

2005 APR 13 PM 3:00

JEANNE HICKS, CLERK

BY: ~~C. SUTTON~~

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

4 Attorneys for Plaintiffs

5 **IN THE SUPERIOR COURT OF ARIZONA**  
6 **COUNTY OF YAVAPAI**  
7

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

12 Plaintiffs,

13 vs.

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

15 Defendants.  
16

Case No. CV 2003-0399

Division 1

**PLAINTIFFS' MOTION TO  
COMPEL PLAINTIFFS'  
PRODUCTION OF DOCUMENTS  
PURSUANT TO COURT'S  
JANUARY 31, 2005  
RULING**

17 Plaintiffs, John and Barbara Cundiff, Becky Nash, and, Kenneth and Katheryn Page, by and  
18 through undersigned counsel, hereby moves this Court for an order pursuant to Rule 37(a),  
19 Ariz.R.Civ.Proc., compelling Defendants Donald and Catherine Cox to comply with this Court's  
20 ruling on January 31, 2005 ordering Defendants to disclose complete copies of *all* tax returns from  
21 1998 to the present. Defendants, without justifiable excuse, continue to refuse or otherwise fail to  
22 disclose Schedule K-1's for each and every tax return they have been previously ordered to disclose.  
23 Plaintiffs' further request an award of attorney's fees and costs incurred in bringing this motion, and  
24 for such other relief as the Court deems just and equitable.


25 This motion is supported by the following memorandum of points and authorities and  
26 supporting documents, separate statement of undersigned counsel in compliance with Rule 37(a)(2)(C)  
filed concurrently with this motion, as well as the entire record in this proceeding.

**DIV. 1**

APR 14 2005

1 RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of April, 2005.

2 FAVOUR MOORE & WILHELMSSEN, P.A.

3  
4 By:   
5 David K. Wilhelmsen  
Marguerite Kirk

6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7 **I. Statement of Case**

8 On September 28, 2004, Plaintiffs filed their motion to compel moving this Court for an order  
9 requiring Defendants to produce complete and accurate copies of their income tax returns from 1998  
10 to the present. Subsequent to the matter being fully briefed to the Court by the parties, oral argument  
11 was held on January 31, 2005.

12 At the conclusion of oral argument, the Court granted Plaintiffs' motion to compel and ordered  
13 "Defendants to produce their income tax returns for the years 1998 through 2003, *including all*  
14 *schedules.*" *Minute Entry, CV 2003-0399, January 31, 2005 at p.2 (italics added).* Defendants were  
15 further ordered to make the production within 30 days of the Court's order. *Id.*

16 On March 3, 2005, Defendants had still not produced complete copies of their tax returns from  
17 1998, requiring undersigned counsel to write to opposing counsel. *See, Certificate of Compliance,*  
18 *filed concurrently herewith at Exhibit "1."* Shortly thereafter, Defendants did produce copies of the  
19 tax returns but failed to include copies of the K-1 schedules for each tax return. *Id. at Exhibit "2."*  
20 This again required undersigned counsel to contact Defendants' counsel on March 8, 2004 again  
21 requesting compliance with the Court's order. *Id. at Exhibit "3."* More than 2 weeks later, on March  
22 24, 2005, Defendants' counsel still had not complied with the Court's order, citing his being out of  
23 the office on vacation. *Id. at Exhibit "4."* It should be noted that Defendants are represented by both  
24 Mark Drutz and Jeffrey Adams in this litigation, and only Mr. Adams was out on vacation.

25 To date, more than 2 additional weeks have passed, and Defendants have still failed to provide  
26 accurate copies of their K-1 schedules that must accompany each of their federal income tax returns.

1 Defendants have failed to provide any justifiable reason for their continued neglect in complying with  
2 the Court's January 31, 2005 order to produce true and complete copies of their tax returns filed since  
3 1998.

4 Furthermore, the Court has since set this matter for trial, and has imposed discovery and  
5 motion cut-off dates. *Minute Entry, April 4, 2005*. Additionally, the matter has been scheduled for  
6 a court-ordered settlement conference before the Honorable Ralph Hess. *Minute Entry, April 8, 2005*.  
7 Defendants and/or their counsel's continuing failure and neglect to produce complete copies of their  
8 income tax returns is detrimental to Plaintiffs ability to conduct further discovery or prepare and file  
9 appropriate dispositive motions with the Court in light of the upcoming settlement conference and  
10 trial.

11 **II. Defendants' Continuing Failure to Comply with the Court's**  
12 **Order to Produce Complete Copies of their Income Tax Returns**  
13 **is a Violation of Rule 37(d), Ariz.R.Civ.Proc.**

14 Defendants purposeful and inexcusable neglect in producing copies of the K-1 schedules  
15 necessarily part of their tax returns since 1998, despite this Court's order more than 2 months earlier,  
16 leads to the compelling inference that Defendants are failing to disclose "unfavorable information."  
17 Rule 37(d) provides:

18 *A party's or attorney's knowing failure to timely disclose damaging or unfavorable*  
19 *information shall be grounds for imposition of serious sanctions* in the court's  
discretion up to and including dismissal of the claim or defense.

20 *Id. (emphasis added).*

21 In this case, Defendants pattern of first strenuously objecting to the disclosure of the  
22 information, coupled with their failure to abide by the Court's January 31, 2005 order to produce  
23 complete copies of their tax returns, mandates that the Court sanction Defendants in accordance with  
24 Rule 37(d). Plaintiffs request that this sanction include an award of attorney fees to them for the  
25 expense incurred in bringing this motion, together with additional monetary sanctions. Plaintiffs  
26 further request that in the event Defendants fail to produce the documents within 3 days of the Court's


1 decision on this motion, that the Court enter as a sanction under Rule 37(d) a finding that Defendants  
2 are engaged in a commercial or business activity in violation of the restrictive covenants. The trial  
3 on the matter would then proceed solely on Defendants' affirmative defense of abandonment.

4 **III. Conclusion**

5 Therefore, Plaintiffs respectfully request that this Court enter its order requiring Defendants  
6 to produce full and complete copies of their income tax returns from 1998 to present as requested in  
7 Plaintiffs' discovery, including all K-1 schedules together with any other schedules Defendants have  
8 failed to previously disclose. Plaintiffs also request that this Court award them their attorney's fees  
9 incurred in attempting to resolve this discovery dispute with Defendants' counsel, and in the bringing  
10 of this motion to compel, together with an additional monetary sanction against Defendants and/or  
11 their counsel for their abusive conduct on this issue and unjustifiable defiance of the Court's previous  
12 order.

13 DATED this 13<sup>th</sup> day of April, 2005.

14 FAVOUR MOORE & WILHELMSSEN, P.A.

15  
16  
17 By:   
18 David K. Wilhelmsen  
19 Marguerite Kirk  
20 Post Office Box 1391  
21 Prescott, Arizona 86302-1391  
22 Attorneys for Plaintiffs

23 Original of the foregoing  
24 filed this 13<sup>th</sup> day of April, 2005  
25 with:

26 Clerk, Superior Court of Arizona  
Yavapai County  
Prescott, Arizona

///


///

1 A copy hand-delivered this 13<sup>th</sup> day  
of April, 2005 to:

2  
3 Honorable David L. Mackey  
4 Division One  
5 Superior Court of Arizona  
6 Yavapai County  
7 Prescott, Arizona

8 and, a copy hand-delivered this  
9 13<sup>th</sup> day of April, 2005 to:

10  
11 Mark Drutz  
12 Jeffrey Adams  
13 MUSGROVE, DRUTZ & KACK, P.C.  
14 1135 Iron Springs Road  
15 Prescott, Arizona 86302  
16 Attorneys for Defendants Cox

17  
18 By:   
19 David K. Wilhelmsen

20  
21  
22  
23  
24  
25  
26