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DONNA INEQUALITY CLERK

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11 Attorneys for Defendants Donald and Catherine Cox

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

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

14 JOHN B. CUNDIFF and BARBARA C.  
15 CUNDIFF, husband and wife;  
16 ELIZABETH NASH, a married woman  
17 dealing with her separate property;  
18 KENNETH PAGE and KATHERYN  
19 PAGE, as Trustee of the Kenneth Page  
20 and Catherine Page Trust,

21 Plaintiffs,

22 v.

23 DONALD COX and CATHERINE COX,  
24 husband and wife, et al., et ux.,

25 Defendants.

Case No. P1300CV20030399

Division Pro Tem A

**MOTION TO QUASH ORDER  
REQUIRING DEBTOR TO  
PRODUCE DOCUMENTATION AND  
APPEAR FOR EXAMINATION**

(Oral Argument Requested)

26 Defendants Donald Cox and Catherine Cox, by and through undersigned counsel,  
27 pursuant to Rules 26 and 45, Ariz. R. Civ. P., hereby move to quash the Order Requiring  
28 Debtor to Produce Documentation and Appear for Examination, which was filed  
September 13, 2017. Plaintiffs have not complied with Arizona procedural rules in securing  
this Order and are seeking information from third parties that is overbroad, unconnected to

1 this case, and harassing. As a result, the Order should be quashed and Plaintiffs should be  
2 directed to re-submit a valid Motion for supplemental proceedings. This Motion to Quash  
3 is supported by the following Memorandum of Points and Authorities.  
4

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. Factual Background**

7 Plaintiffs filed a Motion Requesting Order Requiring Debtor to Produce  
8 Documentation and Appear for Examination on August 11, 2017. This Motion contains no  
9 mailing certificate and was never served on Defendants' counsel. On September 7, 2017,  
10 this Court signed the Order submitted with that Motion. The Order was filed September 13,  
11 2017, and Defendants' counsel received a signed copy of the Order on September 15, 2017  
12 from the Court. Defendants' counsel had been entirely unaware of the Motion or the Order  
13 until September 15, 2017.  
14

15 **II. Legal Argument**

16 *A. Plaintiffs clearly violated Arizona's procedural rules by failing to serve*  
17 *Defendants with the Motion that resulted in the instant Order. If Plaintiffs had*  
18 *properly served the Motion, Defendants would have objected prior to the entry*  
19 *of the Order.*

20 Plaintiffs did not serve the Motion Requesting Order Requiring Debtor to Produce  
21 Documentation and Appear for Examination on Defendants and Defendants only became  
22 aware of this Motion after they received the Order and then went to the Courthouse to review  
23 the file. Rule 5.1(d), Ariz. R. Civ. P., states that "[a]ny proposed order or proposed judgment  
24 must be served on all parties at the same time it is submitted to the court." Here, Plaintiffs  
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1 brazenly ignored that Rule and submitted the Motion and proposed Order *ex parte* with no  
2 cause for doing so.

3 Further, Plaintiff's Motion contains no certificate of service whatsoever. Rule 5(c)(3)  
4 directs that all filings contain a certificate of service, and Plaintiffs clearly violated this Rule  
5 as well.  
6

7 Defendants are not aware of any rule or law that allows a judgment creditor to avoid  
8 service on a judgment debtor simply because the motion seeks to set supplemental  
9 proceedings after a Judgment has been entered. Defendants' counsel, when representing a  
10 judgment creditor, always serves the judgment debtor or its counsel with filings with regard  
11 to supplemental proceedings because this is what the Arizona Rules of Civil Procedure  
12 dictate.  
13

14 If an order is taken without notice, the absent party may rightly ignore it and assume  
15 that no court will enforce it, *Tryon Fed. Sav. & Loan Ass'n v. Phelps*, 415 S.E.2d 397, 398  
16 (S.C. 1992), since one is not bound by an order where there has been neither actual nor  
17 constructive notice. *In re Rask's Estate*, 177 N.W.2d 287, 297 (N.D. 1970). Defendants  
18 never had any notice of this Court's Order until it was received. This is entirely contrary to  
19 the American adversary system of law. As a result, the Order should be quashed and  
20 Plaintiffs should be directed to file a Motion *and serve it on Defendants* and then, at that  
21 point, the parties can litigate any issues regarding supplemental proceedings in this matter.  
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1           B.     *Plaintiffs have utilized an improper procedural vehicle to seek information*  
2                     *from third parties who are not parties to the underlying case.*

3           A.R.S. § 12-1631 states that a Judgment Creditor may “[h]ave an order from the court  
4 requiring the judgment debtor to appear and answer concerning his property before the court  
5 or a referee, at a time and place specified in the order.” Other than the utter failure to serve  
6 them with the Motion, *see supra*, Defendants would not object to appearing to testify  
7 regarding their own assets, contingent upon a Bankruptcy stay not being issued. However,  
8 this statute does not require third parties who are foreign to the litigation to appear, provide  
9 documents and be questioned.  
10

11           If Plaintiffs sought documentation from third parties foreign to this litigation, they  
12 should have done so through a Subpoena Duces Tecum under Rule 45. Rule 45 requires  
13 service of Subpoenas Duces Tecum because without proper service on an entity that is not  
14 a party to a case, the entity is not otherwise bound to comply. The third-party LLC’s and  
15 James Michael Cox, who are named in the Order, have never been served with the Order and  
16 they are not bound to comply with it because this Court has never exercised personal  
17 jurisdiction over them. *Baker v. Bradley*, 231 Ariz. 475, 482, 296 P.3d 1011, 1018 (App.  
18 2013) (“Because Reeder had not appeared or been served, the trial court had not acquired  
19 personal jurisdiction over her and she was not a ‘party’ under our rules at the time of the  
20 April 22 minute entry.”). To be clear, this Motion to Quash is filed only on behalf of  
21 Defendants and should not be construed as a general appearance on behalf of any entity.  
22 However, Defendants believe that it is worth noting that Plaintiffs have never served any  
23 entity with the Motion or the Order and thus this Court does not have personal jurisdiction  
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1 over anyone other than Plaintiffs and Defendants. The third-party LLCs and James Michael  
2 Cox need to be properly served so they can retain counsel of their choosing and object to the  
3 documentation being sought as appropriate.  
4

5 Furthermore, if Plaintiffs had properly served the non-parties, Rule 45 has its own  
6 process governing Motions to Quash and protective orders, and, if Plaintiffs had sought a  
7 Subpoena Duces Tecum, the third parties could have used that process to object. Instead,  
8 Plaintiffs sought a Court Order through a Motion that they did not serve on adverse parties  
9 and have attempted to enforce an Order against parties foreign to this litigation. This was  
10 improper procedurally, has not resulted in personal jurisdiction over non-parties, and thus the  
11 Order should be quashed.  
12

13 *C. The requests contained within the Order are clearly beyond the scope of that*  
14 *contemplated by Rule 69, Ariz. R. Civ. P.*

15 Rule 69(c), Ariz. R. Civ. P., directs that discovery with regard to executing on a  
16 Judgment can be obtained from any person “as provided in these rules and other applicable  
17 law.” Arizona’s Rules of Civil Procedure require, under Rule 26, that discovery be relevant  
18 to a claim or defense and proportional to the needs of the case.  
19

20 Plaintiffs’ extensive discovery requests are clearly overbroad and not proportional to  
21 the needs of this case. It is not relevant to Plaintiffs’ recovery on its Judgment that a limited  
22 liability company against which Plaintiffs do not have a Judgment owns real property in  
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1 Arizona (or anywhere else for that matter). It is similarly irrelevant whether such LLCs –  
2 against which Plaintiffs do not have a Judgment – have an interest in a will or a trust.<sup>1</sup>

3  
4 It is not proportional to this case to require ten (10) years of tax returns and bank  
5 statements for this Judgment. This is beyond what is reasonable for any judgment debtor,  
6 let alone a third party. See Rule 45(e), Ariz. R. Civ. P. (“party or an attorney responsible for  
7 serving a subpoena must take reasonable steps to avoid imposing undue burden or expense  
8 on a person subject to a subpoena”). For example, the Arizona Legal Forms book contains  
9 a sample request for document production in supplemental proceedings. This sample  
10 requests two years of tax returns and two years of bank statements. 3 Ariz. Legal Forms,  
11 Debtor-Creditor § 18.1.50 (2d ed.). This is appropriate because a judgment debtor is looking  
12 to collect now, not eight or ten years ago. The request filed by Plaintiffs seeks to harass  
13 because there is no other reason to request such information going back ten (10) years.  
14

15  
16 Defendants agree that discovery in supplemental proceedings can be taken from third  
17 parties – if undertaken properly under Rule 45 – but this discovery still must have a clear  
18 nexus to the actual judgment debtors and collection on the Judgment.

19  
20 When discovery is sought from ... the third person the judgment creditor  
21 should be given the freedom to probe the deponent for the purpose of  
22 discovering any hidden or concealed assets of the debtor. The inquiry should,  
23 however, be kept pertinent to that goal; and should not be allowed to get out  
24 of hand and become a means of harassment of the ... third person.

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25  
26 <sup>1</sup> Many of the questions included in the Order cannot be answered by an LLC as  
27 they are obviously directed at individuals. For example, an LLC cannot answer “What is  
28 your occupation?” or “Are you married?”

1 7 Moore's Federal Practice ¶ 69.05(1) (2d Ed.), quoted in *Ex Parte Burchinal*, 571 So. 2d  
2 281, 283 (Miss. 1990) (analyzing supplemental proceedings rules virtually identical to those  
3 in Arizona). In *Caisson v. County West Building Corp.*, 62 F.R.D. 331, 335 (E.D.Pa. 1974),  
4 the federal court explained that a judgment creditor seeking to question third parties must  
5 make "some showing of the relationship that exists between the judgment debtor and the  
6 third party from which the court on motion for protective order can determine whether the  
7 examination has a basis." In *Burchinal*, the Court vacated a contempt order that had been  
8 entered against a third party who refused to answer questions because those questions "were  
9 broad, and were clearly not within the contours of that which is allowed." 571 So.2d at 284.  
10  
11

12 The outcome here is no different. Plaintiffs have not provided any demonstration of  
13 the nexus between these third parties and the Defendants against whom the Judgment has  
14 been entered. Plaintiffs say only that James Michael Cox was added as a member of Prescott  
15 Valley Growers, LLC, but there is no explanation of the connection between these LLCs that  
16 are not parties and Defendants. Plaintiffs do not explain how other LLCs are related to the  
17 Defendants and they do not explain what information these LLCs are believed to have.  
18

19 Because Plaintiffs' requests are overbroad and there has been no demonstration of the  
20 nexus between the third parties and the Defendants, the Order is improper and should be  
21 quashed.  
22

23 *D. Defendants are entitled to an award of attorneys' fees in this matter.*

24 Defendants are entitled to an award of attorneys' fees pursuant to A.R.S. §§ 12-  
25 341.01, 12-349 and any other applicable law. This case arises out of contract and thus  
26 Defendants are entitled to attorneys' fees on that basis. Further, Plaintiff has violated  
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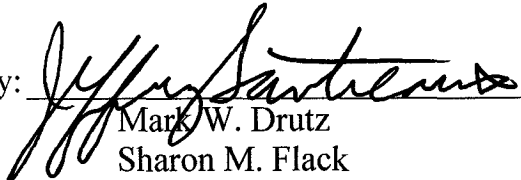
1 Arizona's procedural rules and also sought discovery that is beyond the appropriate scope,  
2 including through the harassment of entities that are not parties to this case. As a result, this  
3 Court should enter an award of the attorneys' fees in favor of Defendants for the fees  
4 incurred in filing this Motion to Quash.  
5

6 **III. Conclusion**

7 Pursuant to the foregoing, the Order entered here on September 13, 2017, should be  
8 quashed. Plaintiffs never served their Motion on Defendants, and Plaintiffs seek discovery  
9 that is beyond the scope of that which is discoverable under Arizona procedural rules. This  
10 Court should not permit such *ex parte* conduct and should not allow Plaintiffs to harass non-  
11 parties with improper discovery requests. Plaintiffs are entitled to participate in supplemental  
12 proceedings in an effort to collect on their Judgment; they are not, however, permitted to  
13 ignore Arizona law in doing so. The Order entered herein should be entirely quashed, and  
14 Plaintiffs should be ordered to resubmit a Motion that is served on Defendants and outlines  
15 the grounds for the discovery Plaintiffs seek.  
16  
17

18 RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of September, 2017.

19 MUSGROVE DRUTZ KACK & FLACK, PC

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21 By:   
22 Mark W. Drutz  
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24 Jeffrey D. Gautreaux  
25 Attorneys for Defendants Donald and  
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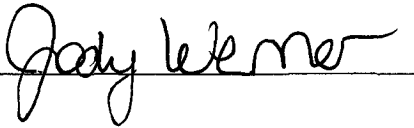


1 COPY the foregoing hand-delivered  
2 this 21<sup>st</sup> day of September, 2017, to:

3 Honorable Don Stevens  
4 Yavapai County Superior Court  
5 120 South Cortez Street  
6 Prescott, AZ 86303

7 COPY the foregoing mailed  
8 this 21<sup>st</sup> day of September, 2017, to:

9 J. Jeffrey Coughlin, Esq.  
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13 Attorneys for Plaintiffs

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