13 Defendants' fault because they did not file their Motion for Summary Judgment Re: Agricultural
14 Defendants' fault because they did not file their Motion for Summary Judgment Re: Agricultural
15 Defendants' fault because they did not file their Motion for Summary Judgment Re: Agricultural
16 Activities until June 2005. However, none of Plaintiffs' arguments hold water.

17 It is a fact that all of the work that went into the foregoing was necessary and critical to
18 Defendants' representation. No reasonable or competent lawyer would argue that preparing all of
19 the foregoing pleadings is not a necessary and critical component of a successful trial. The lawyers
20 trying a case must carefully select that evidence that will be used, those witnesses that will be called
21 and those jury instructions and jury voir dire that will yield the most beneficial results in order to
22 achieve success at trial. Consequently, it was incumbent upon Defendants' counsel to spend the time
23 necessary to complete the foregoing in order to competently and effectively try Defendants' case.
24 Defendants are entitled to recover the fees incurred in connection with the foregoing despite the fact
25 that a week before trial that work became unnecessary due to the Court's ruling on Defendants'
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1 Motion for Summary Judgment. Plaintiffs' objection, therefore, itself is unreasonable and must be
2 denied.

3
4 Regarding Plaintiffs' argument that the involvement of four attorneys in getting this case into
5 a trial posture is inappropriate, Defendants incorporate by reference their discussion above, *supra*,
6 of the different lawyers from MDK and their individual contributions to this case. Defendants
7 further point out to the Court that Plaintiffs do not point to a single time entry related to the trial
8 preparation work or the pre-trial pleadings that is objectionable. The fact of the matter is, in light
9 of the issues before the Court, Mark Drutz's and Tom Kack's involvement was appropriate as they
10 have far more trial experience than Sharon Sargent-Flack and Jeff Adams. Plaintiffs' objection in
11 this regard should be denied.
12

13
14 Contrary to their statement, Plaintiffs were served with Defendants' Pretrial Statement,
15 Proposed Jury Instructions, Requested Jury Voir Dire Questions, Notice of Jury Verdict Forms on
16 July 22, 2005, the day they were filed with the Court. Plaintiffs likewise were served with
17 Defendants' Notice of Filing Exhibits and Notice of Filing of Witnesses and Exhibits on July 25,
18 2005, the day those pleadings were filed with the Court. Plaintiffs' statement that none of the
19 foregoing was either filed with the Court nor served on them simply is untrue. Plaintiffs' objection
20 in this regard should be denied accordingly.
21

22
23 Regarding the contention that the foregoing pleadings and work should have been performed
24 by a paralegal, suffice it to say that Defendants' counsel are not in the habit of assigning the
25 necessary pre-trial pleadings and preparation to a paralegal. While Defendants' counsel did receive
26 several telephone calls from Defendants' witnesses advising us that in the few days prior to
27 commencement of trial, they had received a single telephone call from Mr. Wilhelmensen's paralegal
28

1 to inquire into their expected testimony, rest assured that Defendants' counsel does not delegate pre-
2 trial preparation to non-attorneys. Rather, that work, including the preparation of witnesses for trial
3 and preparation for the cross-examination of the adversary's witnesses, is performed by the lawyers
4 responsible for trying the case and representing the clients. By any measurable standard, proceeding
5 in the foregoing manner was responsible, prudent and reasonable. Defendants are entitled to recover
6 their attorneys' fees incurred as a result.
7

8
9 Finally, Plaintiffs object to an award of fees for pre-trial work on the basis that Defendants
10 did not file their Motion for Summary Judgment Re: Agricultural Activities sooner and therefore,
11 having to prepare for trial was Defendants' fault. That argument is absurd. The fact is, the time
12 Defendants' counsel had to spend litigating this case was Plaintiffs' fault. They are the ones who
13 filed the lawsuit in the first place and refused to accept reasonable settlement proposals during two
14 mediations and a settlement conference despite the inherent problems with their case including the
15 nature of Defendants' use of their property. Plaintiffs' argument and attempt to shift the blame and
16 cost of this case to Defendants is improper must be denied.
17

18
19 **XIV. DEFENDANTS SHOULD RECOVER ITS FEES INCURRED TO COLLECT**
20 **ATTORNEYS' FEES.**

21 Without citing to any authority, Plaintiffs argue that Defendants should be denied recovery
22 of their fees associated with their efforts to secure an attorneys' fees award. See Plaintiffs' Objection
23 at p. 14. While there is no established uniform rule for whether time spent in establishing
24 entitlement to court-awarded attorneys' fees is compensable in the fee award, the law does support
25 such an award. See e.g., Bruce E. Meyerson and Patricia K. Norris, Arizona Attorneys' Fees Manual
26 §§ 1.6.9 and 1.8 (4th ed. 2003) and Larkin v. State ex rel. Rottas, 175 Ariz. 417, 857 P.2d 1271 (Ct.
27

1 App. 1992) (Holding that fees expended to pursue award of fees allowed under A.R.S. § 12-348).
2 In this case, everything has been a struggle in dealing with opposing counsel as was evident from
3 the fact they sought to disqualify this firm, conducted discovery beyond the discovery cut-off date,
4 and sought to utilize witnesses at trial that they never before had disclosed, just to name a few.

6 As should be obvious from Plaintiffs' Objection, Plaintiffs have objected to every
7 conceivable time entry they could and in many instances in the face of adverse controlling legal
8 authority supporting Defendants' request for fees. In doing so, Plaintiffs have turned the fee
9 application into a "second major litigation", which is frowned upon. See e.g., Bruce E. Meyerson
10 and Patricia K. Norris, Arizona Attorneys' Fees Manual § 1.6.6 at 1-8 (4th ed. 2003) citing Hensley
11 v. Eckerhart, 461 U.S. 424 (1983). This is the case despite the fact that Plaintiffs ignored viable
12 opportunities to resolve this matter during two mediations and a settlement conference, factors that
13 must be taken into account by this Court in ruling on Defendants' request for fees. Id. at Arizona
14 Attorneys' Fees Manual at § 1.6.6 ("Courts should be told that the adversary (or his attorney) has
15 rejected reasonable and fair settlement offers..." (citations omitted)); and Assoc. Indem. Corp. v.
16 Warner, 143 Ariz. 567, 570, 694 P.2d 1181, 1184 (1985) (holding that one of the facts to be
17 considered in awarding the prevailing party his fees is whether the litigation could have been settled).
18 The fact is, Defendants voluntarily agreed to participate in two mediations and a settlement
19 conference and made significant concessions in an effort to resolve this matter. However, Plaintiffs
20 were adamant in their demand that Defendants discontinue all present use of their property. In fact,
21 the only offer made by Plaintiffs was to allow Defendants some time to discontinue their present use
22 of their property, which was an entirely unreasonable demand given the facts of this case. Now, after
23 having lost their lawsuit and forcing Defendants to expend tens of thousands of dollars in defense,
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1 Plaintiffs are looking for every opportunity to pass the cost of their bad decision to litigate onto
2 Defendants, which this Court should not condone. Plaintiffs' objection to an award of the fees
3 associated with making the fee request should therefore be denied.
4

5 **XV. PLAINTIFFS' HARDSHIP OBJECTION FLIES IN THE FACE OF THEIR**
6 **OWN TESTIMONY AND MUST BE REJECTED.**

7 Faced with the very real possibility that they will have to reimburse Defendants for the
8 substantial attorneys' fees they have had to pay to successfully defend this case, Plaintiffs have taken
9 the position that having to meet that obligation will cause them an undue hardship as they will not
10 only have to repay their benefactor, Alfie Ware, for his investment in this lawsuit but also will have
11 to pay any attorneys' fee award.
12

13 As stated in the Motion for Award of Attorneys' Fees, Plaintiff John Cundiff testified that
14 Plaintiffs have incurred no liability related to the attorneys' fees in this case. Nor did Mr. Cundiff
15 ever mention anything about a loan that must be repaid. Rather, he testified that Mr. Ware was
16 furnishing the funds for the litigation, which implies that his payment of attorneys' fees amounted
17 to a gift. Specifically, Mr. Cundiff testified as follows:
18

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

21 A. No.

22 Q. Do you have any information regarding why he would be a contact
23 person concerning the action you've brought against Mr. and Mrs. Cox.

24 A. Well, he's furnishing a majority of the funds.
25

26 Q. What do you mean he's furnishing the majority of the funds?

27 A. He's paying the legal expenses.
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Q. Is he paying all of the legal expenses?

A. So far.

(Deposition of John B. Cundiff taken August 29, 2004 at p. 120, lns. 7-18). Based on the foregoing, Plaintiffs' new claim that they "borrowed" the funds to pursue this case doesn't pass the smell test and appears to be something Plaintiffs cooked up to argue that having to pay Defendants' attorneys' fees will work an undue hardship on them.

It is worth noting that despite the fact that Alfie Ware owns no property in the section of Coyote Springs Ranch purportedly governed by the Declaration of Restrictions at issue, Plaintiffs and their counsel included Mr. Ware in both mediations. Mr. Ware likewise attended the meeting in Coyote Springs Ranch concerning this litigation and conducted several meetings at his home to discuss this case. While it is perplexing at best why Mr. Ware, an individual who does not live in the portion of Coyote Springs Ranch that is at issue in this case, had and has such a personal and economic interest in pursuing this action against Defendants, suffice it to say that the fact that he has sponsored Plaintiffs' legal fees does not create a hardship to Plaintiffs and, rather, provided them with a significant economic advantage. This is the case because, unlike Plaintiffs, Defendants had to pay their attorneys' fees themselves, which brings up another point.

Plaintiffs' counsel has attempted to characterize Plaintiffs as poverty-stricken and Defendants as the "proverbial deep pocket," which is an incredible assertion. The fact of the matter is that Plaintiffs' benefactor and partner in this litigation, Alfie Ware, who is the owner of the Liquor Barns in Yavapai County, has what appears to be unlimited litigation resources, having voluntarily chosen to involve himself in numerous lawsuits over the last couple of years that have consumed hundreds of thousands of dollars in attorneys' fees. Plaintiffs Page are the owners of Quality Bumper with

1 numerous stores located throughout the State of Arizona. Defendants, on the other hand, are a very
2 elderly couple who have invested their life's savings in their property only to have Plaintiffs attack
3 them because they use their property to grow trees. If either Plaintiffs or Defendants deserve the
4 characterization as a "deep pocket," it is Plaintiffs and their benefactor, Alfie Ware.
5

6 When considering the hardship to Plaintiffs, the Court must consider Plaintiffs' motives. In
7 doing so, the following questions must be asked. Did Plaintiffs launch litigation to attack the
8 automobile repair garage in their subdivision where Plaintiffs get their personal and work vehicles
9 repaired? Have they sued the construction or transportation companies and warehouses being
10 operated in their subdivision? Did Plaintiffs sue the llama, alpaca or horse ranches in their
11 subdivision that are operating for a profit? Have Plaintiffs pursue any of the horse training, horse
12 boarding or horse breeding operations in their subdivision operating for profit? And did Plaintiffs
13 pursue any of the other Coyote Springs Ranch property owners, including each other, for the plethora
14 of violations of the Declaration of Restrictions?
15
16

17 The answers to each of the foregoing questions is "no". Rather, Plaintiffs pursued
18 Defendants only, singling them out despite myriad and obvious apparent violations of the
19 Declaration of Restrictions that have existed and been ongoing virtually since the Declaration of
20 Restrictions was created. Furthermore, contrary to Plaintiffs' contention, the imposition of fees
21 against Plaintiffs will not "chill litigation" by other homeowners seeking to enforce the Declaration
22 of Restrictions. Rather, an award of fees in this case hopefully will cause those considering litigation
23 to more carefully evaluate the merits of their alleged claims before filing suit and it will encourage
24 them to seek alternative methods of resolution rather than litigation, which would be a positive
25 outcome from this case given the current and historical uses of properties in Coyote Springs Ranch.
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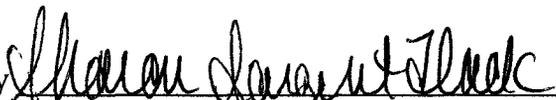
1 Based on the foregoing, Plaintiffs' objection premised upon their allegation of hardship
2 should be denied.

3
4 **XVI. CONCLUSION.**

5 Based on the foregoing, it is evident that the Motion for Award of Attorney's Fees and the
6 supporting billing summaries submitted to the Court comply with the mandates of the China Doll
7 case and will allow the Court to exercise its judicial discretion to reach a determination of the
8 amount of fees to which Defendants are entitled. Further, Defendants have properly justified their
9 request for attorneys' fees. Plaintiffs have failed to assert any viable objections, which all should
10 be denied. Accordingly, Defendants should be awarded attorneys' fees pursuant to A.R.S. § 12-
11 341.01 in the amount of Eighty-Eight Thousand One Hundred Seven Dollars and Twenty-Five Cents
12 (\$88,107.25) plus the attorneys' fees and costs incurred in responding to 20 pages of objections from
13 Plaintiffs.
14
15

16 RESPECTFULLY SUBMITTED this 6th day of September, 2005.

17
18 MUSGROVE, DRUTZ & KACK, P.C.

19
20 By 

21 Mark W. Drutz

22 Jeffrey R. Adams

23 Sharon Sargent-Flack

24 *Attorneys for Defendants*

25 COPY of the foregoing mailed
26 this 6th day of September, 2005 to:

27 Honorable David L. Mackey
28 Yavapai County Superior Court
Division 1
Yavapai County Courthouse
Prescott, Arizona 86301

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7 *Attorneys for Plaintiffs*

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1 Wares' house?

2 A. What we were going to do to stop businesses
3 from coming into Coyote Springs.

4 Q. Did you only talk about that issue in context
11:10:42 5 of the Coxes' use of their property or in a more global
6 sense with respect to all of the people who owned Coyote
7 Springs Ranch property?

8 A. Well, the Coxes are the ones that have
9 motivated us to try to get some momentum going. Since
11:10:59 10 there is no association, we are trying to get some
11 momentum going so that when we do, when we become aware
12 of violations like businesses, that we can stop it.

13 Q. So would I be safe in assuming that if you're
14 successful in pursuing the Coxes in this lawsuit, and you
11:11:19 15 subsequently find out that other businesses are being
16 conducted in your section of the Coyote Springs Ranch,
17 that you will pursue them to enforce the CC & R's against
18 them as well?

19 MS. KIRK: Objection. I'm going to
11:11:34 20 instruct her not to answer that question.

21 MR. ADAMS: On what grounds?

22 MS. KIRK: There is an attorney/client
23 privilege that attaches to that.

24 MR. ADAMS: What's the privilege?

11:11:41 25 MS. KIRK: Attorney/client privilege.



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July 27, 2004

File 9449-1

VIA FACSIMILE

Marguerite Kirk, Esq.
FAVOUR MOORE & WILHELMSSEN, P.A.
1580 Plaza West Drive
Prescott, Arizona 86305

RE: *Cundiff v. Cox*
Yavapai County Superior Court Cause No. CV 2003-0399
Depositions

Dear Marguerite:

This letter is being sent pursuant to Rule 37(a)(2)(C), Ariz. R. Civ. P., and is our response to (i) our July 22, 2004, telephone conversation during which you advised me that you would not stipulate to the depositions of Alfie Ware, Don James or any other property owner engaging in business and commercial activities in the portion of Coyote Springs Ranch where our respective clients' properties are located and (ii) your July 22, 2004, letter in which you asked for our rationale in seeking to take the depositions of Mr. Ware, Mr. James and those property owners in Coyote Springs Ranch that are conducting business and commercial activities.

We would like to take the depositions of Mr. Ware because meetings were held at his home at which the issues in this lawsuit were discussed. In fact, his name was mentioned on several occasions during your clients' depositions. Therefore, his testimony is directly relevant and material to the issues in this lawsuit. Your clients likewise referred, during their depositions, to a conversation with Mr. James and the fact that that conversation, *inter alia*, formed the sole basis for your clients' belief that (i) our clients intentionally ignored the Declaration of Restrictions and (ii) were advised that the Declaration of Restrictions prohibited the current use of our clients' property. As such, Mr. James' testimony is directly germane, relevant and material to this case. Finally, as we have already identified at least 48 individuals/property owners who are conducting business and commercial activities on properties in Coyote Springs Ranch, their testimony is necessary to

Marguerite Kirk
July 27, 2004
Page 2

ascertain whether they are proper, necessary and indispensable parties to this action under Rule 19, Ariz. R. Civ. P. Be advised that we don't expect that the depositions will last more than one hour each and our questioning will be limited to their business and commercial activities.

Based on the foregoing, we believe that we are entitled to take the foregoing depositions. Therefore, we respectfully request that you stipulate to the foregoing depositions in an effort to avoid the cost and expense that will be associated with filing a motion with the Court seeking Court permission.

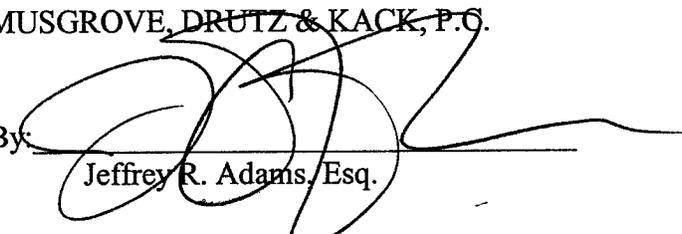
Please advise us by Monday, August 2, 2004, whether you will stipulate to the foregoing depositions. If we do not hear from you by that date, we will file our Motion with the Court accordingly.

With respect to your request regarding documentation protected by the attorney-client and work-product privileges, be advised that no such documentation will be provided.

Finally, previously we asked for a date on which disclosure statements will be exchanged. To date, you have not responded to that request other than to state that you would not discuss that matter until the Court ruled on the Motion to Disqualify and Motion for Protective Order. Since the Court has ruled on, and denied, those motions, please advise us of a date on which you would like to exchange Rule 26.1 Disclosure Statements.

Sincerely,

MUSGROVE, DRUTZ & KACK, P.C.

By: 

Jeffrey R. Adams, Esq.

JRA/hs

cc: Donald & Catherine Cox



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7 Attorneys for Plaintiffs

8 **IN THE SUPERIOR COURT OF ARIZONA**
9 **COUNTY OF YAVAPAI**

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' RULE 26.1
DISCLOSURE STATEMENT

21 Pursuant to Rule 26.1, Ariz.R.Civ.Proc., Plaintiffs, John and Barbara Cundiff, Becky Nash,
22 and Kenneth and Kathryn Page, hereby make the following disclosure.

23 **I. Factual Basis for Claims**

24 Plaintiffs and Defendants are owners of real property located in Coyote Springs Ranch,
25 Yavapai County, Arizona. The common grantors of Coyote Springs, prior to conveying deeds to
26 subsequent grantees, recorded Declaration of Restrictions that govern, in relevant part, the permissible
uses of lots located in Coyote Springs Ranch. The recorded covenants and restrictions preclude
property in the subdivision from being used for commercial or business enterprises, and limits
permissible use to one single-family residence per deeded lot. Additionally, the recorded covenants
preclude the installation and maintenance of outdoor toilets and/or other sanitary facilities of like
nature.

1 Defendants have violated these relevant covenants by establishing and maintaining a
2 commercial nursery on their land in the subdivision as an “expansion” of their business, Prescott
3 Valley Growers. As well, Defendants have erected more than one single-family residence on the
4 subject property, and maintain impermissible outdoor bathroom facilities on the property. Further,
5 on or about July 29, 2002, Defendant Catherine Cox evidenced her intent to expand the current non-
6 permissible use of the property for the “production of the following items: annuals, perennials,
7 vegetables, fruit trees, shade trees and ornamental and native shrubs and trees.” *See* Letter of Intent,
8 signed by Catherine Cox, July 29, 2002. This expansion of Defendants’ business enterprise will
9 include the storage of irrigation water in “an above ground storage tank.” *Id.*

10 Plaintiffs, neighboring homeowners, object to Defendants’ non-permissible use of their
11 property for a commercial enterprise in violation of the recorded covenants and restrictions on the
12 land, and object to any intended future expansion of the business currently existing on the subject
13 property.

14 **II. Legal Theories in Support of Claims**

15 A. Violation of Restrictive Covenant and Injunctive Relief

16 A recorded declaration of restrictions constitute “a covenant running with the land and form
17 a contract between the subdivision’s property owners as a whole and the individual lot owners.”
18 *Arizona Biltmore Estates Assoc. v. Tezak*, 177 Ariz. 447, 448, 868 P.2d 1030, 1031 (App. 1993)
19 (internal citation omitted). Where, as here, one purchases real property subject to recorded covenants
20 and restriction, the owner has constructive (if not actual) notice of the restriction, and is subject to a
21 suit for injunction for violation of the covenant. *Heritage Heights Home Owners Assoc. v. Esser*, 115
22 Ariz. 330, 333, 565 P.2d 207, 210 (App. 1977) (enforcement of restrictive covenants by injunction);
23 *Murphey v. Gray*, 84 Ariz. 299, 327 P.2d 751 (1958) (grantee with notice of restrictions is “deemed
24 to assent to be contractually bound by the restrictions as if he had individually executed an instrument
25 containing them.”)

26 In this case, the recorded Declaration of Restrictions evidences that development of Coyote

1 Springs Ranch was for rural, residential purposes. Paragraph 1 of the Declaration of Restrictions
2 expressly states that “[e]ach and every parcel” in the subdivision “shall be known and described as
3 residential parcels....” *Declaration of Restrictions, Coyote Springs Ranch*, recorded June 13, 1974 at
4 ¶1; and, ¶6(e) (allowing only one single family dwelling per lot); see ¶3 (no parcel or lot shall contain
5 less than 9 acres). Consequently, the covenants and restrictions specifically prohibit the operation of
6 any “trade, business, profession or any other type of commercial or industrial activity” in the
7 subdivision. *Id.* at ¶2.

8 Defendants having purchased the property with at least constructive notice of the recorded
9 restrictions, have nevertheless clearly violated the single-family residence scheme of the subdivision
10 by operating a “satellite” nursery for their commercial enterprise, Prescott Valley Growers.
11 Furthermore, in operating their impermissible business, Defendants have violated other provisions of
12 the recorded covenants, including but not limited to: outdoor sanitary facilities, in violation of ¶15;
13 and, erecting buildings used in their business (in violation of ¶6(e). Defendant’s “Letter of Intent,”
14 establishes that expansion of the business would entail the storage of irrigation water using above-
15 ground containers. This structure constitutes a violation of ¶16, prohibiting the erection of containers
16 above-ground or otherwise visible to adjoining properties.

17 Defendant Catherine Cox in her July 29, 2002 “Letter of Intent,” states that intended expansion
18 of Defendants’ current commercial business on the property is permissible due to “the fact that other
19 agricultural businesses were already operating in the area.” Assuming only for the sake of argument
20 that this allegation is correct, Defendants cannot rely upon this premise to support a defense of waiver
21 or abandonment of the restrictions and covenants to allow them to either continue or expand their
22 current business operations. In *Camelback Del Este Homeowners Assoc. v. Warner*, 156 Ariz. 21, 749
23 P.2d 930 (App. 1987), the appellate court phrased the test for determining whether covenants and
24 restrictions are enforceable when the claim is raised that a change in the neighborhood obviates the
25 purpose of the restrictions:

26 ...the test for determining whether restrictive covenants should be enforced is “whether

1 or not the conditions have changed so much that it is impossible to secure in a
2 substantial degree the benefits intended to be secured by the covenants.”

3 *Id.* at 24-25, 749 P.2d at 933-34 (quoting *Decker v. Hendricks*, 7 Ariz.App. 162, 163, 436 P.2d 940,
4 934 (1968). Arizona, similar to the position adopted by the majority of courts, are reluctant to find
5 a waiver or abandonment of a restriction governing the use of property even though there has been
6 some violation by lot owners. In a case where a company sought relief from a residential-only
7 restrictive covenant where the land was of greater value if used for commercial purposes, the Arizona
8 Supreme Court stated:

9 It is also a matter of common knowledge and accepted human experience that, if the
10 restrictive bars were let down for [the business owners] in this case, the business
11 encroachment on the remained of the addition would be a matter of gradual yet steady
12 development against which the home owners would be helpless, and the benefits and
13 protection of the restrictive covenants would eventually be lost to all the co-owners
14 therein.

15 *Continental Oil Company v. Fennemore*, 38 Ariz. 277, 285, 299 P. 132, 135 (1931). Arizona courts
16 continue to adhere to the principles stated by the Supreme Court in *Continental Oil*:

17 We adhere to the doctrine that the lot of [the business owner] cannot be considered
18 separate and apart from its relation to the entire restricted addition. Though there may
19 be a fringe of property all around the borders of a restricted addition which would be
20 more valuable for business than for residential purposes, this fact alone is not sufficient
21 to warrant the breach of restrictions by these owners.

22 *Id.* at 286, 299 P. at 135. The supreme court further stated:

23 The policy of the courts of this state should be to protect the home owners who have
24 purchased lots relying upon, and have maintained and abided by, restrictions, from the
25 invasion of those who attempt to break down these guaranties of home enjoyment
26 under the claim of business necessities.

Id. at 286, 299 P. at 135.

27 In *Whitaker v. Holmes*, 74 Ariz. 30, 243 P.2d 462 (1952), the Arizona supreme court dealt with
28 the issue of whether homeowners in a division to which a residential-only use covenant applied were
29 estopped or otherwise barred in their litigation to enjoin a business operation in the division where
30 they had failed to object to a similar business operating in the area. In that case, “Plaintiffs did not
31 at any time complain or seek to enforce the covenant as against the seven prior violators. Plaintiffs are

1 now seeking to enjoin these defendants” from their use of the property in violation of the recorded
2 covenants. *Id.* at 31, 243 P.2d at 463. The defendant asserted the defense of estoppel, to which the
3 Arizona supreme court rejected, relying upon an exception to the general rule:

4 “An important limitation to the general rule is recognized in many decisions to the
5 effect that a person entitled to enforce a restrictive covenant may have notice of
6 violations which inflict no substantial injury on him without losing the right to enforce
the restriction in case of a substantially injurious violation by failure to take steps to
restrain the first mentioned class of violations.”

7 *Id.* at 33-34, 243 P.2d at 464 (quoting 32 C.J., Injunctions, §326 at p.211; internal case citations
8 omitted in original). Thus, the supreme court held in *Whitaker* that a homeowner’s failure to object
9 to other businesses operating in the subdivision in violation of the restrictions and covenants, did not
10 bar the homeowner’s suit for injunctive relief against another business. “To let these defendants
11 continue to operate this business contrary to the restrictive covenant and to the detriment of the
12 plaintiffs is a gross violation of the covenant and one which the framers of the covenant had in mind
13 when it was incorporated into the deeds.” *Id.* at 34, 243 P.2d at 465. Similarly, in this case, any
14 alleged failure by Plaintiffs not to object to any other violation of the covenants (whether of the same
15 or a different type) by any other property owner does estop Plaintiffs from seeking injunctive relief
16 against Defendants’ use of their land for a business enterprise.

17 Similarly, several courts from other jurisdictions that have dealt with similar issues as
18 presented in this case have consistently upheld the homeowner’s right to enforce a residential-use
19 restriction. Viewing the issue as one whether the restrictions have been abandoned due to a substantial
20 change in the neighborhood, the Illinois appellate court upheld enforcement of a use restriction against
21 business enterprises in a residential subdivision:

22 In accord with equitable principles, a covenant will not be enforced when there has
23 been such a change in the character and environment of the property that the object of
24 the restrictions cannot be accomplished by their enforcement, or if by such changes it
25 would be unreasonable or oppressive to enforce them. Under this doctrine the
26 character and condition of the adjoining property must have been so changed as to
render the restrictions inapplicable according to the spirit of the contract.

The Exchange National Bank of Chicago v. The City of Des Plaines, 32 Ill.App.3d 722, 733-34, 336

1 N.E.2d 8, 16-17 (1975) (internal case citations omitted).

2 The Supreme Court of Utah recently phrased the test for a finding of abandonment or waiver
3 of a restrictive covenant as:

4 Restrictive covenants are a common method of effectuating private residential
5 developmental schemes. Property owners who purchase land in such developments
6 have a right to enforce such covenants against other owners who violate them.

6 * * *

7 The case law is uniform that before an abandonment of a covenant may be found
8 there must be "substantial and general noncompliance" with the covenant...The
9 violations must be so substantial as to destroy the usefulness of the covenant and
10 support a finding that the covenant has become burdensome. If the original purpose
11 of the covenant can still be accomplished and substantial benefit will continue to inure
12 to residents, the covenant will stand.

11 * * *

12 "Before a change will vitiate a covenant, it must be of such a magnitude as to
13 neutralize the benefits of the restriction, to the point of defeating the object and
14 purpose of the restrictive covenant. The change required to afford relief is reached,
15 where the circumstances render the covenant of little or no value...."

16 *Swenson v. Erickson*, 387 Utah Adv.Rep. 12, 998 P.2d 807, 813 (2000) (internal citations omitted;
17 quoting *Papanikolas Brothers Enterprises v. Sugarhouse Shopping Center Associates*, 535 P.2d 1256,
18 1261 (Utah 1975)). This test is in accord with that applied in Arizona. *Camelback Del Este*
19 *Homeowners Assoc. v. Warner*, 156 Ariz. 21, 24-25, 749 P.2d 930, 933-34 (App. 1987).

20 In this case, the purported commercial activity allegedly conducted by other landowners in
21 Coyote Springs Ranch fails to meet the standard that there has been "substantial and general
22 noncompliance" with the restrictive covenants to such an extent that it can be said that the benefits
23 of the covenant have been "destroyed." At most, the evidence establishes only that Defendants are
24 conducting a business enterprise that clearly violates the recorded Declaration of Restrictions
25 prohibiting commercial or business enterprises on any lot. The other alleged violations Defendants
26 have pointed to reveal only that other homeowners are parking their business vehicles at home, or
otherwise utilizing their property in a manner consistent with the intent of the recorded covenants.
Furthermore, paragraph 19 of the recorded Declaration of Restrictions expressly provides that a failure
to enforce any of the restrictions by any property owner against another shall not constitute a "waiver

1 thereof or consent to any further or succeeding breach or violation thereof.” *Id.*

2 B. Expansion of Current Business Operations by Defendants

3 As for the issue of expansion of a non-conforming use in violation of a restrictive covenant
4 running with the land, the Florida Supreme Court, in a case factually analogous to the instant action,
5 held that a homeowner was not barred from seeking enforcement of a residential-only use restriction
6 where the defendant, who owned and operated a motel in violation of the restriction sought to further
7 expand the hotel operations. *Wood v. Dozier*, 464 So.2d 1168 (Fla. 1985). The Florida supreme court
8 further rejected the defendant’s position that the restrictive covenants had been waived as other
9 business pre-existed in the subdivision:

10 [A] purchaser cannot rely on violations of deed restrictions to support a claim for relief
11 therefrom if the violations occurred prior to his taking title.

11 * * *

12 This holding that a property owner cannot rely on changes occurring in a neighborhood
13 before his own acquisition of title in seeking to remove a deed restriction has been
14 uniformly followed. (internal case citations omitted).

15 We find no reason for changing this well established principle of law. Persons who
16 purchase property subject to restrictive covenants cannot expect to have the covenants
17 invalidated simply because the covenants have been previously violated and not
18 enforced against others. Where a purchaser of land intends to use if for a purpose not
19 allowed by a restrictive covenant, he should seek to have the deed restriction removed
20 before purchasing the property. Restrictive covenants serve a valid public purpose in
21 enabling purchasers of property to control the development and use of property in the
22 surrounding environment....

23 In this case, the Woods’ motel is the only major structure that was build in violation
24 of the restrictive covenants. To allow them to expand the motel in further violation of
25 the restrictive covenant would only open the door to even more violations, eventually
26 resulting in the complete circumvention and abandonment of the restrictive covenants.

21 *Id.* at 1169-70. The Florida appellate court also declined to allow an expansion of a non-conforming
22 use by a homeowner of his property in violation of the recorded restrictions. *Siering v. Bronson*, 564
23 So.2d 247 (Fla.App. 1990).

24 In another case dealing with the issue of expansion by a landowner of a non-conforming use,
25 the Missouri appellate court ruled in favor of the homeowner who sought to enforce a residential-only
26 covenant pertaining to the land. *Viridon v. Horn*, 711 S.W.2d 205 (Mo.App. 1986). The plaintiffs

1 granted permission to a prior landowner to use the property for a business purpose, but later revoked
2 that permission to a subsequent purchaser of the land. *Id.* at 206-07. Nevertheless, the subsequent
3 purchaser continued to use the land for business purposes, and sought to expand the scope of their
4 business operations. *Id.* at 207. The Missouri court of appeals rejected the subsequent purchaser's
5 defense of estoppel or waiver, holding:

6 Restrictions which, as here, are adopted for the purpose of preserving beauty and
7 enhancing the value of residential property are valid, and injunction is the proper
8 remedy for their violation.

8 *Id.* at 207 (internal case citations omitted).

9 Therefore, in accordance with these legal principles, even if Defendants can successfully assert
10 a waiver or an estoppel defense in this case, it would not permit them to expand their business
11 operations beyond their current scope.

12 *C. Lack of Affirmative Defense*

13 Defendants contend that the restriction prohibiting business or commercial activity has been
14 waived by subdivision homeowners' acquiescence for alleged other violations of the same covenant.
15 However, even assuming for sake of argument only, the existence other business or commercial
16 activities conducted in the subdivision, the non-waiver provision does not foreclose enforcement of
17 the restriction against Defendants.

18 The non-waiver provision in the recorded Declarations, paragraph 19, specifically provides
19 that a property owners failure to object, or acquiescence in, a violation of any covenant does not
20 preclude enforcement of the covenants. This case is controlled by the appellate court's holding in
21 *Burke v. Voicestream Wireless Corp.*, 422 Ariz. Adv. Rep. 16, 87 P.3d 81, 83 (App. Div.1 2004). In
22 *Burke*, the Arizona court of appeals specifically held that a non-waiver provision in recorded
23 covenants and restrictions are not considered waived or abandoned merely on the grounds that
24 property owners did not previously seek to enforce the provision, or otherwise "acquiesced" in the
25 violation. Further, the appellate court held that covenants will be enforced in accordance with their
26 plain meaning. Hence, in this case, Defendants cannot assert affirmative defenses of waiver,

1 acquiescence or abandonment of the recorded Declaration of Restrictions, and Plaintiffs are, as a
2 matter of law, entitled to enforce against Defendants the prohibition against business or commercial
3 development of their land located in the subdivision.

4 D. Plaintiffs are Legally Entitled to an Award of Attorneys Fees and Costs

5 Paragraph 19 of the recorded Declaration of Restrictions provides for any party who seeks to
6 enforce the covenants to recover “damages” sustained by the person in advancing the claim at law or
7 in equity. *Id.* In Arizona, enforcement of a recorded restriction entitles the prevailing party to their
8 attorney’s fees and costs pursuant to A.R.S. §12-341.01. *Pinetop Lakes Assoc. v. Hatch*, 135 Ariz.
9 196, 198, 659 P.2d 1341, 1343 (App. 1983) (action to enforce restrictive covenant “arises out of
10 contract” under A.R.S. §12-341.01); *Heritage Heights Home Owners Assoc. v. Esser, supra.*
11 Therefore, Plaintiffs have a claim for recovery of their attorney’s fees and costs in pursuing
12 enforcement of the restrictive covenant against Defendants pursuant to A.R.S. §12-341.01.

13 **III. Identity of Witness(es) and Substance of Expected Testimony**

14 (A) Plaintiffs, John and Barbara Cundiff; Becky Nash; and, Kenneth and Kathryn Page
15 c/o David Wilhelmsen, Esq.
16 FAVOUR MOORE & WILHLEMSEN, P.A.
17 1580 Plaza West Drive
18 Prescott, Arizona 86302
19 P: (928) 445-2444

20 Description of Testimony: It is anticipated that each Plaintiff will testify as to the underlying facts in
21 this case, consistent with their deposition testimony.

22 (B) Defendants, Donald and Catherine Cox
23 c/o Mark Drutz, Esq.
24 MUSGROVE, DRUTZ & KACK, P.C.
25 1135 Iron Springs Road
26 Prescott, Arizona 86305
P: (928) 445-5935

Description of Testimony: It is expected that Defendants will each testify as to the circumstances
surrounding their purchase of the subject real property, the improvements made thereon, their use of
the property as a commercial nursery, and their intention to develop their remaining ten (10) acres for
the same purpose.

1 (C) Juanita Offerman
2 c/o Cassandra Haynes
3 THE CAVANAGH LAW FIRM, P.A.
4 1850 N. Central Ave., Suite 2400
5 Phoenix, Arizona 85004-4527
6 P: (602) 332-4052

7 Description of Testimony: It is anticipated that Ms. Offerman will testify as to the circumstances
8 regarding Defendants' purchase of the subject property in Coyote Springs Ranch, and her informing
9 Defendants of the recorded Declaration of Restrictions.

10 (D) Robert Launders, Esq.
11 LAW OFFICES OF ROBERT J. LAUNDERS, P.C.
12 8168 E. Florentine Rd., Suite B
13 Prescott Valley, Arizona 86314
14 P: (928) 775-5409

15 Description of Testimony: It is expected that Mr. Launders will provide testimony as to Defendants
16 contacting him to obtain a copy of the recorded Declaration of Restrictions for the subdivision, Mr.
17 Launders providing the same to Defendants, and his conversation with Defendants as to the covenant
18 prohibiting business or commercial use of land in the subdivision.

19 Plaintiffs reserve the right to supplement this disclosure statement as discovery progresses and
20 to call as a witness any individual identified by Defendants' in their disclosure statement(s) or through
21 discovery. Plaintiffs reserve the right to utilize any deposition transcript. Plaintiffs reserve the right
22 to supplement their disclosure as discovery progresses in this matter.

23 **IV. Identification of Other Persons Who May Have Relevant Knowledge or Information**

24 At this time, Plaintiffs have not identified other persons who may have relevant knowledge
25 or information regarding the facts in this case. Plaintiffs reserve the right to supplement their
26 disclosure as discovery progresses in this matter.

27 **V. Identification of All Individuals who may have given Statements**

28 Plaintiffs are unaware of any individual who may have given a statement concerning the events
29 in this case. Plaintiffs reserve the right to supplement this disclosure as discovery progresses.

1 **VI. Identification of Expert Witnesses Expected to be Called at Trial**

2 Plaintiffs do not intend on calling any expert witness at trial in this matter; but, reserve the
3 right to supplement or amend this disclosure as discovery progresses in the case.
4

5 **VII. Computation and Measure of Damages**

6 Plaintiffs seek injunctive relief because monetary damages are inadequate.

7 **VIII. Existence, Location, Custodian and Description of Tangible Evidence and Documents**

8 Plaintiffs have identified the following categories of tangible documents and evidence that may
9 be introduced at trial:
10

11 (A) Documents received from custodian of records, Capital Title Agency in response to
12 subpoena *duces tecum*; true and correct copy attached hereto (bate-stamped 000067 to 000195).

13 (B) Documents received from custodian of records, Realex Management, LLC dba Realty
14 Executives of Prescott Area in response to subpoena *duces tecum*; true and correct copy attached
15 hereto (bate-stamped 000196 to 000271).
16

17 (C) Documents provided in response to Defendants' request for production of documents
18 (previously provided; bate-stamped 000001 to 000066).
19

20 (D) Documents attached to Defendants' deposition transcripts.

21 (E) Map of the subject area (attached to Plaintiffs' Request for Court's On-Site Inspection,
22 previously provided).

23 (F) Any pleading, motion, affidavit or response to discovery filed by Defendants.
24
25
26

1 Plaintiffs reserve the right to introduce any document identified by Defendants, and further
2 reserve the right to supplement this disclosure as discovery progresses.

3 **IX. Other Tangible Documents or Relevant Evidence**
4

5 Plaintiffs are presently unaware of any other tangible documents or relevant evidence not
6 otherwise disclosed but reserves the right to supplement this disclosure as discovery progresses.

7 DATED this 31st day of August, 2004.

8 FAVOUR, MOORE & WILHELMSSEN, P.A.
9

10
11
12 By Marguerite Kirk

13 David K. Wilhelmsen
14 Marguerite Kirk
15 Attorneys for Plaintiffs

16 Original of the foregoing hand-
17 delivered this 31st day of August,
2004 to:

18 Mark Drutz, Esq.
19 Jeffrey Adams, Esq.
20 MUSGROVE, DRUTZ & KACK, P.C.
21 1135 Iron Springs Road
22 Prescott, Arizona 86302

23 By: Marguerite Kirk
24 Marguerite Kirk
25
26