

1 The Nevada Supreme Court has repeatedly linked the breach of the covenant of
2 good faith and fair dealing with bad faith conduct. In *Morris v. Bank of America Nevada*,
3 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994), the court used the cause of action breach
4 of the covenant of good faith and fair dealing (in contract) interchangeably with a "bad faith
5 claim." *Id.* ("[W]e, nevertheless decide that Morris should be allowed to proceed in the trial
6 court on his counterclaim against the Bank for breach of the implied covenant of good faith
7 and fair dealing. We reverse the trial court's order dismissing Morris' bad faith claim...").
8 In *Martin v. Sears, Roebuch and Co.*, 111 Nev. 923, 929, 899 P.2d 551, 555 (1995), the
9 court held, "Bad faith discharge finds its genesis in Section 205 of the Restatement
10 (Second) of Contracts, which states that: 'Every contract imposes upon each party a duty
11 of good faith and fair dealing in its performance and its enforcement.'" In *K Mart Corp. v.*
12 *Ponsock*, 103 Nev. 39, 46 n. 6, 732 P.2d 1364, 1369 (1987), the court observed,
13 "Appropriate nomenclature might be 'breach of employment contract,' for the true breach of
14 contract case, 'tortious discharge,' for public policy cases, and 'bad faith discharge,' for the
15 cases involving breach of the implied covenant of good faith and fair dealing." *Id.* And the
16 Nevada Supreme Court explicitly tied bad faith acts to breaches of the implied covenant of
17 good faith and fair dealing in *A.C. Shaw Const., Inc. v. Washoe County*, 105 Nev. 913,
18 915, 784 P.2d 9, 10 (1989), holding:

19 [I]n our view, sound public policy warrants recognition of the
20 covenant of good faith and fair dealing in public works
21 construction contracts. To hold otherwise would suggest that a
22 governmental entity has a right to refrain from cooperation in a
23 contract, or that a governmental entity could act in bad faith,
24 calculated to destroy the benefit of that contract to the other
25 contracting party.

26 *Id.*⁹ Between these five decisions, it is clear that Nevada law, for the purposes of pleading
27 a cause of action for breach of the duty to act in good faith, considers allegations in support
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⁹ Defendant may attempt to argue that somehow the Nevada Supreme Court's separation
of the possibility of refraining from cooperation on the one hand, from acting in bad faith on
the other, is evidence that the proposed amendment is futile. Specifically, Defendant may
argue that because Plaintiffs' primary charge is that Defendant failed to provide them with
documents, Defendant therefore only allegedly failed to cooperate with Plaintiffs, and thus

1 of the cause of action for the breach of that duty to be functionally the same as allegations
2 of acts involving bad faith. However, even despite the substantial caselaw in support of
3 Plaintiffs, it may still not prevent the Defendant from attempting to present an argument
4 concerning the differences between breach of the covenant of good faith and fair dealing in
5 contract versus the same in tort.

6 4. For the Purposes of Falling Under the Specific Claims Identified in *Sandy*
7 *Valley*, Plaintiffs' Cause of Action for Breach of the Implied Covenant of
8 Good Faith and Fair Dealing in Contract Is Appropriate

9 The Court is well aware that claims for breach of the covenant of good faith and fair
10 dealing can be brought under contract or in tort. The primary differences between the two
11 are the two additional elements to plead the claim in tort: (1) that there exists a special
12 relationship between the tortfeasor and the tort victim; and (2) the tortfeasor engaged in
13 "grievous and perfidious misconduct." See *State, Univ. and Comm. College Sys. v. Sutton*,
14 120 Nev. 972, 989, 103 P.3d 8, 19 (2004). In most cases, claims for breach of the
15 covenant of good faith and fair dealing in tort (a.k.a. "contort") occur in employment and
16 insurance contexts. See *Martin*, 111 Nev. at 929; *Pemberton v. Farmers Ins. Exchange*,
17 109 Nev. 789, 793, 858 P.2d 380, 382 (1993). In both of these instances, courts refer to
18 the tort claims as bad faith claims (eg. bad faith discharge mentioned above). *Id.*

19 However, a court's reference to the tort of "bad faith" or "bad faith discharge" has no
20 impact on causes of action for breach of the implied covenant of good faith in contract,
21 such as Plaintiffs', and the allegations in support thereof. Again, as the Court is aware, at
22 this juncture, all that is necessary for the proposed Second Amended Complaint to pass

23 it did not act in bad faith. This argument would be flawed for a number of reasons. First,
24 the court in *A.C. Shaw* did not state that refraining from cooperation would not be conduct
25 involving bad faith—it made the distinction between active and passive conduct (refraining
26 from action vs. acting). The Court is well aware that both acts and omissions can
27 constitute bad faith conduct. Second, in the context of the breach of the covenant of good
28 faith and fair dealing, the example of refraining from cooperation refers to a party's own
failure to cooperate with the other side so that the other side can discharge its obligations.
See *Witkin*, supra p. 12. Therefore, this language in *A.C. Shaw* does not refer to
Defendant Pardee's failure to discharge its own obligations. If it did, all breaches of
contract would be examples of refraining from cooperation and one example of the breach
of the implied covenant would effectively swallow the entire doctrine. Such is not the case.

1 muster is that it put Defendant on notice that Plaintiffs will seek to establish that Defendant
2 acted in bad faith. Pleading a cause of action that Defendant breached its duty to act in
3 good faith satisfies that requirement as demonstrated by the depth of Nevada
4 jurisprudence linking breaches of the covenant of good faith and fair dealing in contract to
5 allegations of bad faith. *See Hilton Hotels; Morris; and A.C. Shaw.*

6 Additionally, unlike a contort claim, there is no requirement that Plaintiffs allege that
7 Defendant engaged in grievous and perfidious misconduct to appropriately plead
8 Defendant's bad faith in order to qualify for attorney's fees under *Sandy Valley*. Multiple
9 Nevada Supreme Court cases confirm that the intensity of bad faith or other misconduct
10 necessary to be awarded attorney's fees as damages does not rise to the level of "grievous
11 or perfidious misconduct" as in contort claims. For example, in *City of Las Vegas v. Cragin*
12 *Industries, Inc.*, 86 Nev. 933, 940-941, 478 P.2d 585, 590 (1970), the Nevada Supreme
13 Court held that attorney's fees would have been appropriate as damages in a case where
14 defendant was successful in seeking injunctive relief necessitated by plaintiff's "improper
15 conduct." *Id.* This pronouncement was made despite no finding of "fraud, malice, or
16 wantonness." *Id.* In other words the court held that attorney's fees as damages could be
17 appropriate when the opposing party's misconduct rises to the level of improper, but not
18 necessarily fraudulent, malicious, or wanton. *Cf. Southern Nevada Homebuilders Ass'n,*
19 *Inc. v. City of North Las Vegas*, 112 Nev. 297, 303, 913 P.2d 1276, 1280 (1996) (holding
20 that attorney's fees as damages would not be appropriate where Defendant acted in good
21 faith). Considering the broad swath of acts or omissions which could be considered bad
22 faith conduct and the Nevada Supreme Court's holding in *Cragin* that attorney's fees would
23 have been appropriate with only a showing of improper conduct, there would be no basis
24 for Defendant to argue, or the Court to find, that Plaintiffs must plead Defendant's grievous
25 and perfidious misconduct to survive a futility test.

26 Finally, because "good faith is a state of mind which can only be resolved through
27 an application of the facts in each particular case," denying the Motion would be
28 inappropriate. *N.L.R.B. v. Stanislaus Imp. & H. Co.*, 226 F.2d 377, 380 (9th Cir. 1955).

1 Similarly, as the Nevada Supreme Court held in *Mitchell v. Bailey and Selover, Inc.*, 96
2 Nev. 147, 150, 605 P.2d 1138, 1139 (1980), "the question of good faith is a question of
3 fact," and therefore, the Court must permit Plaintiffs to file the Proposed Second Amended
4 Complaint so that they would be allowed to offer evidence and prove the nature and
5 severity of Defendant's bad faith conduct.

6 **E. Plaintiffs' Claims For Time and Effort Damages are Appropriate**

7 While most of the argument at the hearing was dedicated to the attorney's fees
8 issue, Plaintiffs are also seeking to amend their special damage claims to state their
9 damages for the time they spent attempting to acquire the documents promised to them.
10 Without knowing what counsel for Defendant will submit (or if counsel will submit briefing
11 on this topic), in an abundance of caution, Plaintiffs submit this supplemental briefing on
12 this issue.

13 Plaintiffs spent significant time attempting to recover the documents and information
14 they were owed under the Commission Letter Agreement. Had Defendant not breached its
15 contract, Plaintiffs would not have needed to spend this time looking for documents and
16 records already given to them. As a result of this breach, Plaintiffs must be compensated
17 for their time.

18 Plaintiffs' time and effort spent trying to acquire the documents they were owed are
19 compensable. The Supreme Court of California sitting en banc in *Gray v. Don Miller &*
20 *Associates, Inc.*, 35 Cal. 3d 498, 504, 674 P.2d 253, 256 (Cal. 1984) held that Plaintiff
21 could be compensated for his damages in the form of his lost time. *Id.* ("Plaintiff is entitled
22 to damages in the amounts he spent in anticipation of completing the purchase and for his
23 own time in planning the business on the site."). Another California Court held the same,
24 that Plaintiff could recover his damages for time he wasted because of Defendant's failure
25 to deliver appropriate title. See *Barthels v. Santa Barbara Title Co.*, 28 Cal. App. 4th 674,
26 680, 33 Cal. Rptr. 2d 570, 581-82 (Cal. App. Ct. 1994) (affirming trial court's award of
27 damages for some of the time Plaintiff spent). Plaintiffs are entitled to compensation for
28 their wasted time and effort because the damages were caused by Defendant's breach

1 and because it is reasonably foreseeable that in the event Defendant breached its duty to
2 appropriately inform Plaintiffs, they would seek out the information on their own.

3 As stated by the Nevada Supreme Court, "It is fundamental that contract damages
4 are prospective in nature and are intended to place the nonbreaching party in as good a
5 position as if the contract had been performed." *Colorado Environments, Inc. v. Valley*
6 *Grading Corp.*, 105 Nev. 464, 470, 779 P.2d 80, 84 (1989). Damages arising from breach
7 of contract must (1) arise from the breach of contract and (2) "be such as may reasonably
8 be supposed to have been in the contemplation of both parties." See *Clark County School*
9 *Dist. v. Rolling Plains Const., Inc.*, 117 Nev. 101, 106, 16 P.3d 1079, 1082 (2001)
10 (disapproved of on other grounds, 117 Nev. 948). Stated another way, "the damages
11 claimed for the breach of contract must be foreseeable." *Id.* Applying this standard to
12 Plaintiffs' action, the Court must find that Plaintiffs' claim for damages to compensate them
13 for time spent are foreseeable and grant the Motion.

14 It is natural and foreseeable that Plaintiffs, in the event they were denied the
15 information and records promised to them by Defendant, would seek out alternative
16 sources of that information. First, because the information concerned the availability of
17 commissions to be paid to Plaintiffs, they would naturally inquire as to the land transactions
18 to determine if any money is owed to them. Second, Pardee's Option to buy land from CSI
19 lasted for forty (40) years. Given that both Plaintiffs were over sixty (60) years of age at
20 the time the Commission Letter Agreement was executed, it is foreseeable that Plaintiffs
21 would be concerned as to their families' abilities to track the land purchases to which they
22 would be entitled a commission when Plaintiffs have passed on. As such, the damages for
23 Plaintiffs' time and effort attempting to get information owed to them by Pardee is
24 foreseeable and compensable.

25 Finally, even if the Court is unsure as to the foreseeability of these damages, the
26 Court must defer its ruling on this issue because foreseeability of damages is generally "a
27 question of fact." *Valladares v. DMJ, Inc.*, 110 Nev. 1291, 1294, 885 P.2d 580, 582 (1994);
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Daniel v. Hilton Hotels, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982). Therefore, the Court should grant Plaintiffs' Motion for Leave to File a Second Amended Complaint.

III. CONCLUSION

Plaintiffs' proposed Second Amended Complaint appropriately pleads Plaintiffs' entitlement to their attorney's fees as damages. *Sandy Valley* holds that when attorney's fees are to be claimed as special damages, they must be the natural and foreseeable consequence of the injurious conduct. For years Plaintiffs were denied the records and information they were owed. It was only by the act of filing suit that Plaintiffs acquired the ability to subpoena documents and appeal to the Court's power to mandate an accounting. Without any other alternative method to acquire the records, the only foreseeable response was the filing of suit and the resulting expenditure of attorney's fees. These fees are damages. And not only because Plaintiffs' claims comply with *Sandy Valley's* general criteria, but also because they are of the type specifically identified in *Sandy Valley* as being eligible for a claim for attorney fee damages.

Plaintiffs also appropriately plead their entitlement to compensation for their wasted time and effort attempting to seek out alternative sources of the information. Plaintiffs at all relevant times prior to this action were subject to Defendant's will as to whether Plaintiffs would be kept informed of the developments at Coyote Springs—a right they were entitled to. When it became apparent that Defendant was not going to fulfill its end of the bargain, Plaintiffs sought to acquire the information from another source. Despite Plaintiffs' best efforts, they were unsuccessful. As such, Plaintiffs should be compensated for this time lost.

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Wherefore, because Plaintiffs properly plead their claims for special damages in the proposed Second Amended Complaint, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion for Leave to File a Second Amended Complaint.

DATED this 10th day of May, 2013.

JIMMERSON HANSEN, P.C.

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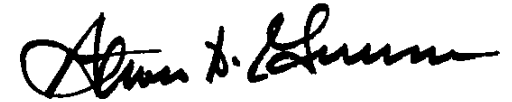
CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy PLAINTIFFS' SUPPLEMENT TO MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT PURSUANT TO THE COURT'S ORDER ON HEARING ON APRIL 26, 2013 was made on the 10th day of May, 2013, as indicated below:

- ☒ By first class mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P. 5(b) addressed as follows below
- ☐ By facsimile, pursuant to EDCR 7.26 (as amended)
- ☐ By receipt of copy as indicated below

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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,
WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,

Defendant.

CASE NO.: A-10-632338-C
DEPT NO.: IV

**DEFENDANT'S SUPPLEMENTAL
BRIEF IN SUPPORT OF ITS
OPPOSITION TO PLAINTIFFS' MOTION
FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT**

Hearing Date: May 15, 2013
Hearing Time: In Chambers

Pardee Homes of Nevada ("Pardee" or "Defendant") submits the following Supplemental Brief ("Brief") in Support of its Opposition ("Opposition") to the Plaintiffs' Motion for Leave to File a Second Amended Complaint ("Motion"). This Brief is filed at the direction of the Court from the hearing on the Motion held April 26, 2013 and is limited to the single issue of whether Plaintiffs proposed amended complaint alleges bad faith or other intentional misconduct by Pardee, as requested by the Court. This Brief is supported by the following Memorandum of Points and Authorities, the supporting exhibits to the Opposition, the papers and pleadings on file in this matter, and any additional argument the Court may permit at the hearing of this matter.

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RESPECTFULLY SUBMITTED this 10th day of May, 2013.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Legal Standard.

As set forth in Pardee’s Opposition, granting a party leave to amend under NRCP 15(a) is not appropriate when the amendment would be futile. See Reddy v. Litton Industries, Inc., 912 F.2d 291, 296-97 (9th Cir. 1990). Futility occurs when the proposed amendment is frivolous or attempts to advance a claim that is legally insufficient. See Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (citation omitted) (“It is not an abuse of discretion to deny leave to amend when any proposed amendment would be futile.”). If the proposed amendment could not withstand a motion to dismiss, then the amendment should be denied as futile. See 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure Civ. 2d §1487 (2006). In this case, Plaintiffs’ request for attorneys’ fees as special damages is insufficient under Nevada law and would not withstand a motion to dismiss. Therefore, the Motion should be deemed futile and denied with prejudice.

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B. Plaintiffs’ Proposed Second Amended Complaint is Futile Because Nevada Law Does Not Permit the Recovery of Attorneys’ Fees as Special Damages in This Case.

Under Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc. and its progeny, the recovery of attorneys’ fees as special damages is extremely limited. 117 Nev. 948, 957, 35 P.3d 964, 969 (2001). And in Sandy Valley the court made clear that “the mere fact that a party was forced to file or defend a lawsuit is insufficient to support an award of attorney fees as damages.” Id., 117 Nev. at 957, 35 P.3d at 970. Yet file a lawsuit is exactly the only thing Plaintiffs claim they were forced to do. See Plaintiffs’ Opposition to Defendant’s Motion for Summary Judgment, pp. 17-18 (plaintiffs argued the only way to get the documents needed to determine if they were/were not entitled to further commissions was to file a lawsuit).¹

As set forth in the Opposition, this case does not fit any of the narrow circumstances contemplated by the Nevada Supreme Court allowing a party to recover its attorneys’ fees as special damages. In Horgan v. Felton, the court specifically clarified that “[a]s an **exception to the general rule**, a district court may award attorney fees as special damages in **limited circumstances**.” 123 Nev. 577, 583, 170 P.3d 982, 986 (2007) (emphasis added). Plaintiffs here contend the limited circumstances that apply to their case is they could not get all of the documents they wanted to confirm they were not entitled to additional commissions. See Plaintiffs’ Opposition to Defendants Motion for Summary Judgment, 17:8-13. (“The essential piece of information missing from the letter is the confirmation that the other transactions between [Pardee and Coyote Springs Investment LLC] were not subject to the Option

¹ Pardee disagrees vehemently with that contention.

1 Agreement: namely some disclosure of the other transactions sufficient to confirm to
2 Plaintiffs that they were not entitled to a commission for those transactions.”)²

3 In Horgan, a quiet title action, the court made it clear that in order to support the
4 proposition that attorneys’ fees are available as special damages, there must be
5 elements of “intentional malicious” and “calculated” acts on the part of a defendant that
6 forced the plaintiff into litigation. 123 Nev. at 585-86, 170 P.2d at 987-88 (internal
7 quotation omitted). Further, in Sandy Valley, the court stated that “actions for
8 declaratory or injunctive relief **may** involve claims for attorney fees as damages when
9 the actions were necessitated by the opposing party’s **bad faith conduct**.” 117 Nev. at
10 958, 35 P.3d at 970 (emphasis added). In this case with regard to Plaintiffs’ request for
11 leave to amend their complaint a second time to add a claim for attorneys’ fees as
12 special damages, the issue is whether the Plaintiffs have alleged or asserted in their
13 proposed amended complaint that Pardee engaged in intentional, malicious, calculated
14 and/or bad faith behavior that forced Plaintiffs into litigation. If not, their Motion must be
15 denied because the purported amendments are futile.

16 A review of the proposed Second Amended Complaint reveals that it is void of
17 any allegations that Pardee engaged in intentional, malicious, calculated or bad faith
18 behavior directed toward Plaintiffs. The proposed Second Amended Complaint
19 generically alleges that Pardee “failed to act in good faith and to the best of its ability,
20 and also failed to deal fairly with Plaintiffs, thereby breaching its duties to so conduct
21 itself and injuring Plaintiffs’ rights to conduct its business and its ability to receive the
22 benefits of the Commission Letter.” See proposed Second Amended Complaint, at ¶
23 30, a copy of which is attached to Plaintiffs’ Motion as Exhibit 1. Plaintiffs argued at the
24 April 26, 2013, hearing that their cause of action for breach of the covenant of good
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26 ² Pardee continues to be perplexed by Plaintiffs’ position. By their argument Plaintiffs concede they were
27 not entitled to any commission from the other transactions between Pardee and CSI, but they only
28 wanted to be told or confirm that they were not entitled to further commissions. Such an argument is
obviously circular: Pardee allegedly breached a duty to inform by not informing Plaintiffs about a
transaction in which they were not entitled to commission?


1 faith and fair dealing is synonymous with a claim for bad faith, thereby satisfying their
2 pleading requirement regarding their claim that they are entitled to attorney fees as
3 special damages. This position contradicts Nevada law and is misleading to the Court.

4 In order to properly allege a contractual breach of the implied covenant of good
5 faith and fair dealing, the claimant must show that: (1) plaintiff and defendant were
6 parties to the contract; (2) the defendant owed a duty of good faith to the plaintiff; (3)
7 the defendant breached that duty by performing in a manner that was unfaithful to the
8 purpose of the contract; and (4) the plaintiff's justified expectations were thus denied.

9 See Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995); Hilton Hotels Corp.
10 v. Butch Lewis Prod. Inc., 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991) ("Hilton I").

11 None of these elements (as pled by Plaintiffs) involve or concern intentional, malicious,
12 calculated or bad faith conduct. Moreover, these elements are drastically different than
13 the elements required to establish a claim for bad faith.

14 Nevada law states that "bad faith is not simply bad judgment or negligence."
15 Hulse v. Sheriff, Clark County, 88 Nev. 393, 398, 498 P.2d 1317, 1320 (1972). Rather,
16 a showing of bad faith "requires" that the party acting in bad faith actually held a
17 dishonest purpose or consciously committed a wrongdoing. See United States v.
18 Gilbert, 198 F.3d 1293, 1299 (11th Cir. 1999); Groder v. United States, 816 F.2d 139,
19 144 (4th Cir. 1987). Thus, the party seeking to assert "bad faith" must allege and prove
20 that the party was specifically acting with a dishonest purpose, consciously acting
21 improperly, or purposefully breached its duties. Id. Plaintiffs have the burden to both
22 allege and prove such, and must make this showing by clear and convincing evidence.
23 See Groder v. United States, 816 F. 2d 139, 142 (4th cir 1987); So. Comfort Builders,
24 Inc. v. United States, 67 Fed. Cl. 124, 154-155 (2005); see also Powell v. Foxall, 65
25 S.W.3d 756, 763 (Tex. App. 2001) (cited with approval by Jordan v. State ex. rel. Dep't
26 Motor Vehicles and Public Safety, 121 Nev. 44, 71 n.44, 110 P.3d 30, 41 n.44 (2005)).

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1 When one compares the essential elements of these two separate claims it is
2 clear that Plaintiffs' contention that Pardee "failed to act in good faith and to the best of
3 its ability, and also failed to deal fairly with Plaintiffs" is legally insufficient to allege a
4 bad faith claim. Simply put, Plaintiffs proposed amended complaint makes absolutely
5 no mention of intentional or malicious or calculated or bad faith conduct by Pardee.
6 From the very beginning and continuing to date, this case has always been about two
7 differing interpretations of an admittedly clear and unambiguous agreement.
8 Therefore, the proposed Second Amended Complaint is futile and the Motion should be
9 denied.³

10 RESPECTFULLY SUBMITTED this 10th day of May, 2013.

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28 ³ Pardee has limited this brief to the single issue requested by the Court. Pardee continues to advance all other reasons why Plaintiffs' motion should be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP
and that on the 10th day of May, 2013, I served a true and correct copy of the foregoing
**DEFENDANT’S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS OPPOSITION TO
PLAINTIFFS’ MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**
via U.S. Mail upon the following::

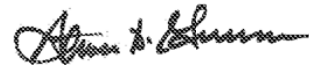
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1 ORDER

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CLARK COUNTY, NEVADA

11 JAMES WOLFRAM and

12 WALT WILKES,

13 Plaintiffs,

14 vs.

15 PARDEE HOMES OF NEVADA,

16 Defendant.

CASE NO.: A-10-632338-C

DEPT. NO.: IV

18 ORDER ON HEARING ON APRIL 26, 2013

19 This matter coming on for a hearing on the 26th day of April, 2013, on the issue of
20 Plaintiffs' Motion for Leave to File a Second Amended Complaint, Lynn M. Hansen, Esq.,
21 and James M. Jimmerson, Esq. appearing on behalf of Plaintiffs, and Pat Lundvall, Esq.
22 and Aaron D. Shipley, Esq. appearing on behalf of Defendant Pardee Homes of Nevada,
23 and the Court having reviewed the papers and pleadings on file, Plaintiffs' Motion for Leave
24 to File a Second Amended Complaint, Defendant's Opposition thereto, and Plaintiffs'

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JA002659

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
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1 Reply, and the Court having heard the arguments of counsel, and for good cause
2 appearing,

3 THE COURT FINDS that Plaintiffs, in bringing forth the claims for special damages
4 in the proposed Second Amended Complaint attached to Plaintiffs' Motion for Leave to File
5 a Second Amended Complaint, does not cause undue delay and does not prejudice
6 Defendant.

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Counsel shall provide
8 supplemental briefing by 5:00 p.m. on May 10, 2013 on the issue of whether Plaintiffs'
9 Motion for Leave to File Second Amended Complaint should be denied on the basis of
10 futility;

11 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Motion for Leave
12 to File a Second Amended Complaint has been continued to the Chamber's Calendar for a
13 written decision;

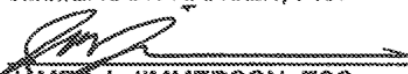
14 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that discovery
15 is re-opened for the limited purpose of obtaining information as to Plaintiffs' damages: (1)
16 the attorney's fees and costs incurred by Plaintiffs; and (2) Plaintiffs' individual time and
17 effort damages.

18 Dated 30 this day of May, 2013.

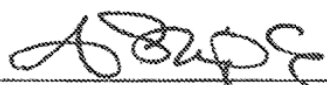

DISTRICT COURT JUDGE

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21 Respectfully Submitted:

22 JIMMERSON HANSEN, P.C.

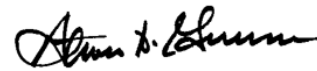
23 
24 JAMES J. JIMMERSON, ESQ.
25 Nevada Bar No.: 00264
26 LYNN M. HANSEN, ESQ.
27 Nevada Bar No.: 00244
28 JAMES M. JIMMERSON, ESQ.
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James Wolfram and Walt Wilkes
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3 Reviewed as to form and content:
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7 Nevada Bar No.: 3781
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10 Attorneys for Defendant
Pardee Homes of Nevada
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CLERK OF THE COURT

ORDR

JAMES J. JIMMERSON, ESQ.
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LYNN M. HANSEN, ESQ.
Nevada Bar No.: 00244
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Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JAMES WOLFRAM and)	
WALT WILKES,)	CASE NO.: A-10-632338-C
)	DEPT. NO.: IV
Plaintiffs,)	
)	
vs.)	
)	
PARDEE HOMES OF NEVADA,)	
)	
Defendant.)	

**ORDER GRANTING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND
AMENDED COMPLAINT**

This matter coming on for a hearing on the 26th day of April, 2013, on the issue of Plaintiffs' Motion for Leave to File a Second Amended Complaint, Lynn M. Hansen, Esq., and James M. Jimmerson, Esq. appearing on behalf of Plaintiffs, and Pat Lundvall, Esq. and Aaron D. Shipley, Esq. appearing on behalf of Defendant Pardee Homes of Nevada, and the Court having reviewed the papers and pleadings on file, Plaintiffs' Motion for Leave to File a Second Amended Complaint, Defendant's Opposition thereto, Plaintiffs' Reply, Plaintiff's Supplemental Brief and Defendant's Supplemental Brief, and the Court having heard the arguments of counsel, and for good cause appearing,

1 THE COURT FINDS that in the absence of any apparent reason involving undue
2 delay, bad faith or dilatory motive on behalf of Plaintiffs, the leave to amend shall be freely
3 given. *Stephens v. Southern Nevada Music Co.*, 89 Nev. 104 (1973).

4 THE COURT FURTHER FINDS no such reasons to be present in the instant case.
5 The Court ordered at the hearing on April 26, 2013 that discovery is to be reopened for the
6 limited purpose of Defendant obtaining information regarding any alleged attorney's fees
7 as special damages as well as any alleged time and effort damages incurred by Plaintiffs.
8 The Court granted Defendant the opportunity to conduct the aforementioned discovery to
9 avoid any prejudice to Defendant.

10 THE COURT FURTHER FINDS that the holding in *Sandy Valley Assoc. v. Sky*
11 *Ranch Estates Owners Assoc.*, 117 Nev. 948 (2001) governs the issue of whether
12 attorney's fees may be considered an element of special damages or as a cost of litigation.
13 Pursuant to *Sandy Valley*, attorney's fees may be considered an element of special
14 damages in those rare cases when they were reasonably foreseeable and the natural and
15 proximate consequence of the injurious conduct. 117 Nev. at 957. The above referenced
16 general criteria in *Sandy Valley* allows the Court to determine in a specific case if a
17 Plaintiff's claim for damages could include attorney's fees as special damages.

18 THE COURT FURTHER FINDS that *Sandy Valley* and its progeny discuss specific
19 types of claims that allow attorney's fees as special damages. However, even if a
20 Plaintiff's claim does not fall under all of the specific types of claims cited in those cases,
21 the general criteria in *Sandy Valley* is still determinative of whether a case is eligible for
22 attorney's fees as special damages.

23 THE COURT DOES NOT FIND that Plaintiff's Motion for Leave to File a Second
24 Amended Complaint should not be denied on the basis that the amendment sought is futile
25 under Nevada law. Whether Plaintiffs during trial provide evidence to fit the narrow
26 circumstances of *Sandy Valley* and its progeny will be decided by the Court at the
27 appropriate time.

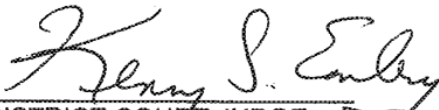

28

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1 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
2 Plaintiffs' Motion for Leave to File a Second Amended Complaint is hereby GRANTED.

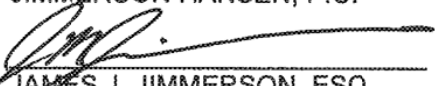
3 Dated 4 this day of May, 2013.

4 

5 
DISTRICT COURT JUDGE 

6 Respectfully Submitted:

7 JIMMERSON HANSEN, P.C.

8 
9 JAMES J. JIMMERSON, ESQ.

Nevada Bar No.: 00264

10 LYNN M. HANSEN, ESQ.

Nevada Bar No.: 00244

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13 Las Vegas, Nevada 89101

Attorneys for Plaintiffs

14 James Wolfram and Walt Wilkes

15
16 Reviewed as to form and content:

17 McDONALD CARANO WILSON, LLP

18 
19 PAT LUNDVALL, ESQ.

20 Nevada Bar No.: 3761

21 AARON D. SHIPLEY, ESQ.

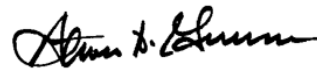
Nevada Bar No.: 8258

22 2300 W. Sahara Avenue, Suite 1000

23 Las Vegas, Nevada 89102

Attorneys for Defendant

24 Pardee Homes of Nevada
25
26
27
28



CLERK OF THE COURT

1 **NEO**
2 JAMES J. JIMMERSON, ESQ.
3 Nevada Bar No. 000264
4 LYNN M. HANSEN, ESQ.
5 Nevada Bar No. 0244
6 JAMES M. JIMMERSON, ESQ.
7 Nevada Bar No. 12599
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12 lmh@jimmersonhansen.com
13 jmj@jimmersonhansen.com
14 Attorney for Plaintiffs
15 James Wolfram and Walt Wilkes

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

11 JAMES WOLFRAM AND WALT WIKES)

CASE NO.: A-10-632338-C
DEPT NO.: IV

12
13 Plaintiffs,
14 vs.

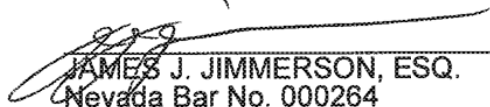
15 PARDEE HOMES OF NEVADA,
16 Defendant.

17 NOTICE OF ENTRY OF ORDER

18 PLEASE TAKE NOTICE that an Order on Hearing of April 26, 2013 was entered in the
19 above-entitled matter on the 30th day of May, 2013, a file-stamped copy of which is attached
20 hereto.

21 Dated this 5 day of June, 2013.

22 JIMMERSON HANSEN, P.C.

23
24 
25 JAMES J. JIMMERSON, ESQ.
26 Nevada Bar No. 000264
27 LYNN M. HANSEN, ESQ.
28 Nevada Bar No. 0244
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James Wolfram & Walt Wilkes

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CERTIFICATE OF SERVICE

I here by certify that service of a true correct copy of **NOTICE OF ENTRY OF ORDER**
was made on the 5th day of June, 2013 , as indicated below:

☒ **By first class mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P. 5(b) addressed as follows below**

☐ **By electronic service through the E-filing system**

☒ **By facsimile, pursuant to EDCR 7.26 (as amended)**

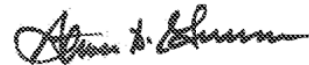
☐ **By receipt of copy as indicated below**

PAT LUNDVALL, ESQ.,
AARON D. SHIPLEY, ESQ.
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2300 W. Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Attorneys for Defendant
Pardee Homes of Nevada
Fax No.: 702-873-9966


An Employee of JIMMERSON HANSEN, P.C.

ORIGINAL

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CLERK OF THE COURT

1 ORDER

2 JAMES J. JIMMERSON, ESQ.

3 Nevada Bar No.: 00264

4 LYNN M. HANSEN, ESQ.

5 Nevada Bar No.: 00244

6 JAMES M. JIMMERSON, ESQ.

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12 Fax No.: (702) 388-6406

13 lmh@jimmersonhansen.com

14 jmi@jimmersonhansen.com

15 Attorneys for Plaintiffs.

DISTRICT COURT

CLARK COUNTY, NEVADA

11 JAMES WOLFRAM and

12 WALT WILKES,

13 Plaintiffs,

14 vs.

15 PARDEE HOMES OF NEVADA,

16 Defendant.

CASE NO.: A-10-632338-C

DEPT. NO.: IV

18 ORDER ON HEARING ON APRIL 26, 2013

19 This matter coming on for a hearing on the 26th day of April, 2013, on the issue of
20 Plaintiffs' Motion for Leave to File a Second Amended Complaint, Lynn M. Hansen, Esq.,
21 and James M. Jimmerson, Esq. appearing on behalf of Plaintiffs, and Pat Lundvall, Esq.
22 and Aaron D. Shipley, Esq. appearing on behalf of Defendant Pardee Homes of Nevada,
23 and the Court having reviewed the papers and pleadings on file, Plaintiffs' Motion for Leave
24 to File a Second Amended Complaint, Defendant's Opposition thereto, and Plaintiffs'

25 ///

26 ///

27 ///

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JA002667

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1 Reply, and the Court having heard the arguments of counsel, and for good cause
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5 a Second Amended Complaint, does not cause undue delay and does not prejudice
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8 supplemental briefing by 5:00 p.m. on May 10, 2013 on the issue of whether Plaintiffs'
9 Motion for Leave to File Second Amended Complaint should be denied on the basis of
10 futility;

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12 to File a Second Amended Complaint has been continued to the Chamber's Calendar for a
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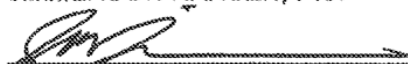
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17 effort damages.

18 Dated 30 this day of May, 2013.

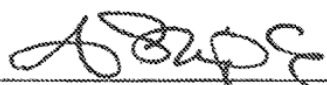

DISTRICT COURT JUDGE

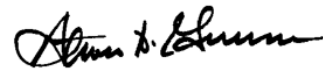
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21 Respectfully Submitted:

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CLERK OF THE COURT

1 SAC

2 JIMMERSON HANSEN, P.C.
3 JAMES J. JIMMERSON, ESQ.
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6 JAMES M. JIMMERSON, ESQ.

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11 (702) 388-7171

12 Attorney for Plaintiffs

13 James Wolfram and Walt Wilkes

14 DISTRICT COURT

15 CLARK COUNTY, NEVADA

16 JAMES WOLFRAM,
17 WALT WILKES,

18 Plaintiffs,

19 vs.

20 PARDEE HOMES OF NEVADA,

21 Defendant.

CASE NO.: A-10-632338-C

DEPT NO.: IV

22 SECOND AMENDED COMPLAINT

23 Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through their
24 undersigned counsel, James J. Jimmerson, Esq. of the law firm of Jimmerson Hansen
25 P.C., for their Complaint states as follows:

26 GENERAL ALLEGATIONS

27 1. At all times relevant hereto, Plaintiffs James Wolfram and Walt Wilkes are
28 individuals who have resided in Clark County, Nevada.

2. That Plaintiff Wolfram has been assigned all of Award Realty's rights, title
and interest in that certain Commission Letter dated September 1, 2004, and he is the real
party in interest in this case.

1 3. That Plaintiff Wilkes has been assigned all General Realty's rights, title and
2 interest in that certain Commission Letter dated September 1, 2004, and he is the real
3 party in interest in this case.

4 4. At all times relevant hereto, Defendant Pardee Homes of Nevada ("Pardee")
5 was a corporation registered in the state of Nevada.

6 5. Plaintiffs' predecessors in interest, Award Realty and General Realty, and
7 Plaintiffs and Defendant have a financial relationship. Plaintiffs were real estate brokers,
8 dealing in real estate owned by Coyote Springs Investment LLC and being purchased by
9 Defendant. The relationship between Coyote Springs Investment LLC and Defendant was
10 governed by a certain Option Agreement for the Purchase of Real Property and Joint
11 Escrow Instructions, dated in May of 2004 ("Option Agreement") and later amended and
12 restated on March 28, 2005. Plaintiffs and Defendant entered into an agreement entitled
13 "Commission Letter" dated September 1, 2004, which related to the Option Agreement and
14 governed the payment of commissions from Defendant to Plaintiffs for real estate sold
15 under the Option Agreement. For easy reference, Award Realty and General Realty and
16 Plaintiffs, are concurrently referred to as "Plaintiffs" herein.

17 6. Pursuant to the Commission Letter, Plaintiffs were to be paid a commission
18 for all real property sold under the Option Agreement.

19 7. Pursuant to the Commission Letter, Plaintiffs were to be fully informed of all
20 sales and purchases of real property governed by the Option Agreement. Specifically, the
21 Commission Letter stated:

22 Pardee shall provide each of you a copy of each written option
23 exercise notice given pursuant to paragraph 2 of the Option
24 Agreement, together with the information as to the number of
25 acres involved and the scheduled closing date. In addition,
26 Pardee shall keep each of you reasonably informed as to all
27 matters relating to the amount and due dates of your
28 commission payments.

29 8. On or about April 23, 2009, Plaintiffs sent a letter to Defendant requesting
30 documents, which detail the purchases and sales of certain real property for which

1 Plaintiffs believe are part of the property outlined in the Option Agreement and, therefore,
2 property for which they are entitled to receive a commission. A parcel map was also
3 requested to identify which properties had been sold.

4 9. Defendant replied to Plaintiffs' April 23, 2009, letter with a letter dated July
5 10, 2009. The July 10 letter failed to provide the documents requested by the Plaintiffs.

6 10. Plaintiffs once again requested the documents from the Defendant in a letter
7 dated August 26, 2009. In that letter, Plaintiffs alleged that failure to deliver the requested
8 documents constituted a material breach of the Commission Letter.

9 11. Defendant, after conversations with Plaintiffs, sent a two-page letter dated
10 November 24, 2009, with four attachments: 2 maps, a spreadsheet, and a map legend.
11 The letter attempted to explain the recent purchases or "takedowns" of real property by
12 Pardee.

13 12. Plaintiffs relied upon Defendant's representations made in the November 24,
14 2009 letter as being truthful and accurate.

15 13. Upon further inquiry, however, Plaintiffs have discovered that the
16 representations made by the Defendant in the November 24, 2009, letter were inaccurate
17 or untruthful. In response to their concerns, Plaintiffs sent another letter dated May 17,
18 2010 to Defendants, asking for additional information and further documentation of all
19 properties purchased by Defendant and sold by Coyote Springs Investment LLC. In that
20 letter, Plaintiffs alleged that the representations made in the November 24, 2009, letter
21 were believed to be inaccurate or untruthful after the Plaintiffs investigated the property
22 transactions and records in the Clark County Recorder's Office and Clark County
23 Assessor's Office. Plaintiffs further asked Defendant why it had instructed Francis Butler of
24 Chicago Title not to release closing escrow documents regarding purchase of properties
25 from Coyote Springs.

26 14. Defendant responded to the May 17, 2010, letter with a letter dated June 14,
27 2010. In that letter, Defendant denied breaching the covenants contained in the
28 Commission Letter, but did not reply or address any particular concern, including, but not

1 limited to: the discrepancy between the representations made by Defendant in the
2 November 24, 2009, letter and information and records found in the Clark County
3 Recorder's Office and the Clark County Assessor's Office, the request as to why closing
4 escrow documents were being withheld, and the request for all relevant closing escrow
5 documents.

6 15. To date there has been no further documentation produced by Defendant for
7 the Plaintiffs regarding their concerns about the sales and purchases of real property by
8 Defendant from Coyote Springs Investment, LLC.

9 **FIRST CLAIM FOR RELIEF**

10 **(Accounting)**

11 16. Plaintiffs incorporate each of the allegations contained within paragraphs 1
12 through 15 above.

13 17. Plaintiffs have requested documents promised to them by Defendant in the
14 Commission Letter and have not received them. Specifically, the have requested: the
15 name of the seller, the buyer, the parcel numbers, the amount of acres sold, the purchase
16 price, the commission payments schedule and amount, Title company contact information,
17 and Escrow number(s), copy of close of escrow documents, and comprehensive maps
18 specifically depicting this property sold and would, with parcel number specifically
19 identified.

20 18. Plaintiffs are entitled to an accounting and copies of the documents and
21 maps for all transfers of real property governed by the Option Agreement.

22 19. As a direct, natural and proximate result of Defendant's failure to account to
23 Plaintiffs, Plaintiffs have been forced to retain an attorney to prosecute this action.
24 Plaintiffs have therefore been damaged in the amount of the fees and costs expended to
25 retain the services on their attorney and are entitled to an award of reasonable attorney's
26 fees as special damages.

27 20. As a direct, natural and proximate result of Defendant's failure to account to
28 Plaintiffs, Plaintiffs have been forced to spend a significant amount of time and effort

1 attempting to get the information owed to them from alternative sources. Plaintiffs have
2 therefore been damaged in the amount of their fair hourly rate in attempting to acquire the
3 information and documents owed to them.

4 21. As a result of this action, Plaintiffs have been forced to bring this matter
5 before the Court. Plaintiff has been damaged in a sum in excess of \$10,000.00.

6 SECOND CLAIM FOR RELIEF

7 (Breach of Contract)

8 22. Plaintiffs incorporate each of the allegations contained within paragraphs 1
9 through 20 above as though said paragraphs are fully stated herein.

10 23. Plaintiffs have requested documents promised to them by the Defendant in
11 the Commission Letter and have not received them.

12 24. Defendant has a duty to honor its contractual obligations. Defendant has
13 failed and refused to perform its obligations pursuant to the terms and conditions of the
14 Commission Letter.

15 25. As a direct, natural and proximate result of Defendant's breach of contract,
16 Plaintiffs have been forced to retain an attorney to prosecute this action to acquire the
17 documents owed to Plaintiffs. Plaintiffs have therefore been damaged in the amount of the
18 fees and costs expended to retain the services on their attorney and are entitled to an
19 award of reasonable attorney's fees as special damages.

20 26. As a direct, natural and proximate result of Defendant's breach of contract,
21 Plaintiffs have been forced to spend a significant amount of time and effort attempting to
22 get the information owed to them from alternative sources. Plaintiffs have therefore been
23 damaged in the amount of their fair hourly rate in attempting to acquire the information and
24 documents owed to them.

25 27. As a result of Defendant's breach of contract, Plaintiffs have suffered
26 damages in the amount according to proof, in excess of Ten Thousand Dollars (\$10,000).

27 THIRD CLAIM FOR RELIEF

28 (Breach of the Implied Covenant of Good Faith and Fair Dealing)

1 28. Plaintiffs reallege and incorporate herein each and every allegation
2 contained in paragraphs 1 through 25, inclusive, herein above.

3 29. Defendant Pardee owed, and continues to owe, Plaintiffs a duty of good faith
4 and fair dealing to do everything under the Commission Letter that Defendant is required to
5 do to further the purposes of the Commission Letter and to honor the terms and conditions
6 thereof to the best of its ability.

7 30. In doing the acts alleged herein, Defendant Pardee failed to act in good faith
8 and to the best of its ability, and also failed to deal fairly with Plaintiffs, thereby breaching
9 its duties to so conduct itself and injuring Plaintiffs' rights to conduct its business and its
10 ability to receive the benefits of the Commission Letter.

11 31. As a direct, natural and proximate result of Defendant's breach of the implied
12 covenant of good faith and fair dealing, Plaintiffs have been forced to retain an attorney to
13 prosecute this action to acquire the documents owed to Plaintiffs. Plaintiffs have therefore
14 been damaged in the amount of the fees and costs expended to retain the services on their
15 attorney and are entitled to an award of reasonable attorney's fees as special damages.

16 32. As a direct, natural and proximate result of Defendant's breach of the implied
17 covenant of good faith and fair dealing, Plaintiffs have been forced to spend a significant
18 amount of time and effort attempting to get the information owed to them from alternative
19 sources. Plaintiffs have therefore been damaged in the amount of their fair hourly rate in
20 attempting to acquire the information and documents owed to them.

21 33. As a direct and proximate result of Defendant's breach of the covenant of
22 good faith and fair dealing, Plaintiffs have been damaged in a sum in excess of
23 \$10,000.00.

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WHEREFORE, Plaintiffs pray as follows:

1. For the documents promised to them including, but not limited to, an accurate parcel map with Assessor's Parcel numbers, and an accounting of all transfers or title or sales.

2. For general damages in a sum in excess of \$10,000.00.

3. For special damages in a sum in excess of \$10,000.00

3. For cost of suit.

4. For reasonable attorney's fees.

5. For such further relief as the Court deems proper.

DATED this 6th day of June, 2013.

JIMMERSON HANSEN, P.C.

By 
JAMES J. JIMMERSON, ESQ.
Nevada Bar No. 000264
jjj@jimmersonhansen.com
JAMES M. JIMMERSON, ESQ.
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415 So. Sixth St., Ste. 100
Las Vegas, NV 89101
(702) 388-7171
Attorney for Plaintiffs
JAMES WOLFRAM and WALT WILKES

CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of SECOND AMENDED COMPLAINT was made on the 6th day of June, 2013, as indicated below:

☒ By first class mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P. 5(b) addressed as follows below

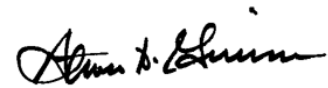
☐ By electronic service through the E-filing system

☐ By facsimile, pursuant to EDCR 7.26

☐ By receipt of copy as indicated below

PAT LUNDVALL, ESQ.,
AARON D. SHIPLEY, ESQ.
McDONALD CARANO WILSON, LLP
2300 W. Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Attorneys for Defendant
Pardee Homes of Nevada


An Employee of JIMMERSON HANSEN, P.C.



CLERK OF THE COURT

1 **ANAC**
2 PAT LUNDVALL
3 Nevada Bar No. 3761
4 AARON D. SHIPLEY
5 Nevada Bar No. 8258
6 McDONALD CARANO WILSON LLP
7 2300 West Sahara Avenue, Suite 1000
8 Las Vegas, Nevada 89102
9 (702) 873-4100
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11 lundvall@mcdonaldcarano.com
12 ashipley@mcdonaldcarano.com
13 *Attorneys for Defendant*
14 *Pardee Homes of Nevada*

8 **DISTRICT COURT**
9
10 **CLARK COUNTY, NEVADA**

10 JAMES WOLFRAM,
11 WALT WILKES

CASE NO.: A-10-632338-C
DEPT NO.: IV

12 Plaintiffs,
13 vs.

**ANSWER TO SECOND AMENDED
COMPLAINT AND COUNTERCLAIM**

14 PARDEE HOMES OF NEVADA,
15 Defendant.

16
17 Defendant PARDEE HOMES OF NEVADA ("Defendant"), for their Answer to
18 JAMES WOLFRAM AND WALT WILKES' ("Plaintiffs") Second Amended Complaint
19 responds as follows:

20 **GENERAL ALLEGATIONS**

21 1. Answering paragraph 1, Defendant lacks sufficient knowledge or
22 information to form a belief as to the truth or falsity of the allegations set forth therein
23 and, on that basis, denies each and every allegation set forth in said paragraph.

24 2. Answering paragraph 2, Defendant lacks sufficient knowledge or
25 information to form a belief as to the truth or falsity of the allegations set forth therein,
26 but acknowledges the Court's order and, on that basis, denies each and every
27 allegation set forth in said paragraph.

28 3. Answering paragraph 3, Defendant lacks sufficient knowledge or

1 information to form a belief as to the truth or falsity of the allegations set forth therein,
2 but acknowledges the Court's order, and, on that basis, denies each and every
3 allegation set forth in said paragraph.

4 4. Defendant admits the allegations contained in paragraph 4.

5 5. Answering paragraph 5, Defendant admits certain aspects of the
6 relationship between Coyote Springs Investment LLC and Defendant were governed by
7 an Option Agreement for the Purchase of Real Property and Joint Escrow Instructions
8 ("Option Agreement") dated May of 2004, along with the subsequent amendments
9 thereto. Further, Defendant admits that its letter to Award Realty and General Realty
10 dated September 1, 2004 ("Commission Letter"), which Plaintiffs acknowledged and
11 executed, memorializes an agreement between the parties. Defendant submits that the
12 terms of the Option Agreement and its amendments and the Commission Letter speak
13 for themselves. Defendant denies each and every allegation set forth in this paragraph
14 that is inconsistent with the terms of either the Option Agreement and its amendments
15 or the Commission Letter, and the remaining allegations contained in paragraph 5.

16 6. Answering paragraph 6, the language of the document speaks for itself.
17 Defendant denies all allegations inconsistent with the terms of the document.

18 7. Answering paragraph 7, the language of the document speaks for itself.
19 Defendant denies all allegations inconsistent with the terms of the document.

20 8. Answering paragraph 8, the language of the document speaks for itself.
21 Defendant denies all allegations inconsistent with the terms of the document.

22 9. Answering paragraph 9, the language of the document speaks for itself.
23 Defendant denies all allegations inconsistent with the terms of the document.

24 10. Answering paragraph 10, the language of the document speaks for itself.
25 Defendant denies all allegations inconsistent with the terms of the document.

26 11. Answering paragraph 11, the language of the document speaks for itself.
27 Defendant denies all allegations inconsistent with the terms of the document.

12. Answering paragraph 12, Defendant denies the allegations set forth therein.

13. Answering paragraph 13, the language of the document speaks for itself. Defendant denies all allegations inconsistent with the terms of the document and all other allegations.

14. Answering paragraph 14, the language of the document speaks for itself. Defendant denies all allegations inconsistent with the terms of the document.

15. Answering paragraph 15, Defendant denies the allegations.

FIRST CLAIM FOR RELIEF

(Accounting)

16. Defendant hereby repeats and incorporates its responses to the foregoing paragraphs as if fully set forth herein.

17. Defendant denies the allegations contained in paragraph 17.

18. Defendant denies the allegations contained in paragraph 18.

19. Defendant denies the allegations contained in paragraph 19.

20. Defendant denies the allegations contained in paragraph 20.

21. Defendant denies the allegations contained in paragraph 21.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

22. Defendant hereby repeats and incorporates its responses to the foregoing paragraphs as if fully set forth herein.

23. Defendant denies the allegations contained in paragraph 23.

24. Defendant denies the allegations contained in paragraph 24.

25. Defendant denies the allegations contained in paragraph 25.

26. Defendant denies the allegations contained in paragraph 26.

27. Defendant denies the allegations contained in paragraph 27.

THIRD CLAIM FOR RELIEF

(Breach of Good Faith and Fair Dealing)

28. Defendant hereby repeats and incorporates its responses to the foregoing paragraphs as if fully set forth herein.

29. The allegations contained in paragraph 29 of the Complaint state a legal conclusion to which no response is required.

30. Defendant denies the allegations contained in paragraph 30.

31. Defendant denies the allegations contained in paragraph 31.

32. Defendant denies the allegations contained in paragraph 32.

33. Defendant denies the allegations contained in paragraph 33.

AFFIRMATIVE DEFENSES

First Affirmative Defense

The Second Amended Complaint fails to state a claim against Defendant upon which relief can be granted.

Second Affirmative Defense

Any damage suffered by Plaintiffs was the result of the acts or omissions of the Plaintiffs, or other third-parties over which Defendant had no control, and is not the result of acts or omissions of Defendant.

Third Affirmative Defense

Plaintiffs' claims are barred, either in whole or in part, under the doctrines of waiver, laches and/or estoppel.

Fourth Affirmative Defense

Plaintiffs' claims are barred, either in whole or in part, under the parol evidence rule and/or the statute of frauds.

Fifth Affirmative Defense

Plaintiffs' claims are barred, either in whole or in part, by reason of Plaintiffs' unclean hands and inequitable conduct.

Sixth Affirmative Defense

Plaintiffs failed to and should have taken action to minimize or eliminate any loss, injury, or damage, and therefore Plaintiffs are precluded from recovering damage, or Plaintiffs' damage should be reduced, by operation of the doctrines of avoidable consequences or mitigation of damages.

Seventh Affirmative Defense

Plaintiffs' claims are barred, either in whole or in part, because Plaintiffs' alleged damages are speculative and uncertain.

Eighth Affirmative Defense

The Second Amended Complaint may be barred by other affirmative defenses enumerated in NCRP 8(c). Defendant therefore reserves its right to amend this list of Affirmative Defenses to add new defenses should discovery or investigation reveal facts giving rise to such defenses.

WHEREFORE, Defendant hereby requests that judgment be entered in its favor and against Plaintiffs as follows:

1. Dismissing the Second Amended Complaint and all claims set forth therein, and ordering that Plaintiffs take nothing thereby;
2. For an award of reasonable attorneys' fees and costs of suit incurred in the defense of this action; and
3. For such other and further relief as this Court may deem just and equitable under the circumstances.

COUNTERCLAIM

Pardee Homes of Nevada, for its Counterclaim against Counter-Defendants James Wolfram and Walt Wilkes complains and alleges as follows:

1. Pardee Homes of Nevada ("Pardee") is now and was at all times relevant hereto a Nevada corporation and is authorized to do business in the State of Nevada.

1 2. James Wolfram and Walt Wilkes have asserted claims against Pardee.

2 3. Plaintiffs were aware of a real estate development project know as
3 Coyote Springs in Counties of Clark and Lincoln, Nevada (the “Coyote Springs
4 Project”) and had become acquainted with Harvey Whittemore, the principal member
5 of Coyote Springs Investment LLC (“CSI”), the developer of the Project.

6 4. Plaintiffs had also become acquainted with Jon Lash, Vice President
7 and COO of Pardee.

8 5. Plaintiffs asked if Mr. Lash would be interested in meeting with Mr.
9 Whittemore if they could facilitate such a meeting. Mr. Lash agreed.

10 6. A meeting was then scheduled and held at Pardee’s Las Vegas office.
11 Present at this initial meeting were Plaintiffs, Mr. Whittemore, Mr. Lash, and Klif
12 Andrews, another executive of Pardee. Pardee learned that CSI intended to contact
13 Pardee before Plaintiffs suggested doing so.

14 7. Mr. Whittemore expressed his desire to sell certain portions of real
15 estate concerning the Coyote Springs project. Pardee made it clear that they only
16 wanted to purchase the single-family detached production residential lots on the
17 project

18 8. The initial meeting led to several months of negotiations between
19 Pardee and CSI. Plaintiffs were not involved in any of those negotiations.

20 9. After much negotiation, Pardee and CSI entered into a written
21 agreement entitled Option Agreement for the Purchase of Real Property and Joint
22 Escrow Instructions (“Option Agreement”), which set forth, in relevant part, the terms
23 of the deal whereby Pardee would purchase certain portions of real estate – the
24 single family detached production residential lots --from CSI in a series of
25 “takedowns” over an established period of time. The Option Agreement was later
26 amended.

27 10. Pardee and Plaintiffs (through their predecessors in interest, Award
28

1 Realty Group ("Award") and General Realty Group, Inc. ("General")) also negotiated
2 and entered into a Commission Agreement dated September 1, 2004, which the
3 Plaintiffs countersigned ("Commission Agreement" or "Commission Letter"). Pardee
4 relied upon Plaintiffs living up to their obligations under the Commission Agreement.
5 The Commission Agreement governs the payment of commissions from Pardee to
6 Plaintiffs related to Pardee's purchase of the single family detached production
7 residential lots from CSI for purposes of the project. Plaintiffs accuse Pardee of
8 breaching the Commission Agreement. Pardee denies that accusation.

9 11. Pardee paid Plaintiffs commissions on the \$84,000,000 Purchase
10 Property Price and kept Plaintiffs informed of all commissions paid.

11 12. Over the course of the multiple takedowns, Plaintiffs were paid a total of
12 \$2,632,000 in commissions pursuant to the terms of the Commission Agreement.

13 13. No commission was payable under clause (iii) of the Commission
14 Agreement unless the property purchased fell within the applicable definition of
15 "Option Property."

16 14. Pardee has never exercised any options to purchase any Option
17 Property from CSI.

18 15. The Commission Agreement states, in part:

19 Pardee shall provide to each of you a copy of each written option exercise
20 notice given pursuant to paragraph 2 of the Option Agreement, together
21 with information as to the number of acres involved and the scheduled
22 closing date. In addition, Pardee shall keep each of you reasonably
23 informed as to all matters relating to the amount and due dates of your
24 commission payments.

25 16. Pardee has not given any option exercise notice pursuant to paragraph
26 2 of the Option Agreement.

27 17. Plaintiffs received all of their commission payments through escrow from
28 either Stewart Title or Chicago Title. With these commission payments Plaintiffs also
received closing statements from the title companies keeping Plaintiffs informed of the
amounts and due dates of their commission payments.

1 18. Pardee fulfilled all of its obligations under the Commission Agreement.

2 19. Despite Pardee fulfilling all of its obligations under the Commission
3 Agreement, Plaintiffs to harassed Pardee for further information and documents to
4 which they are not entitled, and are subject to confidentiality obligations.

5 **FIRST CAUSE OF ACTION**

6 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

7 20. Pardee repeats, realleges and incorporates by reference paragraphs 1
8 through 21 of the Counterclaim as though fully set forth herein.

9 21. Plaintiffs owed, and continue to owe, Pardee a duty of good faith and fair
10 dealing to further the purposes of the Commission Agreement and to honor the terms
11 and conditions thereof to the best of their ability.

12 22. Plaintiffs failed to act in good faith and to the best of its ability, and also
13 failed to deal fairly with Pardee, thereby breaching their duties to so conduct
14 themselves and injuring Pardee's rights to conduct its business.

15 23. As a direct, natural and proximate result of Plaintiffs' breach of the implied
16 covenant of good faith and fair dealing, Pardee has been forced to retain an attorney to
17 prosecute this counterclaim against Plaintiffs. Pardee has therefore been damaged in
18 the amount of fees and costs expended to retain the services on their attorney and are
19 entitled to an award of reasonable attorney's fees as damages. Pardee has objected to
20 Plaintiffs' claim for special attorneys' fees as an element of their alleged damages in
21 this case, separate from the attorney fee provision found within the Commission
22 Agreement. Pardee continues with that objection.. However, Pardee asserts this claim
23 only if the Court deems such a claim permissible in this case under Nevada law.

24 24. As a direct, natural and proximate result of Plaintiffs' breach of the implied
25 covenant of good faith and fair dealing, Pardee has been forced to spend a significant
26 amount of time and effort responding to Plaintiffs' improper attempts to gather
27 information and documents to which Plaintiffs are not entitled. Pardee has therefore
28

1 been damaged in the amount of their fair hourly rate in attempting to provide the
2 information and documents wrongfully requests by Plaintiffs. Pardee has objected to
3 Plaintiffs' claim for compensation for their time and effort as an element of their alleged
4 damages in this case. Pardee continues with that objection. Therefore, Pardee asserts
5 this claim only if the Court deems such a claim permissible in this case under Nevada
6 law.

7 **WHEREFORE**, Counter-claimant Pardee Homes of Nevada, prays for judgment
8 against the Counter-Defendants James Wolfram and Walt Wilkes, jointly and severally,
9 as follows:

- 10 1. For general damages in a sum in excess of \$10,000.00;
- 11 2. For special damages in a sum in excess of \$10,000.00;
- 12 3. For attorneys' fees, costs of suit, and all other expenses reasonably
13 incurred; and
- 14 4. For such other and further relief as the Court may deem just and proper.

15
16
17 DATED this 3rd day of July, 2013.

18
19
20
21 McDONALD CARANO WILSON LLP

22 /s/Pat Lundvall
23 PAT LUNDVALL (#3761)
24 AARON D. SHIPLEY (#8258)
25 2300 West Sahara Avenue, Suite 1000
26 Las Vegas, Nevada 89102
27 *Attorneys for Defendant and Counter-Claimant*
28 *Pardee Homes of Nevada*



McDONALD-CARANO-WILSON²

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PR. 775.788-2000 • FAX. 775.788-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 3rd day of July, 2013, I mailed a copy of the foregoing **ANSWER TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM** to the following:

James J. Jimmerson
James M. Jimmerson
Jimmerson Hansen, P.C.
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101
Attorney for Plaintiffs

/s/SallyWexler
An Employee of McDonald Carano Wilson LLP

1 Defendant conspicuously ignores how Plaintiffs came into possession of the documents
2 reflecting the purchases of property in Coyote Springs: by filing suit and subpoenaing the
3 records.⁷ It is evident that the expenditure of attorney's fees so that Plaintiffs could avail
4 themselves of discovery mechanisms is reasonably foreseeable and would be the
5 proximate consequence of Defendant's failure to provide Plaintiffs with the documents
6 owed to them.⁸ Even counsel for Defendant conceded, at least hypothetically, that if
7 Plaintiffs could demonstrate that Defendant is liable for breaching the Agreement and failed
8 to provide the documents, Plaintiffs would have been damaged. Mot. at 4. As such, it is
9 clear that Plaintiffs are entitled to the fees they expended on attorneys attempting to
10 retrieve the documents owed to them and to prosecute the claim for accounting. See
11 *Burch*, 92 Cal. App. 3d 128.

12 Defendant makes one last desperate argument to persuade the Court that Plaintiffs'
13 claims are not of the ilk to qualify for special damages under *Sandy Valley*. Specifically,
14 Defendant argues that only where a defendant is alleged to have engaged in "intentional
15 malicious" and "calculated" acts may attorney's fees be awarded as damages. Opp. at 8-9
16 (citing *Horgan*, 123 Nev. at 585-586). And, as the Opposition claims, because Plaintiffs'
17 causes of action do not allege such intentional and calculated behavior against Defendant,
18 they cannot claim attorney's fees as damages. *Id.* The Opposition's position is not
19 grounded in the law, however.

20 Defendant would have the Court wrongly believe that because the Nevada
21 Supreme Court had required allegations of intentional and calculated conduct in the
22

23 ⁷ Indeed, Plaintiffs' acquisition of the amendments to the Amended and Restated Option
24 Agreement were not the result of Defendant's production of documents despite multiple
25 requests for those documents in formal requests for production. See Opp. MIL #1 at 6-7.

26 ⁸ Furthermore, the Court has already determined that there exists a genuine issue of
27 material fact as to whether Pardee purchased Option Property and breached the
28 Commission Letter Agreement. Defendant's appeal to the merits of the action when the
Court has ordered that they are in dispute is not a proper basis to decide the Motion for
Leave to Amend. Defendant concedes as much when it states that the proper test to apply
to the present Motion is the same as for a motion to dismiss. Opp. at 5.

1 slander of title action in *Horgan*, that it was making a global pronouncement for all claims
2 seeking attorney's fees as damages.⁹ Defendant does not benefit from the Court
3 examining the several types of other claims, outside of the slander of title context, that the
4 Nevada Supreme Court in *Sandy Valley* held were eligible for damages in the form of
5 attorney's fees. This is because *Sandy Valley* held that there were multiple causes of
6 action not involving intentional acts which could state claims for attorney fee damages.
7 Specifically, the court stated that (1) "third-party legal disputes as a result of a breach of
8 contract or tortious conduct by the defendant" could merit such damages; (2) attorney's
9 fees may also be awarded in actions, "in which a party incurred fees in recovering real or
10 personal property acquired through the wrongful conduct of the defendant;" and (3)
11 "actions for declaratory or injunctive relief may involve claims for attorney's fees as
12 damages when the actions were necessitated by the opposing party's bad faith conduct."
13 *Sandy Valley*, 117 Nev. at 970. An examination of the language used in *Sandy Valley*
14 reveals that the Nevada Supreme Court did not limit the availability of attorney fee
15 damages to cases only involving intentional or calculated misconduct, but instead applied it
16 to cases involving "wrongful conduct" generally, including breach of contract cases such as
17 the instant action.¹⁰ *Id.*

18 Defendant's silence in considering these examples is deafening. The Court cannot
19 be persuaded by incomplete citations to the law and improper appeals to factual analyses
20 on the instant Motion. It must instead consider all of the caselaw on the subject and
21 determine whether the proposed Second Amended Complaint would be able to defeat a
22 motion to dismiss. See Opp. at 5. As has been demonstrated above, Plaintiffs have
23 adequately pleaded their entitlement to attorney's fees as damages and their claims are of
24 the type to warrant such damages.

25 ⁹ In fact, a close reading of *Horgan* confirms that the Nevada Supreme Court only made its
26 decision on a slander of title claim. The court adopted the majority view on attorney fee
27 damages in such actions and it did not consider any other types of claims in the opinion.

28 ¹⁰ The language in *Sandy Valley* also contemplates the availability of attorney fee damages
in claims seeking equitable relief, such as an accounting, where the defendant acted in bad
faith. The Court in *Burch* concluded the same. See also Opp. MIL #1 at 8-9.

2. The Proposed Second Amended Complaint Pleads the Claims for Attorney's Fees Properly, Consistent with *Sandy Valley* and the Nevada Rules of Civil Procedure

Plaintiffs and Defendant agree, "When attorney fees are alleged as damages, they must be specifically pleaded and proven by competent evidence at trial, just as any other element of damages." Opp. at 10 (citing *Sandy Valley*, 117 Nev. at 957). However, the parties disagree as to how to apply this holding. Defendant would have the Court believe that the proposed amendment is inadequate because it uses "boilerplate language," and does not contain allegations of the "attorneys' time spent, billable rate, or overall damage amount." *Id.* Defendant also argues that the proposed Second Amended Complaint is futile because it does not state "the amount of damages specific to *each claim* as required by Nevada law." *Id.* (emphasis in original). Defendant fails to cite any caselaw or other authority in support of these criticisms of the proposed amendment. Defendant cannot do so because this is not the law of Nevada.

The Court is well aware of the standard for pleading special damages. Nevada Rule of Civil Procedure 9(g) states, "Special Damage: When items of special damage are claimed they shall be specifically stated." N.R.C.P. 9(g). Interpreting N.R.C.P. 9's federal counterpart, Wright and Miller state, "Most courts now take the position that allegations of special damage will be deemed sufficient for the purpose of Rule 9(g) if they are definite enough to enable the opposing party to prepare his or her responsive pleading and a defense to the claim..." 5A Charles Alan Wright, Arthur R. Miller et al. *Federal Practice & Procedure* § 1310 (2013).¹¹ In other words, to properly plead special damages, a party's damage claims must put its opponent on notice of the damages being sought. This is consistent with Nevada's firm status as a notice pleading jurisdiction. See *Hall*, 112 Nev. at 1391.

¹¹ Federal cases interpreting the Federal Rules of Civil Procedure are "strong persuasive authority because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *Executive Management, Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal citations omitted).

1 Plaintiffs satisfactorily plead their attorney's fees as special damages in the
2 proposed amendment. Under each claim for relief, Plaintiffs allege that as a natural and
3 proximate consequence of Defendant's conduct, they have suffered damages, including
4 their expenditures of attorney's fees to prosecute their claims. These allegations place
5 Defendant on notice of Plaintiffs' damage claims as required by N.R.C.P. 9 and the
6 prevailing caselaw.¹² Therefore, since attorney's fees need to be pleaded and proven, *just*
7 *like any other element of damages*, Plaintiffs do in fact meet the standard set forth by
8 N.R.C.P. 9(g) by specifically stating the fees as a category of damages under each claim
9 for relief.

10 However, despite the legal support to the contrary, Defendant erroneously insists
11 that the proposed amendment is deficient for its failure to allege the total amount spent, the
12 billing rate, or the time spent by the attorney. See Opp. at 10. As stated above, Defendant
13 provides no support for this argument. Further, courts have outright rejected this
14 interpretation of N.R.C.P. 9(g). The Court in *Marseilles Hydro Power, LLC v. Marseilles*
15 *Land & Water Co.*, No. 00 CV 1164, 2003 WL 259142, at *6 (E.D. Ill. Feb 4, 2003)
16 emphatically rejected Defendant's position and permitted the pleading of attorney's fees as
17 damages, stating:

18 In significant part, the specificity requirement of Rule 9(g) exists
19 to give defendants adequate notice of the items of special
20 damage that a plaintiff seeks to recover... Turning now to the
21 pleading specificity of the two items of special damage that
22 remain—diminution of property value and attorneys' fees and
23 costs—the Court holds that the latter passes muster under
24 Rule 9(g), but the former does not. As a general matter, it
25 bears emphasis that "the level of specificity that must be
26 provided under Rule 9(g) is uncertain and not reducible to
27 formula. It will depend upon the nature of the claim, the type of
28 injury sustained, and the causal connection between
29 defendant's conduct and the damage." Wright and Miller,
30 § 1311 at 708. To be sure, an allegation of special damages is
31 sufficient when it notifies the defendant of the nature of the
32 claimed damages even though it does not delineate them with

12 Plaintiffs' production of their redacted attorney's fees and billing statements provides the
documentary basis for the damage claims and would allow Defendant to prepare for those
claims.

1 as great precision as might be possible or desirable. In
2 particular, the Seventh Circuit has held that an estimation of
3 final total dollar amounts lost is unnecessary.

4 *Id.*


5 Finally, Defendant's interpretation of the Rules is inconsistent with N.R.C.P. 8(a)'s
6 requirement that "Where a claimant seeks damages of more than \$10,000.00, the demand
7 shall be for damages 'in excess of \$10,000.00' without further specification of amount."
8 N.R.C.P. 8(a). Defendant cannot square its argument that Plaintiffs must specifically state
9 how much in fees they have expended when the Rules require only a general allegation
10 that the plaintiff seeks damages in excess of \$10,000.00. As such, the Court should reject
11 Defendant's arguments and hold that the proposed Second Amended Complaint
12 satisfactorily pleads attorney's fees as special damages.

13 **III. CONCLUSION**

14 Plaintiffs have been forced to engage the services of an attorney in order to gain
15 access to the tools of discovery and acquire some of the documents owed to them under
16 the September 1, 2004 Commission Letter Agreement. As such, they are entitled under
17 Nevada law to claim such fees as an element of damages. Because Defendant would not
18 be prejudiced by permitting Plaintiffs to file a Second Amended Complaint, Plaintiffs
19 respectfully request the Court grant the Motion to File a Second Amended Complaint.

20 DATED this 23rd day of April, 2013.

21 JIMMERSON HANSEN, P.C.

22 
23 JAMES J. JIMMERSON, ESQ.
24 Nevada State Bar No. 000264
25 LYNN M. HANSEN, ESQ.
26 Nevada State Bar No. 000244
27 JAMES M. JIMMERSON, ESQ.
28 Nevada State Bar No. 12599
415 South Sixth Street, Suite 100
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Attorneys for Plaintiffs
JAMES WOLFRAM and WALT WILKES

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 Facsimile (702) 387-1167

CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT was made on the 23rd day of April, 2013, as indicated below:

 X By first class mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P. 5(b) addressed as follows below

 X By facsimile, pursuant to EDCR 7.26 (as amended)

 By receipt of copy as indicated below

Pat Lundvall, Esq.
Aaron D. Shipley, Esq.
MCDONALD CARANO WILSON, LLP
2300 W. Sahara Ave., Suite 1000
Las Vegas, NV 89102
Attorneys for Defendant
Fax No.: 702-873-9966


An employee of JIMMERSON HANSEN, P.C.

Exhibit 1

Exhibit 1

1 THE COURT: I saw some of them have already
2 been filed under seal. Am I right? When I was
3 looking --

4 MR. JIMMERSON: We were trying to comply with
5 that, put them in envelopes, you know.

6 THE COURT: Right. I did see that. Is that
7 kind of moot now or do we still need --

8 MR. JIMMERSON: There's not a formal order in
9 place. We don't have any objection as long as it
10 doesn't interfere with the normal preparation of a case
11 or an expert, you know, handling that.

12 And in that regard, I did want to ask, with the
13 delay of the trial by two months, are we now delaying or
14 slipping other dates, like disclosure of expert
15 witnesses and other items approximately in the same time
16 period?

17 MS. LUNDVALL: There would be no agreement, at
18 least from Pardee, that the extension of discovery would
19 be -- or the discovery close, which is already closed,
20 would be extended or anything of that nature. The time
21 frames for disclosure of expert witnesses is long, long
22 ago past. We would not agree.

23 MR. JIMMERSON: That's true. I'm just asking
24 is the cutoff of discovery in place or not? There
25 wouldn't be a particular reason why it would still

Exhibit 2

Exhibit 2

James M. Jimmerson, Esq.

From: James Jimmerson [jjimmerson@gmail.com]
Sent: Monday, April 22, 2013 3:58 PM
To: James M. Jimmerson, Esq.
Subject: Fwd: Wolfram v. Pardee

----- Forwarded message -----

From: James Jimmerson <jjimmerson@gmail.com>
Date: Tue, Apr 16, 2013 at 4:53 PM
Subject: Wolfram v. Pardee
To: Aaron Shipley <ashipley@mcdonaldcarano.com>
Cc: Pat Lundvall <plundvall@mcdonaldcarano.com>, jjj@jimmersonhansen.com, Kim Stewart <ks@jimmersonhansen.com>, ss@jimmersonhansen.com

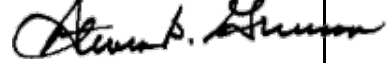
Aaron,

I still haven't spoken to Walt yet. I don't know if he's out of the hospital yet. As soon as I know anything I'll update you and we can talk dates we are all free to preserve testimony.

Now that we have a new trial date, would you and Pat want take discovery on certain things, including the damage issues discussed in the recent court papers? With five months between now and trial we have plenty of time to do any cleanup either side feels is necessary (even some expert discovery if you felt it necessary). Please let me know your and Pat's thoughts.

Thanks.

-Jim



DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM, et al.,)
Plaintiffs,)
vs.) CASE NO. A-10-632338-C
PARDEE HOMES OF NEVADA, et al.,) DEPT. NO. IV
Defendants.) **ORIGINAL**

REPORTER'S TRANSCRIPT OF PROCEEDINGS
BEFORE THE HON. KERRY EARLEY, DISTRICT JUDGE

On Friday, April 26, 2013

At 8:30 a.m.

APPEARANCES:

For the Plaintiffs: JAMES M. JIMMERSON, ESQ.
LYNN M. HANSEN, ESQ.

For the Defendants: PATRICIA K. LUNDVALL, ESQ.
AARON D. SHIPLEY, ESQ.

Reported by: Jennifer D. Church, RPR, CCR No. 568

Jennifer D. Church, CCR No. 568
District Court, Dept. IV

1 FRIDAY, APRIL 26, 2013, 8:30 A.M.

2 LAS VEGAS, NEVADA

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4 MS. LUNDVALL: Good morning, Your Honor. Pat
5 Lundvall from McDonald Carano Wilson, here on behalf of
6 Pardee Homes of Nevada. With me here today is Aaron
7 Shipley.

8 MR. SHIPLEY: Good morning.

9 MR. JIMMERSON: Your Honor, Jim Jimmerson and
10 Lynn Hansen on behalf of plaintiffs.

11 THE COURT: Good morning.

12 MS. HANSEN: Good morning.

13 MR. JIMMERSON: Well, Your Honor, we're here,
14 as you said, on the motion for leave to file a Second
15 Amended Complaint. Specifically the amendments go to
16 plaintiffs' claims for damages. The principal one is
17 claims for attorneys' fees. This has been briefed at
18 length in the motions for summary judgment, the motions
19 in limine, and now this motion for leave to file the
20 Second Amended Complaint.

21 The question before you is whether or not this
22 is the type of case, as pled in the proposed Second
23 Amended Complaint, falls under the Sandy Valley rules as
24 delineated, specifically whether or not the damages were
25 proximately and necessarily caused by the actions of the

1 opposing party, and the fees were a reasonably
2 foreseeable consequence of the --

3 THE COURT: The natural and proximate
4 consequence of the injurious conduct.

5 MR. JIMMERSON: Exactly.

6 THE COURT: I got it. I read this case very
7 carefully.

8 MR. JIMMERSON: And you should because it talks
9 about a lot of different things.

10 THE COURT: Honestly, it's an excellent case.
11 I'm glad the defendants brought it to my attention
12 because I always thought the same thing if you pled it
13 as damages. That's not what this case says.

14 MR. JIMMERSON: Exactly. You actually need to
15 plead some facts, as you talked about. You need to talk
16 about what the facts are.

17 THE COURT: And it has to apply to the cause of
18 action.

19 MR. JIMMERSON: So the opposition to our motion
20 actually doesn't reference any of the facts we talk
21 about in the proposed Second Amended Complaint, which
22 really are just a restatement of the initial and Amended
23 Complaints, specifically as to the necessity of
24 employing an attorney, filing suit, gaining access to
25 the tools of discovery, and then ultimately appealing to

1 you, Your Honor, to compel an accounting of the records
2 and other information to reveal the information that
3 should have been given to our clients and were owed to
4 them under the September 1, 2004 commission letter
5 agreement.

6 THE COURT: The agreement, the September 1,
7 2004 agreement.

8 MR. JIMMERSON: Exactly. The proposed Second
9 Amended Complaint goes on at length talking about the
10 letters, the communications back and forth between our
11 clients and Pardee, our clients and the two title
12 companies, our clients going to the county recorder's
13 office trying to get information that they were owed
14 about these land transactions.

15 So the question --

16 THE COURT: Whether they are or are not owed
17 commissions.

18 MR. JIMMERSON: Exactly. But the commissions
19 are independent -- are not part of this motion
20 particularly because --

21 THE COURT: I understand.

22 MR. JIMMERSON: -- you know, we're only talking
23 about the other additions.

24 THE COURT: The attorneys' fees.

25 MR. JIMMERSON: Exactly. So the question

1 before you is whether or not the facts as pled establish
2 the necessity and the proximate nature of these
3 attorneys' fees.

4 And as Sandy Valley explains, there are just
5 one or two different types of cases. So it's not a case
6 of an insurance company breaching their duty to defend
7 or someone trying to recover real property. Including
8 those two, there's also one more type of case
9 Sandy Valley explicitly talks about, and that is cases
10 appealing for injunctive or declaratory relief.

11 An accounting is exactly that. It is a
12 mandatory injunction, you compelling a party to produce
13 records, produce summaries, and, if necessary, to
14 account for any difference in monies owed. So
15 ultimately it is an equitable form of relief that only
16 you can grant. No one else can give our clients the
17 information that they are owed. Okay.

18 Furthermore, as to getting other information to
19 establish the basis, okay, to prove that they actually
20 did not do what they were supposed to do, to get the
21 information they were owed, we're allowed, under the
22 discovery rules, to subpoena third parties, request for
23 production from the defendant. And these are only
24 things that you can get after you employ an attorney and
25 file suit.

1 The question is was this necessary? And the
2 facts as pled establish that it was. There was no other
3 way for our clients to get the information that they
4 were owed.

5 As proof, just look to the Coyote Springs
6 production. We didn't get the documents from defendant.
7 We got the documents from a third party, the
8 counterparty on these eight amendments to the restated
9 and amended option agreement. If we didn't have that
10 power to go get it, we wouldn't know what was going on.
11 We wouldn't even be here.

12 So the question before you, okay -- and
13 Sandy Valley does not apply to all of our fees. It only
14 applies to the fees necessary for each claim.
15 Particularly of importance is the claim for accounting.
16 And at trial you would make the determination as to what
17 the fees were as applied to that claim.

18 THE COURT: You would have to put the evidence
19 in, I understand.

20 MR. JIMMERSON: Exactly. And much of that
21 evidence has been produced at the other side.

22 THE COURT: I saw one discovery.

23 MR. JIMMERSON: Exactly. They have all of the
24 bills.

25 THE COURT: The supplement discovery.

1 MR. JIMMERSON: Exactly.

2 THE COURT: Well, up to February, I think you
3 said.

4 MR. JIMMERSON: And we will supplement as
5 necessary. The Court has continued trial. So we
6 would -- as each month goes by, we'll produce a new
7 redacted billing statement, cost statement.

8 So the question ultimately then is do we plead
9 consistent with Sandy Valley? The answer is yes. Their
10 only criticism is that we don't say the billable rate,
11 we don't say the number of hours, we don't say the total
12 amount expended. That's not necessary. Nevada Rules of
13 Civil Procedure 8(a) says when you claim damages, all
14 you need to say is that damages exceed \$10,000.

15 There is no statement in Sandy Valley that
16 talks about the need to talk about billable rates or
17 specify the exact amount of damages. There's no Nevada
18 case law that supports that proposition.

19 And, as we've discussed, the discovery solves
20 any problem. We put them on notice of the specific type
21 of damages, that is, attorneys' fees. And we have
22 provided them supplements to the 16.1 disclosures, which
23 include all the billing statements, which have the time,
24 the billing rate, the total amount, and exactly what
25 happened, with the exception of redacting privileged

1 material.

2 So the next question you have before you is
3 whether or not this is unduly prejudicial, specifically
4 to the issue of their ability to conduct the discovery
5 that they wish. Okay.

6 Now, had we had trial back in December, you
7 know, or back in January, I believe, before they had
8 construction and had the other problems to actually get
9 on this court's docket, perhaps there would have been an
10 issue, okay, because there was a very late disclosure.
11 However, plaintiffs have not been -- have been anything
12 but willing to give them the discovery they need. Okay.

13 As you will remember from the December 6, 2012
14 status conference, counsel for plaintiffs specifically
15 suggested, Can we push some of the discovery deadlines,
16 even suggested expert discovery. And counsel for
17 defendant refused that, said there would be no agreement
18 as to that discovery.

19 Well, they had the records then for over two
20 months. If they weren't willing to accept discovery
21 then, why can they now say, "Well, we weren't given
22 discovery on this" to prevent filing of the Second
23 Amended Complaint.

24 More importantly, though, a week ago on
25 Tuesday, I sent an e-mail to opposing counsel asking

1 them, Okay, would you be willing to reopen discovery for
2 the issues that were raised in the recent motions,
3 solving any prejudicial -- any potential prejudicial
4 problems? That e-mail went unanswered. How many times
5 do we need to offer to give them the discovery they are
6 requesting.

7 If you have the discretion, which the Nevada
8 Supreme Court has been very clear about, to grant this
9 motion, okay, you also have the discretion to --

10 THE COURT: To open discovery for those issues.

11 MR. JIMMERSON: Exactly.

12 THE COURT: I thought of it before I even saw
13 your reply.

14 MR. JIMMERSON: So that's --

15 THE COURT: That's one of the issues I saw.

16 MR. JIMMERSON: And we would not be suggesting
17 reopening discovery for everything.

18 THE COURT: No. It would only be opening
19 discovery for damages specifically to these attorney
20 damages that you say flow.

21 MR. JIMMERSON: Exactly, Your Honor.

22 THE COURT: Of course not. There's no grounds
23 to do that. That wouldn't be fair to them.

24 MR. JIMMERSON: Exactly. It wouldn't be
25 economical either.

1 THE COURT: It wasn't necessarily their fault
2 that the trial had to be continued. So I certainly
3 would not do that. Okay.

4 MR. JIMMERSON: But you have the ability to
5 solve those problems.

6 THE COURT: I find those two issues. The first
7 issue we talked about, whether it would be futile -- and
8 I understand that -- to allow the Amended Complaint.

9 MS. LUNDVALL: Your Honor --

10 THE COURT: I'm going to let you talk. What I
11 wanted to say, these are my two issues. If there's
12 another one, let me know, is what I was doing.

13 I have the futile issue under Sandy Valley,
14 which you brought up. I then perceive the second issue
15 is the prejudice. Those were the issues I focused on.
16 I think there was one more, but I wanted to make sure we
17 addressed them all.

18 MR. JIMMERSON: There was the issue of
19 timeliness, but that was brought in under the
20 prejudicial aspect of it. And as the Court saw from the
21 case law, there has not been a single case which said
22 because they have exceeded the time for motion for leave
23 to amend, then automatically it bars it, or there's been
24 no basis -- even the case law they cite does not stand
25 for that if you file a motion for leave to amend the day

1 after, it is automatically barred or that automatically
2 causes prejudice.

3 It really is, again, in your discretion. And
4 as I quoted from two different cases, when you have such
5 an identity of issues from the original or initial
6 Complaint to a proposed Amended Complaint, like we
7 have -- as you observed, we pled the need for attorneys'
8 fees under each claim before -- they were on notice.
9 This is not something that's coming out of left field.
10 This really is something that we have been discussing
11 about and has been on the radar for six months now.

12 So this is something that we can easily solve,
13 if necessary, with limited discovery. And the Court
14 would be able to address that. And because NRCP 15(a)
15 really does say when justice so requires, leave shall be
16 freely given, this mandate shall be heeded.

17 This is something that the Court should grant
18 leave to amend. And NRCP 1 is very clear these rules
19 are supposed to be interpreted to ensure the just and
20 speedy and cost efficient resolution of these matters.
21 This would be such a solution.

22 THE COURT: Okay. All right. Thank you.
23 We've got the same three issues. So -- and I do want to
24 thank you for your pleadings. It was so great to have
25 pleadings that addressed the three issues. Thank you,

1 both parties.

2 MS. LUNDVALL: Sure enough.

3 THE COURT: I want to commend all of you. It's
4 very, very helpful.

5 MS. LUNDVALL: Your Honor, as much as I
6 genuinely like opposing counsel, I have to tell you that
7 I do believe that their written presentation and now
8 listening to their oral presentation, there's a
9 fundamental dishonesty within that presentation. And
10 let me as far as explain why, if the Court will allow me
11 to approach the bench.

12 THE COURT: Absolutely. I want a full hearing.

13 MS. LUNDVALL: I'm going to hand the Court a
14 copy of the Amended Complaint, which is the operative
15 Complaint, and I'm also going to hand the Court a copy
16 of the Second Amended Complaint, which is their
17 proposed.

18 THE COURT: Proposed.

19 MS. LUNDVALL: And I brought copies for counsel
20 as well.

21 When you compare and contrast the Amended
22 Complaint against their proposed Second Amended
23 Complaint, one would assume from their written
24 presentation, as well as now this oral presentation,
25 that the only thing different that you are going to see

1 is proposed amendments that deal with attorneys' fees as
2 special damages. That's not accurate.

3 THE COURT: Because that was --

4 MS. LUNDVALL: That's correct.

5 THE COURT: That's what the briefing is on.

6 MS. LUNDVALL: So if I can get the Court to
7 turn to page 4 --

8 THE COURT: Of the proposed?

9 MS. LUNDVALL: Of the proposed.

10 THE COURT: What you highlighted in yellow?

11 MS. LUNDVALL: What I've highlighted in yellow.

12 As Paragraph No. 19, that is the paragraph that deals
13 with the attorneys' fees.

14 THE COURT: Do you mind if I read it real
15 quick? Okay.

16 MS. LUNDVALL: All right. At Paragraph No. 20,
17 though, Paragraph 20 is all brand-new, and there's been
18 no mention whatsoever made of Paragraph 20, whether it
19 be in the written presentation or the oral presentation
20 to the Court.

21 And this is what Paragraph 20 says, that the
22 plaintiffs themselves have been forced to expend a
23 significant amount of time and effort attempting to get
24 the information owed to them from alternative sources.
25 Plaintiffs have been damaged, therefore, in the amount

1 of their fair hourly time in attempting to acquire the
2 information and documents owed to them.

3 THE COURT: You know, I read that paragraph.
4 Here's how I interpreted it and maybe the plaintiffs --
5 I interpret it meaning they had to have their attorneys
6 because they don't -- I did not interpret it, especially
7 when I saw the hourly rate, I, of course, looked at it
8 thinking who charges an hourly rate? Attorneys.

9 So I, honestly, kind of put 19 and 20 together
10 as just another saying, okay, they couldn't get it
11 themselves and -- you know, I read a lot of facts, but
12 as I recall, they said they tried. I'm not a
13 fact-finder yet. I understand all that. But I remember
14 at our long hearing what they said they had to do
15 because they didn't get certain documents. I think they
16 said they went down to the recorder's office, I'm
17 recalling. It was a long hearing.

18 So I did interpret, because I did read these,
19 20, as meaning just an extension of them going to be
20 putting into evidence that the law firm of Jimmerson --
21 or I don't know if another firm had it before. I'm not
22 quite sure. Probably not -- that that -- I didn't
23 interpret it that they are going to testify on the stand
24 and say, I want to be reimbursed because I'm a real
25 estate broker and I make \$200 an hour as a real estate

1 broker and because I had to go down to the recorder's
2 office or I had to do this amount of time to get these
3 documents pertaining to my agreement, that they were
4 going to look for those damages.

5 Because the way you are saying it, that's what
6 you think it says. Right?

7 MS. LUNDVALL: That's what they say it says.

8 THE COURT: I don't know that, because that
9 would be a different thing. And in all honesty, I look
10 in terms of this, Counsel, as what is going to get into
11 evidence at trial, whether I would think that was
12 appropriate. I know pleading it, I did not read it that
13 way. I did not look for case law, honestly, to
14 interpret it that way. I didn't look to see if that
15 would be appropriate, if that's a -- I don't know. I'm
16 not sure that flows in the contract. I did not look at
17 that issue, I'll be honest. And I'm one that won't give
18 you an answer off the top of her head.

19 I know I've had a lot of economic loss stuff
20 recently when people are trying to get out of tort
21 claims, when there's just economic loss, they are trying
22 to say that it's not just -- I mean, I've had a lot of
23 this overlapping with economic loss recently. So I've
24 really been focusing on damages, which is something very
25 interesting.

1 So I don't read it that way, but I see
2 literally that that's what you are saying. You are
3 saying 20 would not be fair or is not what your
4 understanding is of the motion papers.

5 MS. LUNDVALL: Yes, Your Honor. And let me see
6 if I can't put their allegation into context and why --

7 THE COURT: I did not read it that way either.
8 I will fairly tell you that. I read it -- you know, I
9 saw the hourly rate.

10 MS. LUNDVALL: -- why I do believe that they
11 are talking about something separate, and that what they
12 want to do is to put Mr. Wolfram on the stand, put
13 Mr. Wilkes on the stand, and to say: I'm a real estate
14 professional. I had to incur my time. My time has this
15 value. I incurred 40 hours in doing this. And,
16 therefore, to try to quantify that in some fashion.
17 That's what this goes to.

18 And how do I know that that's what it goes to?
19 On the very last day of discovery, we got a disclosure
20 from them.

21 THE COURT: That's not the fifth one. Is that
22 one after the fifth one?

23 MS. LUNDVALL: That would be -- we appended it
24 as Exhibit C to our opposition, Your Honor. And you are
25 right, it is the fifth one.

1 THE COURT: Okay. You realize you guys have a
2 lot more discovery than I do. I'm not privy. I just
3 look at timing of what was --

4 MS. LUNDVALL: And when you go to Exhibit C --

5 THE COURT: I apologize, mine aren't tabbed.
6 So let me find it real quick. I have it. What page?

7 MS. LUNDVALL: Page 8 of Exhibit C.

8 THE COURT: Okay.

9 MS. LUNDVALL: They go through a long
10 explanation about why they are entitled to attorneys'
11 fees, and then they go to line number 17, where they
12 talk about plaintiffs must be compensated for the time
13 and effort expended attempting to discover from public
14 records what information was owed to them under the
15 commission letter. So --

16 THE COURT: I assume you didn't ask in
17 discovery any questions.

18 MS. LUNDVALL: Discovery is now closed.

19 THE COURT: I know. I do have the timetable in
20 my head. I did not read or focus on that.

21 MS. LUNDVALL: So from my perspective, this
22 is -- had we been on notice that the plaintiffs
23 themselves, individually, wanted to be compensated for
24 their time, during their depositions I would have liked
25 to ask them, all right, What qualifications do you have?

1 What --

2 THE COURT: You would have had to ask them
3 that.

4 MS. LUNDVALL: Absolutely.

5 THE COURT: I totally understand that. That's
6 a whole different issue, and that's why I asked if you
7 probably were not aware of that. So I assume their depo
8 was taken before the supplement.

9 MS. LUNDVALL: Absolutely.

10 THE COURT: Because I saw it was -- that's
11 always an issue. It happened to me a lot. We do it.
12 We look and we see our discovery deadline, and we all
13 try to do our last supplements to get as many ducks in a
14 row before discovery cutoff, and I always had that
15 issue. You would get a lot of additional things or
16 supplement in that last one right before discovery
17 cutoff. I always had that issue in my head, Wait a
18 minute, now discovery cutoff, they have new.

19 And what I would always do is go -- and to be
20 honest, parties are very good about stipulating, Hey, I
21 had not heard about these documents or I had never seen
22 when you compare, I need to open discovery for these
23 issues. And if not, if you go in front of the Discovery
24 Commissioner, in my experience, and I know from talking
25 to them, they will let you -- you know, so I understand

1 what you are saying on that part. Okay.

2 MS. LUNDVALL: So --

3 THE COURT: So that's two issues.

4 MS. LUNDVALL: So you have really two issues.
5 The first one, when it comes to the attorneys' fees,
6 what they try to do to get -- because there's a number
7 of reasons, and undue delay is one of the reasons that
8 the court cites for why an amended pleading should not
9 be accepted, particularly at the late stage in the
10 litigation.

11 Now, they try to explain away the undue delay
12 in bringing their proposed Second Amended Complaint by
13 trying to foist it on me, saying that at the hearing I
14 was the one that contended that they had not adequately
15 pled attorneys' fees as special damages.

16 THE COURT: You put it in part of a motion
17 in limine.

18 MS. LUNDVALL: Exactly. But they offered no
19 explanation whatsoever, none, zippo, nada, why
20 information that was solely within their control about
21 seeking this form of discovery was not set forth as a
22 special damage under the Complaint at any time before.

23 THE COURT: I think they probably, you know --

24 MS. LUNDVALL: There is no explanation as far
25 as that they've offered to the Court to be able to

1 explain that away. And, therefore, that constitutes
2 undue delay.

3 THE COURT: What did you think? Counsel, you
4 got this October 26, 2012. You got that. And once
5 again, I understand it was before discovery. They
6 produced documents of the Jimmersons' billing. What did
7 you think at that time, Counsel?

8 I mean, I'm sure that's where you said, Oh,
9 wait a minute, how are they going to collect this? How
10 did they plead that? I know how litigation works. I
11 would have said, Okay, how is this relevant? They are
12 only going to be producing relevant things. I assume
13 that's when the issue came in.

14 And in all honesty, you and I both know the
15 agreement of September 1, 2004 allows attorneys' fees
16 for either side. So we know attorneys' fees are going
17 to come in. They were either going to come in if
18 there's a breach, when they find that, or the real issue
19 now is are they going to come in also as special
20 damages. There's two ways it's going to come in.

21 So I was thinking in my mind when you got those
22 billing fees, you were thinking, Hey, if we lose at
23 trial, it does allow. Am I correct, Counsel?

24 So just like the case talks about, there's two
25 ways to get attorneys' fees, through a contract and

1 agreement, a statute, you know, or pleading them as
2 special damages.

3 So my biggest concern on the undue delay and
4 prejudice was they were -- they did identify billing
5 records before and that was October 26, 2012. So like I
6 said, based on my experience -- I understand it was two
7 or three days before discovery cutoff -- three days
8 before discovery cutoff when I went through it. And I
9 understand that is frustrating.

10 But whether you do or not get to do discovery,
11 I do know that the mechanism is to ask them, and I'm --
12 I have a question here: Did you ask anyone at the
13 Jimmerson firm, saying, Hey, these are new documents,
14 these are billing records from you, I would like to open
15 discovery on that, or anything like that?

16 Or did you go -- I mean, did they not stipulate
17 to do it? Did you go to any Discovery Commissioner when
18 they wouldn't? Was any of that done? Because I'm not
19 aware of a lot of discovery stuff, so I did want to ask
20 you that. That's one of my questions that I'm
21 considering on the delay and the prejudice.

22 MS. LUNDVALL: Your Honor, if I can explain
23 then from the standpoint --

24 THE COURT: Sure. That's a factual -- I could
25 not find it in the pleadings and, you know, I have

1 pleadings in front of me with the facts that counsel
2 gives me. So that was one question I had.

3 MS. LUNDVALL: All right. From our
4 perspective, this is what we did in response to the late
5 disclosure that they gave in their Rule 16.1.

6 THE COURT: In their fifth supplement?

7 MS. LUNDVALL: Yeah, in their fifth supplement.
8 They identified these attorneys' fees and the billing
9 statements, and they now claim this is somehow special
10 damages. They made a vague reference to these, you
11 know, compensating themselves for their time.

12 What our response back to that was to look to
13 see whether or not that those were recoverable forms of
14 damage. And we set forth, not only in our motion for
15 summary judgment papers these issues, but also we have a
16 motion in limine before the Court to say, You know what,
17 we're not going to permit ourselves to be put into a box
18 of waiting until the time of trial for them to try to
19 introduce this evidence that we think is futile because
20 these claims are not recoverable.

21 THE COURT: But, Counsel, they were going to
22 put that in anyway under the attorneys' fees section
23 because you already knew about this. It's the same
24 facts. It's whether they have a legal theory two ways.
25 Again, we're back to facts.

1 But it's the same factual basis whether they
2 are covered under the agreement, which you were aware
3 of, which, you know, as that paragraph says, the
4 prevailing party shall be awarded reasonable attorneys'
5 fees and costs, and this agreement is the whole basis of
6 the lawsuit. So you were aware of that.

7 MS. LUNDVALL: There's no question about that
8 whatsoever.

9 THE COURT: Right. You just were not aware
10 they were going to do it as special damages.

11 MS. LUNDVALL: Well, that's what I mean.
12 There's a huge difference with a distinction there, and
13 let me explain what that distinction with a difference
14 is.

15 THE COURT: What's the factual basis?

16 MS. LUNDVALL: The factual basis difference is
17 this: They have an opportunity post trial to file a
18 motion to recover attorneys' fees as costs under
19 Sandy Valley. Sandy Valley says as a cost of
20 litigation, if you prevail --

21 THE COURT: What's the --

22 MS. LUNDVALL: If they prevail, then, in fact,
23 that they've got the ability by which to do so.

24 THE COURT: Correct. And if you prevail, you
25 are going to do the same thing.

1 MS. LUNDVALL: Exactly, exactly.

2 THE COURT: I understand that. Absolutely.

3 MS. LUNDVALL: So the --

4 THE COURT: But what's the factual difference
5 whether you do it post trial or you do it in discovery?
6 What would they produce that would be different?

7 Let's say they win the case, and they are going
8 to come to this Court and say, Here's our agreement,
9 Judge. Based on the agreement, you get attorneys' fees.
10 What factual evidence would they give me that is
11 different from what they would give you if they were
12 allowed special damages for attorneys' fees? Are they
13 limited in some respect, the attorneys' fees?

14 MS. LUNDVALL: Significantly. And let me tell
15 you where I'm coming from for this. For them to prove
16 up their claims at trial --

17 THE COURT: For special damages?

18 MS. LUNDVALL: Let me talk just generally.

19 THE COURT: Okay. Under the contract.

20 MS. LUNDVALL: Under the contract they have to
21 demonstrate that there was a valid contract. They have
22 to demonstrate that there was breach of the contract.
23 And they have to demonstrate that they have been damaged
24 as a result of that breach.

25 THE COURT: Right. I understand contract law.

1 I do understand.

2 MS. LUNDVALL: I'm not trying to --

3 THE COURT: What is the difference with the
4 attorneys' fees?

5 MS. LUNDVALL: Because if, in fact, they go to
6 trial and at the time of trial they offer no damage
7 evidence, no damage evidence --

8 THE COURT: Meaning --

9 MS. LUNDVALL: If they offer no damage
10 evidence, they failed in an essential element of their
11 claim.

12 THE COURT: Of their contractual damages?

13 MS. LUNDVALL: Of their contractual damages.
14 They've failed in an essential element of their claim.

15 THE COURT: So you are worried that you may
16 beat them at the contract, but you are not going to beat
17 them at the special damages.

18 MS. LUNDVALL: Precisely.

19 THE COURT: I'm following you. So that's why
20 these special damages are -- I get it. That's the
21 difference. It's not a factual basis. It's a
22 distinction on what happens with the evidence at trial.

23 MS. LUNDVALL: Exactly.

24 THE COURT: I'm following you.

25 MS. LUNDVALL: That, to me, is a huge

1 difference with the distinction in this context.

2 THE COURT: As far as your prejudice?

3 MS. LUNDVALL: That's correct, as to what our
4 prejudice would be.

5 THE COURT: Another element of damages that
6 they can collect. All right.

7 MS. LUNDVALL: All right. So from this
8 perspective, what you have to do then is to take a look
9 at Sandy Valley. That's the one thing that I think that
10 our Nevada Supreme Court is trying very hard to do, is
11 to try to educate counsel. And they even identified in
12 Sandy Valley that the law was a bit of a mishmash and
13 that they are taking this opportunity then to try to
14 educate the practitioners in District Court what is the
15 difference between a cost -- for attorneys' fees as a
16 cost of litigation that you get post trial or as special
17 damages?

18 And it looks like that the Court has the
19 decision --

20 THE COURT: I do.

21 MS. LUNDVALL: -- before you.

22 THE COURT: I've read it and I've got the
23 appropriate part.

24 MS. LUNDVALL: There's a headnote that is under
25 13 and that headnote 13 --

1 THE COURT: What page, because I --

2 MS. LUNDVALL: Mine is a printed copy from
3 Westlaw.

4 THE COURT: I have it.

5 MS. LUNDVALL: It looks like 957 would be
6 the --

7 THE COURT: Okay. That would help me. What I
8 have goes from 965 to 970-something. Can you help me?

9 MS. LUNDVALL: Do you have a headnote 13?

10 MR. SHIPLEY: It would be 969.

11 MS. LUNDVALL: Page 969.

12 THE COURT: That, I do have. I will find it.
13 I've got it. Okay. Headnote 13. Oh, my gosh, it's
14 what I underlined. Okay.

15 MS. LUNDVALL: You know, the last sentence of
16 that paragraph, I think, is informative to begin with,
17 because the Court starts out stating then very
18 specifically: Because parties always know that lawsuits
19 are possible when disputes arise, the mere fact that a
20 party was forced to file or defend a lawsuit is
21 insufficient to award attorneys' fees as damages.

22 All right. So --

23 THE COURT: I understand that.

24 MS. LUNDVALL: What have we heard from counsel?
25 "Well, we couldn't get the documents" -- they claim,

1 which we disagree with wholeheartedly.

2 THE COURT: I know there's a factual dispute.

3 MS. LUNDVALL: -- "from Pardee, so we were
4 forced to file litigation." That puts them square
5 within this statement from the Court, the fact that "we
6 were forced to file litigation."

7 THE COURT: Then I want you to address this: I
8 read all this, but when I look at what the case is based
9 on, which is this September 1, 2004 agreement -- we all
10 know that.

11 MS. LUNDVALL: Yes.

12 THE COURT: We know this very well. Right? We
13 learned it -- okay.

14 What it says, and this is my concern, because
15 when you look at the standard, the mere fact that a
16 party was forced to file or defend a lawsuit is
17 insufficient to support an award of attorneys' fees. I
18 understand that completely.

19 And also at the last time, just the general
20 prayer for relief for attorneys' fees, I, in my mind,
21 had not read this and I was thinking that I'm going,
22 Wait a minute, each one of their complaints -- so I very
23 much appreciate this. There is a huge distinction, and
24 I understand the Nevada Supreme Court is saying that.

25 But what they are saying is if you want -- if a

1 party wants attorneys' fees as a special damage, they
2 must be the natural and proximate consequence of the
3 injurious conduct and they have to be reasonably
4 foreseeable.

5 Here's what I'm looking at, so this is what I
6 want addressed. One of the major allegations in here
7 is, in addition, and it's part of their -- Pardee --
8 which is your client -- shall keep each of you -- which
9 are the two plaintiffs -- reasonably informed as to all
10 matters relating the amount and due dates of their
11 commission payments.

12 MS. LUNDVALL: That's correct.

13 THE COURT: That is a breach. What did they
14 have to do to do that? From the facts I see, they tried
15 on their own, which is interesting, because now we have
16 that issue on whether they get special damages for what
17 they did, which I understand, and they also hired
18 Mr. Jimmerson's firm because -- to help them get --
19 because what they needed is, What is going on here? You
20 know, Pardee, did you sell this, did you sell that? Do
21 we owe anything more? And they were not -- if a jury
22 disagrees with me then -- I'm not a fact-finder.

23 I have to just look at this as what facts will
24 get into evidence. I'll be the fact-finder at the bench
25 trial, but I'm not -- I'm just trying to look at the

1 evidence that will get in.

2 And that is a breach. If that wasn't in there,
3 this would be much harder, I have to agree, because I
4 would have been on the fence a little bit, but that's
5 one of the breaches as part of their lawsuit is, We had
6 to bring this lawsuit because we're saying a breach of
7 it is -- you had a duty under this contract to keep
8 fully informed.

9 MS. LUNDVALL: I know, but --

10 THE COURT: So that is a separate breach.
11 That's not just bringing a lawsuit that we all may
12 have -- people do, you know, to get their damages from a
13 different cause of action. This goes to the heart of
14 their claim, a breach of the contract. That's entirely
15 different to me.

16 MS. LUNDVALL: May I --

17 THE COURT: I just want you to understand. I
18 certainly want you to address this because, you know, I
19 agree it's not easy. I've looked at this every which
20 way I can.

21 Like I said, I go back to this, and when I look
22 at Sandy Valley, they say when attorneys' fees are
23 considered an element of damages -- which is why we're
24 here -- they must be the natural and proximate
25 consequence of the injurious conduct. And this is a

1 breach.

2 Now, tell me why it doesn't flow from this so I
3 can --

4 MS. LUNDVALL: Two responses as far as to that,
5 Your Honor. First, from a substantive standpoint, I did
6 not bring that commission agreement, but I have that
7 provision, you know, pretty well memorized. Okay.

8 THE COURT: I bet you do.

9 MS. LUNDVALL: So they are supposed to be
10 reasonably informed of all the commissions that they
11 are --

12 THE COURT: All matters relating.

13 MS. LUNDVALL: All matters, okay. They
14 received information for every single commission that
15 was due and owing to them.

16 THE COURT: That's your position.

17 MS. LUNDVALL: That's our position. Now, what
18 their position now in the case is, We wanted to know
19 about other things that CSI -- which was Coyote
20 Springs -- and Pardee were doing to confirm.

21 THE COURT: I don't know that. I can find that
22 out in evidence, but I don't know that here.

23 MS. LUNDVALL: I agree. But the point I'm
24 trying to make, and I don't want the Court as far as to
25 come in to our bench trial with --

1 THE COURT: I don't want tunnel vision at all.

2 MS. LUNDVALL: But the point is this, is that
3 their position now is, We wanted to be able to confirm
4 from these other transactions that we weren't entitled
5 to a commission on those. That we were not entitled to
6 a commission on those. That --

7 THE COURT: Or were, if they weren't.

8 MS. LUNDVALL: Hold on. So from that
9 perspective, the question becomes whether or not that
10 they are entitled to information on transactions for
11 which they were not entitled to a commission.

12 Coyote Springs and Pardee entered into many
13 contractual arrangements whereby there was
14 confidentiality clauses that said these documents are to
15 be kept as confidential between the parties, and it had
16 nothing to do with the plaintiffs and their entitlement
17 to commission.

18 THE COURT: But they didn't know that, Counsel.
19 That's what they were trying to find out to make sure
20 they were reasonably informed.

21 MS. LUNDVALL: They asked Pardee and Pardee
22 told them. They never went to Coyote Springs to ask
23 them. But the point, though, I think, that is -- let me
24 back up. They never --

25 THE COURT: You are just giving me a question

1 of fact for the bench trial.

2 MS. LUNDVALL: Precisely.

3 THE COURT: But I can't use that to not grant a
4 leave to amend. What they put in there, they may not
5 win at trial. They may not even have evidence at trial.
6 You may put on evidence that they weren't entitled to
7 any of these. I don't know there.

8 So I'm just looking at it in terms of pleading
9 and whether they come in.

10 MS. LUNDVALL: I understand.

11 THE COURT: That has to be my focus today.

12 MS. LUNDVALL: Then let me go back.

13 THE COURT: So that's why I want this. Whether
14 they prevail or not or whether your client, you know,
15 gave them what they deserve, those are all questions of
16 fact for the bench.

17 MS. LUNDVALL: May I go back then to
18 Sandy Valley? That gets to the legal issues and their
19 pleadings then, for which we are not talking about any
20 issues of fact. What I was simply trying to do,
21 Your Honor, is kind of address the substantive portion
22 of the case of the issues that you had raised. That's
23 why I addressed that.

24 THE COURT: I have to address -- I have to know
25 the substantive in respect to whether there is an issue

1 of they will potentially put on evidence for special
2 damages. Absolutely. That's the heart of this. I will
3 not go the next step whether they are or are not
4 entitled to them. That was my point. And my question
5 is, the legal issue that I really --

6 MS. LUNDVALL: Sandy Valley, can I take you
7 back to Sandy Valley then?

8 THE COURT: I know what Sandy Valley says very
9 well.

10 MS. LUNDVALL: But Sandy Valley doesn't limit
11 you to this. The Court suggested that somehow if
12 attorneys' fees are reasonably and proximately caused,
13 but then, in fact, that they may be special damages.
14 That's not what Sandy Valley says.

15 THE COURT: I didn't say that at all.

16 MS. LUNDVALL: What I'm trying to do is to
17 get -- the Court has identified very specifically the
18 types of causes of action for which the attorneys' fees
19 are recoverable as special damages.

20 THE COURT: So your position is if it isn't
21 identified here, you can't do it?

22 MS. LUNDVALL: My position is --

23 THE COURT: Because I read -- that's what I
24 understood your opposition to be, and I don't read
25 Sandy Valley as totally limiting it, if we don't mention

1 it here, it's not going to happen. That's why they give
2 you, When attorneys' fees are considered as an element
3 of damage, they must be the natural and proximate
4 consequence of the injurious conduct.

5 They are not saying, at least I don't read it,
6 that if they don't discuss it, if you are not one of the
7 cases that they discuss they do allow it, you are
8 limited. They give the judge a criteria, which they say
9 will rarely happen. It says that in here. That's
10 probably true. I think that's probably very true.

11 Rarely would you have a conflict that
12 attorneys' fees outside of litigation would ever be
13 granted. I was trying to think of any case I ever had.
14 I think that is rare. But the case I have --

15 MS. LUNDVALL: Horgan helps the Court, though.

16 THE COURT: Who does?

17 MS. LUNDVALL: Horgan helps the Court. That's
18 where I wanted to at least walk through a couple points
19 in Sandy Valley, and then to bring to the Court's
20 attention then the language also from Horgan that does
21 inform this.

22 THE COURT: That informs that it's limited --

23 MS. LUNDVALL: Yes.

24 THE COURT: -- to only the cases here?

25 MS. LUNDVALL: Absolutely.

1 THE COURT: I don't read Sandy Valley that way.
2 What case are you saying you cited? Horgan?

3 MS. LUNDVALL: Horgan versus Felton,
4 F-e-l-t-o-n. It's found at 123 Nevada 557, and it's 170
5 Pacific 3d 982.

6 THE COURT: Let me find that. What year is
7 that case?

8 MS. LUNDVALL: It's a 2007 case.

9 THE COURT: You had that in your opposition?

10 MS. LUNDVALL: We did.

11 THE COURT: You cited just as an also -- let me
12 read what you cited it for real quick here.

13 All right. I read the case. I can go back and
14 look. You are saying Horgan at 123 Nevada says -- the
15 Supreme Court says only a handful of cases can ever have
16 attorneys' fees as special damages. And if it's not a
17 third-party lawsuit for insurance or indemnity, a
18 slander of title action, malicious prosecution,
19 trademark infringement, or false imprisonment, you are
20 saying we can't do it?

21 MS. LUNDVALL: That's exactly --

22 THE COURT: I don't read it that way, but I'll
23 go back and look at Horgan. Because when you read the
24 language of Sandy Valley, it doesn't read that way to me
25 at all. It even gives me the criteria of when it is

1 special damages. Okay.

2 Read me the section in Horgan that says that
3 because I don't have any quote from Horgan or anything.
4 You just put "see also." Because I read it as you
5 saying that's what Sandy Valley says.

6 MR. SHIPLEY: At the top of page 7 is where we
7 first cite --

8 THE COURT: Okay. So you've got -- Therefore,
9 under Sandy Valley and it's progeny --

10 MR. SHIPLEY: Just above that, the last
11 sentence in the first incomplete paragraph at the top of
12 page 7.

13 THE COURT: As an exception, District Court may
14 award attorneys' fees in limited circumstances. I
15 understand that. But limited, I didn't read "limited"
16 as only these circumstances. If Horgan says only these
17 circumstances -- I have here I read Horgan. So I don't
18 know, but I want to hear if you think it does say that.

19 MS. LUNDVALL: What I wanted to do, if the
20 Court will -- if the Court will indulge me, I would like
21 to begin with Sandy Valley, to take the Court's
22 attention then to the Horgan versus Felton case, and
23 also to bring to the Court's attention the concurring
24 opinion of Justice Maupin in the Horgan case.

25 THE COURT: All right.

1 MS. LUNDVALL: In Sandy Valley, when they begin
2 to talk about attorneys' fees, and right after as far as
3 they speak to the fact that if a party is forced to file
4 a suit does not mean that they are entitled to an award
5 of special damages.

6 THE COURT: I understand that completely. I
7 think that is true.

8 MS. LUNDVALL: The Court goes on to give
9 examples of when, in fact, attorneys' fees may be
10 awarded. They talk about third-party legal disputes.

11 THE COURT: This is the section I just read to
12 you. Right.

13 MS. LUNDVALL: Section number 2 is clarifying
14 or removing a cloud on title. We know that that's not
15 the case. Declaratory or injunctive relief, when
16 necessitated -- now, it's not just declaratory or
17 injunctive relief. It says when necessitated by the
18 opposing party's bad faith conduct.

19 And the point that we made in our opposition
20 was while they tried to bootstrap themselves into
21 injunctive or declaratory relief claiming their
22 accounting claim is a claim for declaratory or
23 injunctive relief, they don't go so far as to plead
24 anything that claims that were necessitated by the
25 opposing party's bad faith conduct. There has been not

1 a whiff of allegation in this case that somehow Pardee
2 engaged in bad faith conduct.

3 We have two parties --

4 THE COURT: Are there any claims for bad faith?
5 I thought there was. One is saying no. One is saying
6 yes. So let me --

7 MS. LUNDVALL: There's a claim for --

8 THE COURT: Good faith and fair dealing.

9 MS. LUNDVALL: -- the covenant of good faith
10 and fair dealing. There is a whole world of difference
11 between good faith and fair dealing versus bad faith
12 conduct. And there's an entire line of cases.

13 THE COURT: Okay. I don't have that in front
14 of me.

15 MS. LUNDVALL: There's an entire line of cases
16 that discuss the difference between breach of a covenant
17 of good faith and bad faith conduct.

18 In this particular case you've got two parties
19 who have got differing interpretations of a single
20 contract, but there have been no allegations that
21 somehow Pardee has engaged in bad faith conduct. And
22 even if you scour their proposed Second Amended
23 Complaint, you don't get any allegations of bad faith.

24 THE COURT: What's the opposite of -- honestly,
25 if you breach good faith and fair dealing, what is the

1 opposite of good faith?

2 MS. LUNDVALL: That's what the --

3 THE COURT: Bad faith?

4 MS. LUNDVALL: No, no. That's --

5 THE COURT: If you have cases that say --

6 MS. LUNDVALL: Absolutely.

7 THE COURT: -- a breach of covenant of good
8 faith and fair dealing does not have anything to do with
9 bad faith, I would really be interested in those.

10 MS. LUNDVALL: Absolutely.

11 THE COURT: Because I did a lot of bad faith
12 litigation. So I don't know what distinction -- I would
13 certainly like to have that because that -- and I didn't
14 see anything like that in your opposition.

15 MS. LUNDVALL: We will -- if the Court allows
16 us then the opportunity for supplemental pleading, we
17 can bring to the Court that there's a difference between
18 breach of a covenant of good faith and fair dealing and
19 a bad faith allegation.

20 THE COURT: That's one step below. I'm
21 still -- I still did not read Sandy Valley that if you
22 don't fill in -- I understand what they are arguing on
23 the declaratory relief. And I'll be honest, I look at
24 it as the accounting, what they were trying to do is to
25 get the information from Pardee to see if they are owed.

1 That's what they say they are still doing in this
2 lawsuit.

3 MS. LUNDVALL: But the point being would be
4 this: Pardee contends that we have given them --

5 THE COURT: I understand that.

6 MS. LUNDVALL: -- all that information.

7 THE COURT: That's all a question of fact for
8 the jury. I'm just looking at pleadings right now as to
9 what the evidence could show. That's my standard, very
10 different from -- believe me, I understand, that, Hey,
11 we gave them everything, we didn't have a duty, and
12 we're going to say we didn't have a breach. They want
13 to know about agreements that had nothing to do with
14 them that they could have -- I understand that.

15 I'm just looking at doing a pleading, amending
16 a pleading. And then at the time of trial we'll see
17 what evidence does or does not get in.

18 And I understand the special damages, and I
19 even thought at the time if they amend, we may revisit
20 this special damages very much at the time of trial
21 because I really want testimony that tells me there is a
22 basis for the special damages within the evidence or
23 they are not going to get an instruction on it, Counsel.

24 You know, that's, to me -- as you and I know,
25 at trial that's a much higher standard than leave to

1 amend, putting something in a pleading, but whether they
2 actually prove it at trial and whether they actually
3 will get a jury instruction on it, we need evidence on
4 that.

5 MS. LUNDVALL: I understand that.

6 THE COURT: My only concern is if you are
7 saying that you read Sandy Valley and Horgan says if you
8 don't fall in to one of these categories, we, Supreme
9 Court, have said, and then -- and I don't know. I have
10 a problem with the accounting and the bad faith, the
11 good faith fair dealing. They may even fit into one of
12 these categories.

13 What you are saying is if you don't fit into
14 one of these categories, you don't get attorneys' fees
15 as special damages. That's what you are saying?

16 MS. LUNDVALL: That's what I'm saying.

17 THE COURT: I did not read Horgan that way. In
18 fact, when I read Sandy Valley, it was much cleaner. It
19 really discussed things much more at length. Right?

20 And, you know, I looked at it as, Hey, you have
21 to look at the lawsuit. It's rare that you would get
22 special damages. And I read it as this may just because
23 of that breach, that failure to inform and this whole
24 lawsuit, at least from everything I read in summary
25 judgment -- I did go back and read, try to get as much

1 facts as I can.

2 And I know I don't necessarily need it for a
3 motion to leave, but to try to address this exact issue,
4 Counsel, because this was the issue I felt -- I'm not
5 going to let him amend if it's futile. I understand
6 that. That's the biggest opposition to this right now.
7 I don't read it that way, but I would like to go
8 back and --

9 And the second thing, if you are saying that it
10 doesn't fit under -- the covenant of good faith and fair
11 dealing doesn't fit under because you say it has to have
12 the bad -- the damages were necessitated by the opposing
13 party's bad faith, what you read in Sandy Valley.

14 I don't know an answer. Counsel, I'll be
15 honest. That wasn't in there. I never thought of it
16 that way. I haven't looked at lines of cases that
17 distinguish it, but that doesn't mean it's not out
18 there. So that -- I don't know about that.

19 MS. LUNDVALL: If I may then, what I would like
20 to be able to do is to supplement with an additional
21 pleading on this issue.

22 THE COURT: Here's what I'm --

23 MS. LUNDVALL: But if you'll allow me then as
24 far as at least to close out my argument --

25 THE COURT: Absolutely.

1 MS. LUNDVALL: -- from this perspective.

2 One of the things that opposing counsel
3 suggests is this: Well, jeez, Your Honor, no harm, no
4 foul. So over a year ago the deadline passed for our
5 motion for leave to amend, who cares about that
6 deadline. So discovery has now closed. Who cares about
7 that. We're going to open up discovery all over again.

8 THE COURT: No. Just for one issue.

9 MS. LUNDVALL: Well --

10 THE COURT: Just for one limited issue. That's
11 a little different.

12 MS. LUNDVALL: But if their entire Amended
13 Complaint -- but if, in fact, we got to the other issue
14 about them wanting as far as the damages in
15 Paragraph 20 --

16 THE COURT: I want them to address that. That
17 would have to open up then Wilkes and Wolfram for a
18 limited issue.

19 MS. LUNDVALL: From this perspective then, why
20 have a deadline? Why have a deadline when a party can
21 run right up to the very edge of it and say, Jeez, all
22 this information, all these ideas were in my possession,
23 I'm not going to give them to you at the very end, and
24 then I'm going to force you as far as to incur
25 additional expense in opening up discovery. That's

1 point number one.

2 But point number two would be this: We have
3 the opportunity also or should have the opportunity to
4 take a look at whether or not we want to retain an
5 expert, to be able to designate that.

6 THE COURT: I understand, to say whether these
7 were reasonable. I understand.

8 MS. LUNDVALL: So from that perspective, for us
9 to be able to get an expert, do an expert report,
10 subject the expert to deposition and everything else,
11 that's an additional point.

12 But probably the most important point would be
13 this: They suggest that their special damages are in
14 the -- one of their special damages is for attorneys'
15 fees and that they have their billing statements. Okay.

16 So this is what I would do if I've got an issue
17 dealing with damages: Who am I going to take a
18 deposition of? I'm not going to take a deposition of
19 Mr. Wolfram or Mr. Wilkes. I'm going to take a
20 deposition of every single one of the timekeepers, of
21 Mr. Jimmerson, and I'm going to go through his time
22 sheets, Ms. Hansen and Mr. Jimmerson, Sr. Each one of
23 those people is fair game.

24 Now, they are also fair game to put on the
25 witness stand at the time of trial.

1 THE COURT: That was my next issue. Do we have
2 a conflict problem?

3 MS. LUNDVALL: That's what I'm going to. And
4 what happens when I put them on the witness stand to be
5 able to do what I'm entitled to from a cross-examination
6 perspective on special damages? That immediately
7 disqualifies this firm from being able to represent --

8 THE COURT: I don't know, because I actually
9 tried to find cases on that too, Counsel. That was my
10 third issue. I actually -- you know, as a former trial
11 attorney, I thought, Okay, who are you going to take the
12 deposition of?

13 I actually have a motion they want to associate
14 in counsel, who is a witness who prepared an agreement,
15 that's for next week. It was identical to this one. I
16 looked in there to see if there was any conflict because
17 I tend to -- I worry about conflicts, you know. And
18 they didn't give me any case law so that -- when you are
19 finished, that was my third thing. I don't know. I
20 don't know what Nevada says. It's an interesting point.
21 I don't know if --

22 MS. LUNDVALL: There's a rule of ethics
23 directly on point, directly on point.

24 THE COURT: And I don't know who -- I don't
25 know. Because I'll be honest, I looked at that issue,

1 and I don't even know how to rule on the other one.
2 They gave me no Nevada law. They just said, Well, you
3 can associate. We're not going to oppose associating
4 this counsel, but we want to take his deposition because
5 he helped prepare this agreement.

6 And I was working on yours, I was like, Wait a
7 minute, they didn't say that they don't want to put him
8 on the stand. What they said is, We just want to make
9 sure, Judge, if you let -- he's from out of state -- you
10 know, associate in, that we still get to do his
11 discovery. But they didn't address my next issue: Is
12 there a conflict?

13 And I'll be honest, I thought about conflict a
14 little bit in the first place because didn't
15 Mr. Jimmerson draft this?

16 MS. LUNDVALL: Exactly.

17 THE COURT: So I didn't quite -- I don't know.
18 I only address issues you give me. I'm not trying to
19 find issues. But I did -- that was my third issue. I
20 don't know an answer to that. Honestly, like I said, I
21 looked at that other motion and they gave me nothing.

22 I don't know. Maybe that's something I think
23 we do need to brief. We do have time. I agree with
24 you. That is an issue that I have down that I -- I need
25 some help from you, Counsel. Because like I said, I

1 didn't find any in that other motion because I
2 thought what are we -- I don't know that.

3 Because it's very different when you put the
4 advocating counsel and I didn't know how -- I didn't
5 know what you were thinking on the drafting. I don't
6 know. Have you taken Mr. Jimmerson's deposition on what
7 was in this contract? I don't know.

8 None of that -- I was kind of -- I was very
9 interested in that topic when you did your summary
10 judgment and no one said anything. So the judge, I
11 don't bring things up sua sponte, but I find it
12 interesting now you are bringing it up as part of
13 attorneys' fees.

14 So that is an issue. If you are bringing it up
15 now as an issue for me to address, I was hoping it came
16 up because I thought of it. I don't want to be in a
17 position to bring up issues. Although maybe I should,
18 because if I have to face it at trial, I'd rather do it
19 now than all of a sudden -- which has been happening to
20 me at trial. All of a sudden these kind of things come
21 to me at 9:00 in the morning and the witness is going on
22 at 1:00 in the afternoon, which makes it difficult,
23 because I find that an issue too.

24 I will be honest, Counsel. I don't know an
25 answer to that. I would like a brief on that because

1 you say you have a professional responsibility. I don't
2 know. I don't know if it's happened before. I also
3 tried to think of all of my career if -- I've never, as
4 the advocate, ever had my deposition taken as far as
5 being an advocate and an issue in the case.

6 I do feel there is a potential conflict issue.
7 I totally agree with you there, and I don't know the
8 answer to that. I certainly think it's an issue that
9 should be addressed. I do agree with you there. I
10 don't know the answer, but --

11 MS. LUNDVALL: Two points, Your Honor, as far
12 as on that, so from this perspective, it's not a
13 conflict issue that comes up. It's actually a rule of
14 prohibition. Under our rules of ethics, there's a rule
15 that prohibits someone from taking a witness stand and
16 being a witness at the time of trial and then going back
17 to counsel table and arguing the case.

18 THE COURT: They would be arguing their own
19 testimony.

20 MS. LUNDVALL: That's correct. And that's one
21 of the things --

22 THE COURT: That's the conflict I thought.
23 Because how do you argue your own credibility?

24 MS. LUNDVALL: Well, whether it's a conflict or
25 it's a rule, it doesn't --

1 THE COURT: It's doesn't matter. It's an
2 issue.

3 MS. LUNDVALL: It's an issue, whatever label.
4 So to that extent, we're happy to bring that to the
5 Court's attention in a supplemental briefing.

6 But the last point then, just to kind of close
7 out my presentation then on this point and that is this:
8 The issue that we've identified then as to how it is
9 that they present these special damages and how that
10 prejudices us brings us then full circle from a
11 substantive standpoint.

12 When you look at the situation that the Nevada
13 Supreme Court, both in Sandy Valley as clarified in the
14 Horgan case, identified as when attorneys' fees as
15 special damages can be recovered, each one of those
16 circumstances end up when you've got some type of an
17 underlying transaction for which a party has incurred
18 attorneys' fees, and then they have to bring litigation.
19 So --

20 THE COURT: Isn't that exactly what we have?

21 MS. LUNDVALL: No, we don't. Because what they
22 are trying to recover is not what attorneys' fees -- we
23 got no documents. And this is a point of clarification:
24 We got no documents, no information about any attorneys'
25 fees that they incurred before the case was brought,

1 nothing. The damages that they are seeking to recover
2 are the attorneys' fees that they --

3 THE COURT: Since they filed the Complaint.

4 MS. LUNDVALL: -- incurred after the case was
5 brought.

6 THE COURT: That's an interesting distinction.

7 MS. LUNDVALL: A distinction --

8 THE COURT: I don't know because I don't have
9 the billing records. I'll be honest, Counsel. So the
10 attorneys' fees that they've produced are all post
11 Complaint.

12 MS. LUNDVALL: Post complaint, Your Honor.
13 Which underscores the fact that --

14 THE COURT: Interesting.

15 MS. LUNDVALL: -- what they are trying to
16 recover is their litigation fees.

17 THE COURT: That could be evidentiary. I look
18 at that as evidence. I'll be honest, I really look at
19 that as evidence. Because if they have special damages,
20 then I would have to make a decision at trial what
21 evidence proves these special damages. That would be
22 something I would definitely look to at trial. If these
23 are post Complaint, those appear to me to fall into --
24 now, I don't know.

25 I assume this letter had to have been drafted,

1 right, before the Complaint, the September 1, 2004? Was
2 it after litigation?

3 MS. LUNDVALL: The commission letter that you
4 have was drafted in September of 2004, and then there
5 was a long period of time.

6 THE COURT: When was the Complaint filed?

7 MS. LUNDVALL: The Complaint wasn't filed
8 until, what, 2010.

9 MR. JIMMERSON: December 2010.

10 THE COURT: So that was my issue. Am I right
11 Mr. Jimmerson drafted this? Is my recollection --

12 MS. HANSEN: I believe he tweaked it.

13 MR. JIMMERSON: It was negotiated between the
14 parties.

15 THE COURT: A lot of discovery, I don't know.
16 But I do know Mr. Jimmerson, Sr., your dad, he was
17 involved in this.

18 MS. LUNDVALL: That's correct.

19 MR. JIMMERSON: That's correct, Your Honor.

20 THE COURT: This is the basis for the
21 litigation, the September 1st. We all know that.
22 Right? So that might be -- it's not a part of -- it
23 wouldn't necessarily be a conflict. I was just
24 interested in the timing.

25 But I do agree with you on the special damages,

1 it has to flow from this breach. So I would tend -- I
2 will address it if I do allow them to amend. I still
3 want to look at the other case. I want to make sure
4 what evidence would be allowed to prove this.

5 MS. LUNDVALL: From this perspective,
6 Your Honor --

7 THE COURT: Plus we have the issue on whether
8 we're going to let Wolfram and Wilkes do their
9 testimony. I'm more inclined on that area because that
10 would, to me -- they have a right -- that would flow
11 from the breach if the reason -- I don't know what they
12 did. I agree with you, the evidence, do they get to say
13 what I said before --

14 MS. LUNDVALL: Why didn't they tell us that
15 before? Why didn't they give us an opportunity to
16 address all these issues before?

17 THE COURT: My real problem with it, though, is
18 you were aware, at least on the attorneys' fees
19 potential, as of October 26, 2012. I didn't look at the
20 discovery. Correct? I have three days before
21 discovery. Why didn't we work this out when you got
22 that then saying, Hey, here may be an issue?

23 You said to me, I don't want to put myself in a
24 box. I guess you wanted to say, I don't want to say
25 there's an issue and what it is. I want to wait until

1 we do the motions before trial. Right?

2 MS. LUNDVALL: From the perspective --

3 THE COURT: Is that the box you are talking
4 about?

5 MS. LUNDVALL: That's the box as far as I find
6 myself in.

7 THE COURT: I understand. But you also could
8 have done -- I mean, this happens all -- you could have
9 done something earlier. And you are saying, Hey, if
10 they didn't know it was an issue, I can wait and do it
11 as a motion, which you honestly did, as a motion
12 in limine, and it came up in the summary judgment.
13 That's why you are saying you didn't do anything on the
14 discovery when they gave you the information three days
15 before discovery. Correct?

16 MS. LUNDVALL: A couple points, Your Honor.

17 THE COURT: Am I understanding that right?

18 MS. LUNDVALL: What you're understanding is
19 this, is that they've offered you no explanation for
20 why, in fact, it was at the very last minute that they
21 even made the discussion and why it is they've offered
22 you no explanation as of yet why that they have not
23 brought this issue to your attention.

24 But the point being is that I'm going to assume
25 that somehow, even if you give them the benefit of the

1 doubt that they weren't lying in wait, that they weren't
2 trying to ambush me, that they weren't --

3 THE COURT: I wouldn't say that.

4 MS. LUNDVALL: I know that. I'm saying --

5 THE COURT: Honestly, they gave you the stuff
6 three days before discovery cutoff.

7 MS. LUNDVALL: I'm saying assume that they
8 weren't doing that. But they just failed through their
9 own --

10 THE COURT: Failed to do what?

11 MS. LUNDVALL: Failed to timely, as far as
12 plead it in their Complaint, to put me on notice of it.
13 Okay. So that when I prepared a deposition of these
14 individuals, that I could make that as a topic area.

15 THE COURT: You are going back to Paragraph 26,
16 the plaintiffs. I know there's two distinctions.

17 MS. LUNDVALL: So that when I tried to figure
18 out what experts I needed to retain, I could figure out
19 whether or not this fell within there. They've offered
20 no explanation.

21 But even if you assume that that's error, what
22 they are now trying to say is, Well, jeez, Pat, you
23 should have covered our error for us. You, Pat, failed
24 to do something because you didn't deal with the fact
25 that we didn't put you on notice.

1 So their problem, their error, maybe their
2 screw-up has now somehow become my fault, my fault
3 because my client wasn't on notice of what should have
4 been within a Complaint if, in fact, they genuinely
5 believed that this was a form of special damages.

6 THE COURT: But you agree with me, don't you --
7 I was in trials where we amended the Complaint during
8 trial based on the evidence. Let's be honest here.
9 When the evidence gets in, sometimes you didn't take the
10 deposition of all the witnesses that come to trial. I
11 mean, I've actually been at trial where a witness has
12 gotten on, and I was able to amend my pleading to
13 conform with the evidence. So that is what Rule 15
14 let's you do. Right?

15 In fact, Sandy Valley talked about, they look
16 to see if any trial evidence was there. So you are
17 saying, Wait a minute, discovery cutoff was in October
18 2012, and I've been ambushed because they gave me
19 attorneys' fees information, but it's not my
20 responsibility that they amend their pleading -- that
21 they put me on notice to amend their pleadings to
22 conform with their proof. That's what you are saying?

23 MS. LUNDVALL: No. What I'm saying is this:
24 Rule 15(c) that speaks about amending pleadings at the
25 time trial is when both sides voluntarily put on or

1 allow evidence to be put on. We, as competent -- hold
2 on.

3 THE COURT: I don't think I agreed to have it
4 put on against me and the judge let it in, but --

5 MS. LUNDVALL: But somehow it got before the
6 finder of fact and so, therefore, you amend your
7 pleading to conform to the evidence.

8 THE COURT: Right.

9 MS. LUNDVALL: We are objecting to the evidence
10 coming in. We --

11 THE COURT: You are doing it in a motion
12 in limine. I understand that. I understand. I wasn't
13 saying that. I was speaking to delay. I'm not -- I'm
14 just saying under Nevada law you can still sometimes do
15 it at time of trial. I'm just speaking to the delay.

16 I understand you've brought it to our attention
17 ahead of time, which is -- I understand, so it wouldn't
18 happen at time of trial. I was just speaking in terms
19 of how freely it's given over the history, because it
20 has even been done at trial. So I was speaking strictly
21 to your prejudice and your delay argument. That's where
22 I was doing it.

23 I understand you brought it to the Court ahead,
24 which I totally appreciate, because the more we work out
25 ahead is fair to both parties. I understand that. I'm

1 just speaking to the delay prejudice.

2 MS. LUNDVALL: Understood. So from our
3 perspective, Your Honor, you've raised, I think, a
4 couple of very interesting points that we would request
5 the opportunity then for supplemental briefing on.

6 Number one would be the issue as to whether or
7 not there's a difference with a distinction, which we
8 believe, between a breach of covenant of good faith and
9 fair dealing claim and bad faith conduct.

10 THE COURT: As to -- so they would be coming --
11 if you agree, then they would be able to amend under the
12 Sandy Valley, even you say it's limited, but it also
13 would go under that page 7.

14 MS. LUNDVALL: There you go.

15 THE COURT: Okay.

16 MS. LUNDVALL: So that would be point one.

17 Point two is the issue dealing with the ethical
18 rule of prohibition that does not allow an attorney both
19 to sit on the witness stand and to argue a case, and so
20 to be able to bring not only from the standpoint of what
21 their documentary evidence has been that they have
22 supplied to us dealing with attorneys' fees, so that you
23 can see and confirm that I'm accurate that their
24 attorneys' fees that they are seeking are those post
25 Complaint.

1 THE COURT: I agree that would go under the
2 damages, if they won at trial, under the agreement. I
3 understand that.

4 MS. LUNDVALL: So from that perspective --

5 THE COURT: We wouldn't have it at issue.
6 Okay.

7 MS. LUNDVALL: So to be able to bring then that
8 rule of ethics to you because it underscores then the
9 prejudice then that would be occasioned upon Pardee by
10 reason of that.

11 THE COURT: Absolutely.

12 MS. LUNDVALL: And the third point would be
13 this, and this is just simply a point of clarification,
14 the Court suggested that, you know, at the time of the
15 motion for summary judgment, that you may have had
16 concerns about Mr. Jimmerson, Sr., drafting the --

17 THE COURT: I shouldn't have brought it up, but
18 I just didn't want it to come up at trial.

19 MS. LUNDVALL: The reason that we didn't think
20 it was an issue was because the plaintiffs, as well as
21 Pardee, both said this contract is clear and unambiguous
22 and, therefore, no parol evidence was going to be
23 necessary.

24 THE COURT: You all know the evidence. I don't
25 know the evidence. So that is fine. See, I just was

1 concerned.

2 MS. LUNDVALL: There you go.

3 THE COURT: That makes perfect sense for
4 everybody. So we don't have a conflict.

5 MS. LUNDVALL: So dealing with that simple
6 issue, we did not think that that was going to be an
7 issue.

8 THE COURT: We just have a problem on
9 interpretation.

10 MS. LUNDVALL: There we go. Thank you, Your
11 Honor. I appreciate you indulging me.

12 THE COURT: I'm trying very hard because these
13 are really interesting issues, you know.

14 And the other issue we still need to kind of
15 address, the Paragraph 26, on whether Wilkes and Wolfram
16 are going to testify as to their damages, because I view
17 that as a separate issue. And if I missed it in the
18 papers, I apologize. I did not view that.

19 MS. LUNDVALL: It wasn't highlighted by either
20 the plaintiff or the reply.

21 THE COURT: Well, I read the Complaint and I
22 read it a different way. So I just want to see what
23 their answer is and clarification for me, because I read
24 the hourly rate more thinking in terms of attorneys
25 because we're so hourly rate on something, but I thought

1 of the scenario you suggested.

2 So I would like addressing on that, whether at
3 time of trial -- because you are asking to amend to do
4 that, because that would be a different thing to open
5 discovery. Correct? Okay. So if you could help me,
6 let's start with that, Mr. Jimmerson. That's my first
7 issue, because that would be a different opening of
8 discovery.

9 MR. JIMMERSON: Yes, Your Honor. As much as I
10 have affection for defendant's counsel, I've never been
11 called dishonest in my life in a setting like this and I
12 would --

13 THE COURT: Honestly, I listen to the facts.
14 You are both very good advocates. You've both brought a
15 lot of issues. I understand that completely.

16 MR. JIMMERSON: The reason why it was not
17 briefed is because it was not opposed. Literally there
18 were only two changes and it was both to special
19 damages. It was on the issue of attorneys' fees and the
20 issue of time and effort damages, which, by the way,
21 Your Honor, have been briefed on the motion for summary
22 judgment, which there is a motion in limine pending
23 before you.

24 And this was in hopes of addressing some of
25 those issues in advance, the idea being that you could

1 grant the leave and then still grant their motion
2 in limine later when you hear it in August, the idea
3 being is it allows you to do both. You give us the
4 relief we ask for now, but then also you would be able
5 to give the relief they are asking for later.

6 So to say that we're trying to hide this --

7 THE COURT: You are trying to amend your
8 pleading.

9 MR. JIMMERSON: Exactly. That's all we're
10 doing.

11 THE COURT: I understand that.

12 MR. JIMMERSON: They have every right to make
13 the arguments they are making, and it's going to be
14 litigated in August.

15 THE COURT: The only thing I look at is whether
16 it's futile, and that's my only concern, is futile.

17 The conflict, then you are right. I don't
18 necessarily have to address that now. If it comes up
19 later -- I do want a brief. I would like that issue
20 addressed because I don't want a concern about it at
21 time of trial.

22 MR. JIMMERSON: I will address it now. And the
23 beauty of having a bench trial is your ability to be a
24 little creative in how we actually do things. The rule
25 of prohibition is true. She's a hundred percent right

1 that you cannot testify to -- you cannot argue your own
2 credibility.

3 That said, however, okay, in this unique
4 circumstance, okay, which, by the way, the analysis that
5 she gave you on Sandy Valley, the type of cases in which
6 special damages would be available, is incomplete. Some
7 of them deal with, for example, abuse of process claim
8 or malicious prosecution, which some other litigation
9 needed to be defended or represented, so you accumulated
10 those fees somewhere else.

11 MS. LUNDVALL: That's what Horgan says.

12 MR. JIMMERSON: Hold on.

13 Somewhere else. On the other side, though,
14 okay, slander of title claims, breach of -- infringement
15 of trademark actions, actions which the underlying claim
16 is for attorneys' fees because I need to prosecute a
17 slander of title because you slandered title and I need
18 to clear that title.

19 THE COURT: I can't stop it unless I do my
20 lawsuit.

21 MR. JIMMERSON: Exactly. Or as the example
22 they gave, in trademark infringement, okay, you've
23 infringed on my trademark, my intellectual property, I
24 need to protect that. So I need to hire an attorney and
25 accumulate those damages -- and accumulate those fees,

1 which are damages.

2 THE COURT: So I can stop and get my relief.

3 MR. JIMMERSON: Exactly. So we would always be
4 in a predicament where they would never have trial
5 counsel because even trial counsel would be subject to
6 discovery of did they do this preparation, was this
7 reasonable, all of this analysis would be done.

8 THE COURT: You would always have to conflict
9 out of the case.

10 MR. JIMMERSON: Exactly. You would never have
11 trial counsel. And the beauty of having a bench trial
12 would be you would be able to make a determination as to
13 damages, whether or not there exist damages. And then
14 later, in a post trial proceeding, like normal,
15 considering the Brunzell factors, is this reasonable,
16 and make that determination.

17 THE COURT: I see. What you are suggesting is
18 they could put evidence in on the damages and then I
19 could make it --

20 MR. JIMMERSON: Exactly.

21 THE COURT: -- post trial?

22 MR. JIMMERSON: So you would avoid both those
23 things. That's just a suggestion right now. It's not
24 necessarily our entire position about it. I would
25 definitely encourage briefing if the Court invites it.

1 THE COURT: It's an issue now that they brought
2 up. I want to make sure everything is briefed.

3 MR. JIMMERSON: If there is a rule of
4 prohibition, we don't want to be part of this.

5 THE COURT: You don't want it either. I
6 understand.

7 MR. JIMMERSON: We have no desire to be
8 unethical. So that would be my initial reaction, is
9 that because you have two different types of cases which
10 attorneys' fees are available, and this is the one in
11 which the actual attorneys' fees are being accumulated
12 because you needed to have an attorney to go out and get
13 the information, okay, that's --

14 THE COURT: That would flow from the contract.

15 MR. JIMMERSON: Exactly. That's why we didn't
16 have pre Complaint damages.

17 You know, the Jimmerson Hansen law firm is just
18 like any other citizen when trying to get information
19 before a Complaint is filed. They don't have access to
20 subpoena power. They don't have the ability to request
21 production from the other side.

22 THE COURT: You don't get to take depositions.

23 MR. JIMMERSON: Exactly. So it's only after
24 the Complaint is filed that they get the tools necessary
25 to go out and get the information and appeal to you to

1 compel them to account and produce the records and other
2 information.

3 THE COURT: That's when an accounting is. If
4 you could do it before, why would you have a cause of
5 action for accounting?

6 MR. JIMMERSON: Exactly. So that's the basis
7 of that.

8 THE COURT: Okay.

9 MR. JIMMERSON: So on the issue of their time
10 and effort damages, okay, it's just purely for pleading
11 purposes. It's been briefed before you, and I will also
12 say, Your Honor, we did offer discovery on this issue as
13 well. You'll see that in our briefs. So this is not
14 something we're trying to hide the ball on. But again,
15 that's a subject for later determination in August.

16 THE COURT: So what you are saying, these
17 issues that counsel has brought up, defense, are also
18 going to come in front of me even if I allow the leave
19 to amend. All we're looking at right now is to amend
20 the Complaint. Whether they actually get to do that or
21 not, I have other issues, which obviously we do, because
22 you brought -- so I'm more comfortable with that --

23 MR. JIMMERSON: Exactly.

24 THE COURT: -- because I didn't look into all
25 those issues. I try to focus on what's in front of me

1 because I lose -- it's very difficult when you get so
2 many things. You've got to do your perspective on, I'm
3 doing a leave to amend. That's what I'm -- and I don't
4 mean to -- because I tend to cut you short and I'm
5 sorry, I apologize, but I'm trying to keep myself
6 focused on the issues I have to worry.

7 The only reason I got into the futility is
8 because that can be one of the grounds that concerns me
9 on the leave to amend. That is why I got into a little
10 bit more -- well, that's what Sandy Valley is about.

11 MR. JIMMERSON: So to address the next issue as
12 to whether or not -- you know, whose responsibility was
13 it to address the issues in discovery? Okay. And
14 Ms. Lundvall has a point. Okay. It was a little late.
15 Maybe not just a little. Maybe a lot late.

16 That said, it was during the discovery period,
17 and we still are subject to the 2.34 discovery
18 conference requirements. If there's an issue in
19 discovery, pick up the phone, let's have a meeting,
20 let's talk about this and try to resolve it before we
21 have to come before you or the Discovery Commissioner to
22 address these types of issues. Okay.

23 So because not only did that not happen, okay,
24 and we've offered to do whatever discovery they wanted
25 and that was refused, we would argue that the refusal to

1 take the discovery and to accept our offers to get the
2 information that they request really cuts against their
3 prejudice, their unduly prejudicial argument.

4 On the issue of futility -- and this is very
5 important -- the Sandy Valley case is the seminal case.
6 It's stated by opposition. Couldn't agree more in our
7 reply. The Horgan case, okay, really only clarified
8 Sandy Valley as it pertained to removing a cloud of
9 title and slander of title cases. Okay. And that is
10 where a lot of the quotations came from in their
11 opposition. However, this is not a slander of title
12 action.

13 And the Nevada Supreme Court was very emphatic
14 when it adopted what is considered the majority rule in
15 the United States, that you need to have some element of
16 intentional or calculated conduct to get access to
17 attorneys' fees as special damages in this particular
18 instance. It did not state, okay, this was the only
19 type of case.

20 THE COURT: That's the issue. That's what I'm
21 trying to struggle with. I did see in my notes that I
22 read it, but I dismissed it. So I had to have -- that's
23 the reason I mention it.

24 MR. JIMMERSON: And the issue on Sandy Valley
25 is -- you are right -- okay, it doesn't say these are

1 the only types of cases. It gives examples of the types
2 of cases, and it gives a formula before it gives those
3 examples.

4 THE COURT: On how to determine it.

5 MR. JIMMERSON: Exactly. So the only other
6 question is do we fall into the stated case, the stated
7 example of injunctive or declaratory relief, as a result
8 of, necessitated by the defendant's bad faith conduct.

9 THE COURT: That's only to get you into the
10 stated cases. You are still arguing to me that it is
11 not limited.

12 MR. JIMMERSON: Exactly. But even if you are
13 going to find in favor of the defendant on that issue,
14 that Sandy Valley really is -- that these are the only
15 types of cases they are talking about, Paragraph 30 in
16 the Proposed Amended Complaint, which is just a carbon
17 copy of a paragraph from the current operative pleading,
18 says: In doing the acts alleged herein, Defendant
19 Pardee failed to act in good faith and to the best of
20 its ability and also failed to deal fairly with
21 Plaintiffs, thereby breaching its duties to so conduct
22 itself and injuring Plaintiffs' rights to conduct its
23 business and its ability to receive the benefits of the
24 commission letter.

25 So even if just the natural claim of breach of

1 the implied covenant of good faith and fair dealing
2 doesn't necessarily fit into the bad faith conduct, our
3 pleadings, the facts as established in the pleadings,
4 alleged the bad faith, that you did not engage us in
5 good faith, that you did not deal fairly with us. So
6 it's a result of this failure to act in good faith that
7 caused and necessitated these special attorneys' fees.

8 THE COURT: As opposed to a specific bad faith
9 cause of action?

10 MR. JIMMERSON: Exactly. So when looking at
11 the Proposed Amended Complaint, the pleadings satisfy
12 the statement in Sandy Valley.

13 So the argument that, you know, we didn't argue
14 bad faith, we don't have to have a claim for bad faith.
15 We just allege that you didn't engage us in good faith,
16 and which, by the way, if you don't engage someone in
17 good faith, it's in bad faith. You can't be half
18 pregnant here. Okay. You are either engaging someone
19 fairly or you are not.

20 So that's -- on that issue, if the Court --

21 THE COURT: That's your argument, that you go
22 squarely, if we need to, if I feel that way, into one of
23 the cases in Sandy Valley. If not -- okay.

24 MR. JIMMERSON: Exactly. The other issue that
25 was addressed was whether or not -- what impact this

1 has. You brought up the point of we're ultimately going
2 to be talking about attorneys' fees one way or another,
3 before or after. Okay.

4 THE COURT: Correct.

5 MR. JIMMERSON: And Ms. Lundvall made the point
6 that the element of damages is an element of the breach
7 of contract action, which she's right. However, she's
8 already conceded that if we establish liability, our
9 clients have been harmed somehow, some way, that they've
10 not just suffered no harm. And because damages is such
11 a low bar -- have you been harmed at all? -- that's why
12 we have nominal damages. Okay. We would succeed on the
13 breach of contract issue. But we don't need to
14 establish damages for the purpose that we don't need to
15 win the breach of contract claim on damages to succeed
16 on the accounting claim.

17 As Ms. Lundvall quite eloquently stated, she
18 could lose the liability issue but win the damages issue
19 and succeed in defending the breach of contract. But
20 she can't lose on liability and succeed on the
21 accounting action.

22 So as the Court recognized in the motions for
23 summary judgment, if there's a breach, we absolutely
24 have the right to account, right to receive an
25 accounting for these documents, for this information.

1 So not only are you able to give nominal damages, which
2 has been conceded would exist if we established
3 liability, but establishing their liability would
4 necessitate attorneys' fees on the basis of accounting
5 alone.

6 THE COURT: On the accounting claim.

7 MR. JIMMERSON: Exactly.

8 The last issue is whether or not we've agreed
9 that the contract is clear and unambiguous. We
10 generally agree that most of the terms are clear and
11 unambiguous, and we can agree as to what the meaning of
12 what each term is.

13 But as you've received the briefing on this,
14 the term what it means to be reasonably informed, that
15 absolutely --

16 THE COURT: It's performance under the contract
17 that we have the problem. I get that.

18 MR. JIMMERSON: Exactly.

19 THE COURT: I appreciate Ms. Lundvall telling
20 me the reason you don't have an issue on the contract.
21 You all agree what it says. It's just performance.

22 MR. JIMMERSON: Exactly. The question is
23 whether or not what they did satisfies that duty, what
24 it means to be reasonably informed.

25 So I don't want to say that the contract is

1 clear and unambiguous because we can point this to means
2 exactly that. That's an issue for trial. But as you
3 know, it really is an issue of performance, something
4 you can take evidence on and listen to witness testimony
5 and determine whether or not defendant has satisfied its
6 duty under the contract.

7 THE COURT: I look at it that way, which makes
8 sense on the contract whether there would have been a
9 conflict whether Mr. Jimmerson was involved in this or
10 not, or Pardee, because you are probably going to put
11 people on the stand that were involved in this too. So
12 that would not be an issue.

13 MS. LUNDVALL: Your Honor, just to make sure
14 the record is clear, we've made no concession whatsoever
15 concerning if they have certain type of proof, that
16 there's been harm. There's no concession.

17 THE COURT: I haven't take any of your argument
18 as an admission on anything.

19 MS. LUNDVALL: Thank you, Your Honor.

20 THE COURT: I understand. This is not an
21 evidentiary hearing where -- you haven't filed
22 admissions or given me any. I don't look at it that way
23 at all. Same with them.

24 MR. JIMMERSON: I was simply quoting from the
25 colloquy back in the motions for summary judgment.

1 MS. LUNDVALL: And that is not a concession on
2 our part, and there's a long line of cases that deal
3 with admissions on behalf of --

4 THE COURT: I'm not looking at argument in
5 summary judgment as a concession at all, especially
6 because there's so many issues here. There's so many
7 tentacles out there that overlap. So I did not look at
8 it at all that way.

9 MS. LUNDVALL: On the additional briefing
10 component, my suggestion would be that we can -- I think
11 that it only fair that opposing counsel have an
12 opportunity to brief these issues as well. My
13 suggestion would be that something like within ten days,
14 that we give simultaneous briefings to the Court so that
15 the Court can take a look at these two additional issues
16 then and so as to be able to inform the Court's
17 decision.

18 MR. JIMMERSON: Your Honor, this is just -- I
19 don't necessarily know if the briefing is essential for
20 your decision today. I would argue and I would suggest
21 that --

22 THE COURT: I'm struggling with that.

23 MR. JIMMERSON: Exactly. -- that at calendar
24 call in August, okay, you could address some of these
25 other issues. Because ultimately you are faced with

1 the --

2 THE COURT: These issues.

3 MR. JIMMERSON: Exactly. So if you would need
4 supplemental briefing, we would be able to do so. Call
5 me an optimist here, hopefully we can maybe perhaps
6 settle the case and take this off of your docket, but --

7 MS. LUNDVALL: From this perspective, why I
8 think that it is important is this: Prejudice is one of
9 the reasons why the Court would deny leave to amend.

10 THE COURT: Right.

11 MS. LUNDVALL: The issue about the rule of
12 prohibition from counsel's perspective, being able to be
13 both witness as well as trial counsel, is an issue of
14 prejudice to us.

15 THE COURT: But not prejudice for leave to
16 amend.

17 MS. LUNDVALL: It is.

18 THE COURT: No. I would not look at that as a
19 prejudice for a leave to amend.

20 MR. JIMMERSON: Our clients could call another
21 attorney the day before trial.

22 THE COURT: Exactly. They could call an expert
23 who reviewed -- now you are going to start on discovery,
24 I know.

25 MS. LUNDVALL: I'm entitled to

1 cross-examination.

2 THE COURT: I understand all that. I
3 understand. I'm just looking at a leave to amend. I
4 don't feel that that's an element on the prejudice right
5 now. Here's what my thoughts are --

6 MS. LUNDVALL: Futility is an additional issue.

7 THE COURT: I'm just starting to talk about
8 that if you'll let me.

9 MS. LUNDVALL: Thank you, Your Honor.

10 THE COURT: The futility issue, I think
11 basically -- I know the exact issue. If all you're --
12 if you are relying on the Sandy Valley and then you
13 brought to my attention the Horgan case -- I marked it
14 here on page 7 -- that it doesn't limit, I can read
15 those on my own. I don't need you to give me what you
16 think interprets it. Correct? I will tell you,
17 Counsel, because I --

18 MS. LUNDVALL: I'm not asking for that. I'm
19 not asking for that.

20 THE COURT: Is there something in the brief you
21 are going to give me more cases or something or are you
22 going to rely on that?

23 MS. LUNDVALL: Mr. Jimmerson has suggested
24 that, in fact, that their allegation about breach of the
25 covenant of good faith and fair dealing brings him into

1 the bad faith issue. What I identified is that there is
2 a line of cases that --

3 THE COURT: So that does --

4 MS. LUNDVALL: -- speaks to the distinction
5 between a covenant of good faith and fair dealing claim
6 versus what is bad faith. And the opposite of good
7 faith is not bad faith and it doesn't require a bad
8 faith claim to be asserted.

9 THE COURT: I understand your argument too. So
10 I would like a brief on that because it does go to the
11 futility issue. I do have to make a determination that
12 it isn't futile. Even if it doesn't fit in, I have
13 another interpretation, I can come up with my
14 interpretation of Sandy Valley and Horgan that it isn't
15 limited to just those, that it gave me a criteria to
16 look at the case to see if it is one of those instances
17 where you can have attorneys' fees as special damages.
18 So that would help me because I do want to address the
19 futility.

20 I will tell you my ruling right now is that I
21 do not feel that there is any undue delay or prejudice.
22 My concern, though, is -- and I think it's legitimate.
23 Here's my concern: We do have trial coming up. I don't
24 want to wait to open discovery because you've had time,
25 but I've got a discovery issue I'm worried about now.

1 Is there a way that you -- number one, you've
2 done no -- you have no discovery done on the attorneys'
3 fees and costs?

4 MS. LUNDVALL: Correct.

5 THE COURT: So do you know now how much you
6 want to do or can you -- I think you have a right to
7 do -- now, what you are saying, there may be motions
8 in limine that that may not even, some of it, come in,
9 but we're still in discovery. Right? So I don't want
10 you cut short on discovery, because that's a problem.

11 So I'm going to open discovery up for the
12 limited purpose of the attorneys' fees and costs, if
13 they were special damages for the Jimmerson firm and
14 then -- what did you call them? I thought it was --

15 MR. JIMMERSON: Time and effort damages.

16 THE COURT: Time and effort damages for the two
17 plaintiffs, Wolfram and Wilkes. That would be extremely
18 limited depositions, and I would ask that counsel for
19 the plaintiffs provide them as soon as possible. That's
20 a very limited issue.

21 MS. LUNDVALL: From our perspective,
22 Your Honor, we appreciate the opportunity for discovery,
23 and we will take the Court up on that.

24 What I would like, though, is this, is to
25 ensure the discovery is from our perspective. It's not

1 somehow a two-way street for all at once them to pile a
2 whole host of additional documents and additional
3 information.

4 THE COURT: I would like it done mutually
5 agreeable. Is that what you are --

6 MS. LUNDVALL: Well, no. What I'm saying is
7 this: I don't want to give them the opportunity to take
8 discovery.

9 THE COURT: You want it one way?

10 MS. LUNDVALL: That's what I want, one way.

11 MS. HANSEN: So when we go to the deposition,
12 we're quiet?

13 MS. LUNDVALL: You have the opportunity for
14 objections.

15 MS. HANSEN: We can ask our clients questions.

16 THE COURT: She's not going to ask her client
17 questions.

18 You don't do that, Ms. Hansen, do you?

19 MS. HANSEN: I might. I might this time.
20 Because I wanted to remind you that one of the
21 plaintiffs, Mr. Wilkes --

22 THE COURT: Is ill.

23 MS. HANSEN: -- is very ill, may not survive
24 the summer.

25 THE COURT: That's almost a preservation

1 deposition.

2 MR. JIMMERSON: We've been working with
3 Ms. Lundvall and Mr. Shipley about trying to arrange for
4 that. By the way, he would not be part of the time and
5 effort. It really was all Jim. It was Mr. Wolfram. So
6 that --

7 THE COURT: So you can work on that.

8 MR. JIMMERSON: Exactly. And the only concern
9 we would have is if they were to produce an expert
10 report, we would like the opportunity to respond to
11 that, to rebut the expert report on the issue of our
12 attorneys' fees. We're not taking additional discovery.

13 THE COURT: I can't open discovery and just
14 make it one-sided. That's -- I would not do that. I
15 would open discovery so it's fair to both people. I
16 don't want -- now, you know, it's a pretty limited
17 issue.

18 MR. JIMMERSON: We're not going to be doing any
19 discovery here. If they were to say that we did
20 something wrong or improper, we absolutely are going to
21 want the ability to respond and rebut that with our own
22 expert.

23 THE COURT: And they may have somebody look at
24 it and say it's reasonable. You know, it's a very
25 limited issue, both of them.

1 MR. JIMMERSON: I just want to preserve our
2 ability to do that.

3 THE COURT: My ruling is discovery is open for
4 both sides, but the issues are very limited. Okay. The
5 issues are limited for the plaintiffs to time and effort
6 damages, which, as discussed in the motions, you know
7 what that is, for them getting information. Same thing,
8 the attorneys' fees damages that are related as special
9 damages if they do come in. Just because you do
10 discovery, doesn't mean it comes in, as we all know.

11 MS. HANSEN: Do you want to make an expert
12 deadline?

13 THE COURT: It's up to you.

14 MS. LUNDVALL: From this perspective, I think
15 that it's only appropriate for us to give some thought
16 to that, some consideration to try to work
17 cooperatively.

18 THE COURT: If you can't work it out, you can
19 call me. I can be a Discovery Commissioner for this
20 because I don't want anybody prejudiced. I will
21 absolutely help you work out anything, not ex-parte, but
22 together I would be glad to.

23 MS. HANSEN: I didn't want to see an expert
24 disclosure at the end of August.

25 MS. LUNDVALL: You guys don't want a late

1 disclosure?

2 THE COURT: Counsel, I was just going to say
3 that. You certainly would hear an argument.

4 MS. HANSEN: You know, with that late
5 disclosure, she's had six months in which to do
6 something. Okay. Thank you.

7 THE COURT: I honestly feel like you both do an
8 excellent job, and it's hard issues and sometimes legal
9 issues come up. Respect each other.

10 MS. LUNDVALL: From the perspective, does the
11 Court agree with the suggestion about the supplemental
12 briefing, then simultaneous briefs?

13 THE COURT: I think that's a great idea.

14 MR. JIMMERSON: Ten days?

15 THE COURT: That would be great. I'm going to
16 judicial college for the next two weeks.

17 MR. JIMMERSON: Have fun.

18 MS. LUNDVALL: Good for you.

19 THE COURT: I wish they'd they teach me
20 substantive law. I looked into it.

21 MS. HANSEN: It's how to get your robe right.

22 THE COURT: Right. How to control my
23 courtroom. Do you think I need help?

24 MS. HANSEN: You need a longer whip.

25 THE COURT: Well, once you've been there, done

1 that. So I just wanted you to know my schedule. So I'm
2 off unfortunately -- no, very fortunately, I'm very glad
3 I'm going. The Supreme Court has ordered us to go. You
4 have to do it within your first year. So I will be in
5 Reno all of next week.

6 So I just wanted to let you know, I will get to
7 it really quickly because I have the issues, but I did
8 want you to know that.

9 MS. LUNDVALL: Since you are going to be
10 gone --

11 THE COURT: If you wanted to give yourself more
12 time, is what I was trying to suggest.

13 MS. LUNDVALL: The first of May -- May 10th
14 would be ten days from today.

15 MR. JIMMERSON: Given that you've opened
16 discovery on these issues, if you needed to take an
17 extra week or two, there's no harm to both sides.

18 THE COURT: I want to make it fair to both. No
19 one needs any more pressure than you already have. I
20 understand that.

21 MR. JIMMERSON: We'll prepare the order on
22 discovery and the balance of the orders.

23 THE COURT: So on the motion for leave to
24 amend, I'm going to -- as I said, I've already not found
25 prejudice, and I have not found that it is untimely, but

1 I will reserve the futility because I do want that brief
2 from both of you that we're waiting for so the record is
3 clear. I don't want new briefing on all those others.

4 MS. LUNDVALL: Thank you, Your Honor. Then I
5 could see why the Court would want an order dealing with
6 the opening of discovery. But as to the overall leave
7 to amend issue, that's still an open issue?

8 THE COURT: Yes.

9 MS. LUNDVALL: So there would be no need for an
10 additional order on that point.

11 THE COURT: No. I'm still looking at the
12 futility issue. I want to be really up-front where I'm
13 looking. That is the issue I'm still looking at and
14 would like a little more assistance on that.

15 MS. LUNDVALL: Thank you, Your Honor.

16 THE COURT: And I understand your argument on
17 the accounting. I want to look at Horgan again, because
18 Sandy Valley, I felt was pretty explicit, and now I read
19 it one way. I would like the additional information.
20 That is the only reason it's open, though. I want to be
21 really clear about that. We already have enough issues.
22 I don't want to go back on the other.

23 MS. HANSEN: Given the Court's constraints, do
24 you foresee that opinion coming out sometime in May,
25 providing the parties an opportunity to fashion their

1 litigation and their trial cases?

2 THE COURT: Yes. I will do it right away.
3 Here's what I do: I have it all done. I do it as
4 quickly -- honestly, I don't even take it under
5 submission. What I do is I put it on my in chambers
6 calendar. What I do is when I have things like this, on
7 Wednesday I put what I call an in chambers calendar so
8 nothing sits. So I would put it on for the Wednesday
9 after I get back from judicial college. So yours is
10 due --

11 THE CLERK: May 10th. So May 15th.

12 THE COURT: And then it pops up on my calendar
13 and I know to do it. I don't take things under -- that
14 would be insane because we have a trial coming up.
15 That's not going to help you at all.

16 MS. LUNDVALL: Great idea.

17 MR. JIMMERSON: I do have one --

18 THE COURT: So that's how I do it. I just take
19 this motion and continue it to my chambers calendar on
20 May 15th, is how I do that.

21 MS. LUNDVALL: Thank you, Your Honor.

22 MR. JIMMERSON: On the issue of futility, I
23 just want to make sure we're on the same page here, this
24 does not include briefing on the actual ethical
25 question?

1 THE COURT: No.

2 MR. JIMMERSON: It is just the issue of the
3 pleading.

4 THE COURT: Right. If you think it would come
5 up, I certainly would like some information on that. We
6 can always get trial briefs.

7 MR. JIMMERSON: We can call the State Bar too.
8 We'll do what's necessary to make sure we get it right.

9 THE COURT: So I would appreciate it, to make
10 sure we do that right.

11 MR. JIMMERSON: We'll work together.

12 THE COURT: We know the issues. Some of these
13 are intertwined. Any trial brief or anything, the
14 sooner -- I will tell you, the sooner you get me the
15 law, I will read it and try very hard to understand and
16 apply it to this case. I mean, I do promise you that.

17 Like I said, I even went back and read the
18 summary judgments. And you know more discovery. That's
19 why I didn't bring up the other conflict. You already
20 knew your specific performance more than the terms of
21 the contract.

22 So I would appreciate that, because, like I
23 said, I've been having trials where they bring it up at
24 9:00 in the morning for a witness that's supposed to get
25 on at 1:00. That is very frustrating. If you are a

1 judge and want to do a good job with the law, that's
2 hard. I understand evidentiary stuff, but these issues
3 you are aware of now. And also you would like it
4 resolved.

5 I'm a huge motion in limine fan because it
6 makes everybody's life and the judge's life easier so
7 that we're not all trying to do it --

8 MS. HANSEN: It saves time during the trial.

9 THE COURT: And it focuses how you prepare your
10 case. You have to know your case ahead and --

11 MS. HANSEN: More than the day before, Judge.

12 THE COURT: It would help. So I absolutely do
13 want -- because that is an issue that the Court needs to
14 know about, and counsel too.

15 Anything else? Are we clear then where we're
16 going?

17 And if you want to do the 15th, Kristin, she
18 puts it on and I get it done. What I do is I actually
19 keep it. I have a table where I keep my in camera
20 things. Because once I learn it, I would rather do it
21 sooner anyway. I'm not fond of taking anything under
22 submission because you have to do the whole facts and
23 everything. As a trial attorney, I used a tub and once
24 the trial is over, it's gone, you know, because you move
25 on to other issues and other cases and other trials.

1 But I do appreciate very much your help on
2 these issues. I cannot compliment both counsel enough
3 that you give me the law, and the briefing is
4 exceptional. And I will tell you that from other cases,
5 it is very much appreciated. I appreciate it very much.
6 I commend both sides.

7 MR. JIMMERSON: Thank you, Your Honor.

8 MS. HANSEN: Thank you, Your Honor.

9 MS. LUNDVALL: Thank you, Your Honor.

10 THE COURT: Thank you, Counsel.

11 -oOo-

12 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF
13 PROCEEDINGS.

14
15 */s/ Jennifer D. Church*

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17 JENNIFER D. CHURCH, CCR. No. 568, RPR
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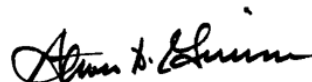
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CLERK OF THE COURT

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10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 JAMES WOLFRAM and)	
13 WALT WILKES,)	CASE NO.: A-10-632338-C
)	DEPT. NO.: IV
14 Plaintiffs,)	
)	
15 vs.)	
)	
16 PARDEE HOMES OF NEVADA,)	
)	
17 Defendant.)	
18)	

19 **PLAINTIFFS' SUPPLEMENT TO MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT PURSUANT TO THE COURT'S ORDER ON HEARING ON APRIL 26, 2013**

20 COME NOW, Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through
21 their counsel of record, James J. Jimmerson, Esq., Lynn M. Hansen, Esq., and James M.
22 Jimmerson, Esq., of the law firm of JIMMERSON HANSEN, P.C., and hereby file Plaintiffs'
23 Supplement to Motion for Leave to File a Second Amended Complaint Pursuant to the
24 Court's Order on Hearing on April 26, 2013. This Supplement is based upon the papers
25 and pleadings on file in this action, the exhibits attached to the original moving briefs, the


26 ///

27 ///

1 Memorandum of Points and Authorities attached hereto, and any argument adduced at the
2 time of any hearing on this matter.

3 DATED this 10th day of May, 2013.

4 JIMMERSON HANSEN, P.C.

5
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'
SUPPLEMENT TO MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT
PURSUANT TO THE COURT'S ORDER ON HEARING ON APRIL 26, 2013

I. INTRODUCTION

As the Court will remember from the hearing on Plaintiffs' Motion for Leave to File a Second Amended Complaint, it requested additional briefing on the issue of whether Plaintiffs' proposed amendment was futile. Specifically, the Court inquired as to the availability of attorney's fees under *Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948, 35 P.3d 964 (2001) and its progeny. Plaintiffs' position at the hearing was that the proposed amendment was not futile because (1) Plaintiffs claims fall under the general *Sandy Valley* special damages criteria, and (2) the category of their claims was specifically mentioned in *Sandy Valley* when the Nevada Supreme Court stated, "actions for declaratory or injunctive relief may involve claims for attorney's fees as damages when the actions were necessitated by the opposing party's bad faith conduct." *Sandy Valley*, 117 Nev. at 958.

Counsel for Defendant responded to Plaintiffs by arguing that the claims at issue were not of the sort specifically mentioned in *Sandy Valley* and therefore Plaintiffs could not seek their attorney's fees as damages. Pointing to the particular clause in *Sandy Valley* regarding a defendant's bad faith conduct necessitating the expenditure of attorney's fees, counsel for Defendant argued that Plaintiffs' claim for the breach of the implied covenant of good faith and fair dealing was not a pleading of bad faith qualifying for damages under *Sandy Valley*. After a back and forth colloquy concerning whether an allegation of failing to act in good faith was an allegation that Defendant acted in bad faith, the Court ordered further briefing on whether Plaintiffs' allegations that Defendant did not fulfill its duty to act in good faith satisfied the standard set forth in *Sandy Valley*.

Also requiring additional briefing was Defendant's underlying argument that later decisions interpreting *Sandy Valley* (specifically *Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007)) limited the availability of attorney's fees as damages to the types of claims specifically mentioned in *Sandy Valley*—and abandoned the general criteria stated in that

1 decision. As the Court will remember, it requested the additional briefing on this issue
2 since *Sandy Valley* did more than list specific types of cases whereby attorney's fees
3 would be potentially available as damages—it set forth a general formula whereby the
4 district courts could determine if a plaintiff's damages could include attorney's fees. The
5 question of whether the Nevada Supreme Court has receded away from this general test in
6 later decisions is significant because, if true, it would limit Plaintiffs' ability to recover their
7 attorney's fees. The Court rightly observed that under *Sandy Valley*, even if Plaintiffs'
8 claims did not fall under one of the specific types listed in the opinion, as long as Plaintiffs'
9 met the general test in *Sandy Valley*, the proposed Second Amended Complaint would not
10 be futile. However, if Defendant's arguments concerning the post-*Sandy Valley* decisions
11 were true, Plaintiffs' claims would have to be of the sort specifically listed by the Nevada
12 Supreme Court in *Sandy Valley* to be eligible for attorney fee damages. Plaintiffs disagree
13 with Defendant's interpretation of *Sandy Valley* and respectfully submit this Supplement as
14 requested by the Court in further support of their Motion for Leave to File a Second
15 Amended Complaint.

16 As will be detailed below, each of Defendant's positions concerning the proposed
17 Second Amended Complaint is without merit. As an initial matter, the Nevada Supreme
18 Court has not abandoned the general test for attorney fee damages set forth in *Sandy*
19 *Valley*. Out of the three cases later addressing this issue from *Sandy Valley*, none of them
20 make any statements to support Defendant's claim. In fact, later decisions confirm that the
21 opposite is true—claims not specifically listed in *Sandy Valley*, but which still satisfy the
22 general *Sandy Valley* formula, do qualify for damages in the form of attorney's fees. And if
23 the Court finds that this analysis is true, it may end its inquiry on the issue of futility here,
24 as there is no genuine dispute that the proposed Second Amended Complaint fits within
25 the general *Sandy Valley* doctrine.¹

26
27 ¹ Presumably the Court would not consider additional briefing on the issues herein if it was
28 inclined to find that the proposed Second Amended Complaint did not fall under *Sandy*
Valley's general criteria to be eligible for attorney fee damages.

1 Furthermore, Defendant's argument that Plaintiffs' claims are not the same as the
2 specific examples of cases eligible for attorney fee damages is similarly faulty and must be
3 rejected. Defendant would have the Court believe that Plaintiffs' request for declaratory
4 and/or injunctive relief (in the form of an accounting) does not warrant attorney fee
5 damages because Plaintiffs do not adequately allege Defendant's "bad faith conduct"
6 necessitating the expenditure of attorney's fees—and thus Plaintiffs' claim does not fit
7 within the examples given in *Sandy Valley, Id.* In order to succeed in this argument,
8 Defendant must persuade the Court that Plaintiffs' cause of action for Defendant's breach
9 of its duty to act in good faith is not the equivalent of an allegation of "bad faith conduct."

10 As the Court will remember, it approached this argument with a healthy amount of
11 skepticism at the hearing. And for good reason. It is both common sense and the
12 common law that the failure to act in good faith is, by definition, the same as engaging in
13 bad faith conduct. A party cannot breach its duty to act honestly and fairly without acting
14 dishonestly or unfairly. It is axiomatic that good faith is a state of mind and the conscious
15 failure to act in that state of mind can be nothing less than an act in bad faith. Nevada law
16 is consistent with this precept and supports Plaintiffs' position that their cause of action for
17 Defendant's breach of the covenant of good faith and fair dealing is the equivalent of an
18 allegation that Defendant acted in bad faith. As such, the Court must find that the
19 proposed Second Amended Complaint conforms to *Sandy Valley* and its progeny in the
20 pleading of attorney fee damages and Plaintiffs should be granted leave to file the
21 proposed Second Amended Complaint.

22 Finally, since the Court ordered supplemental briefing on whether the proposed
23 amendments are futile, Plaintiffs will address the propriety of their claims for compensation
24 for their time and effort as an element of damages. As the Court is aware, Plaintiffs spent
25 a substantial amount of time trying to acquire the records that were owed to them after
26 Pardee had repeatedly refused to provide the documents. Considering that (1) Plaintiffs
27 could have been earning commissions for forty years after they signed the September 1,
28 2004 Commission Letter Agreement, and (2) that they were advanced in age, it is natural

1 and foreseeable that when Defendant Pardee failed to provide the documents to Plaintiffs
2 as it should have, Plaintiffs would look elsewhere for them. As such, Plaintiffs are entitled
3 to be compensated for their time and effort which was needlessly wasted by Defendant.

4 II. LEGAL ARGUMENT

5 A. Legal Standard

6 The Court is well aware of Nevada Rule of Civil Procedure 15 and its mandate that
7 leave to amend pleadings shall be freely given when justice so requires. N.R.C.P. 15(a).
8 However, not all motions for leave to amend must be granted. Plaintiffs and Defendant
9 agree that it is not an abuse of discretion for the Court to deny leave to amend when the
10 proposed amendment would be futile. See Opp.² at 4-5 (citing *Allum v. Valley Bank of*
11 *Nevada*, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993)). However, an amendment may
12 only be considered futile if it would not survive a motion to dismiss. *Id.* at 5; *Sonoma Ass'n*
13 *of Retired Employees v. Sonoma County*, 708 F.3d 1109, 1118 (9th Cir. 2013) ("[Plaintiff]
14 may be able to amend its complaint to state a claim that will survive a motion to dismiss,
15 and so denial of leave to amend on the grounds of futility is improper."); see also *Nordyke*
16 *v. King*, 644 F.3d 776, 778 n.12 (9th Cir. 2011) (holding the same). Defendant cannot
17 meet this heavy burden and demonstrate that the proposed Second Amended Complaint
18 should be dismissed pursuant to N.R.C.P. 12(b)(5).

19 The Court is well versed in Nevada's motion to dismiss jurisprudence. Nevada is a
20 notice pleading state, meaning, "courts liberally construe pleadings to place matters into
21 issue which are fairly noticed to the adverse party." See *Hall v. SSF, Inc.*, 112 Nev. 1384,
22 1391, 930 P.2d 94, 98 (1996); *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co.*
23 *Inc.*, 114 Nev. 1304, 1309, 971 P.2d 1251, 1254 (1998). On a motion to dismiss, the
24 "[C]ourt presumes all factual allegations in the complaint are true and draws all inferences
25 in favor of the plaintiff." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228

26
27 ² Plaintiffs' Motion for Leave to File a Second Amended Complaint is cited herein as "Mot.
28 at ____." Defendant's Opposition to Plaintiff's Motion for Leave to File a Second Amended
Complaint is cited herein as "Opp. at ____." Plaintiffs' Reply in Further Support of Their
Motion for Leave to File a Second Amended Complaint is cited herein as "Reply at ____."

1 181 P.3d 670, 672 (2008). Likewise, the Court may grant a dismissal only, "if it appears
2 *beyond a doubt* that the plaintiff could prove no set of facts, which, if true, would entitle the
3 plaintiff to relief." *Id.* (emphasis supplied). Because Defendant cannot demonstrate
4 "beyond a doubt" that Plaintiffs are not entitled to attorney's fees as damages, the Court
5 should find that the proposed amendment is not futile or frivolous.

6 **B. The Proposed Second Amended Complaint Appropriately Pleads Plaintiffs'**
7 **Entitlement to Attorney's Fees as Special Damages**

8 The proposed Second Amended Complaint attached to Plaintiffs' Motion adequately
9 pleads Plaintiffs' claim for attorney fee damages. Under *Sandy Valley*, "When attorney
10 fees are considered an element of damages, they must be the natural and proximate
11 consequence of the injurious conduct." *Sandy Valley*, 117 Nev. at 957. The proposed
12 amendment is replete with allegations demonstrating how Defendant's injurious conduct
13 naturally and proximately caused Plaintiffs' expenditure of attorney's fees. Paragraphs 8
14 through 15 detail how over the course of twenty months, Plaintiffs tried in vain to retrieve
15 the information and documents owed to them under the September 1, 2004 Commission
16 Letter Agreement. Exhibit 1 at ¶¶ 8-15. These efforts involved requests to Defendant,
17 third party title companies, and document searches at the Clark County Records Office.
18 *Id.* at ¶ 13. Defendant not only failed to provide the necessary records to Plaintiffs, but the
19 information Defendant did provide misled Plaintiffs. *Id.* A comprehensive review of
20 Defendant's actions towards Plaintiffs reveals that Defendant failed to uphold its duty to act
21 in good faith towards Plaintiffs. *Id.* at ¶ 30. After all of these events, Plaintiffs were left with
22 no option other than hiring an attorney to file suit and use the power of discovery and
23 appeal to the Court to compel an accounting and the production of the information owed to
24 Plaintiffs. *Id.* at ¶¶ 19, 25, 31. Liberally construing these allegations and drawing all
25 inferences in favor of Plaintiffs, Defendant cannot demonstrate "beyond a doubt" that no
26 set of facts exists under which Plaintiffs may be entitled to their attorney's fees as
27 damages.
28

Under Nevada's liberal pleading standards, the proposed Second Amended Complaint's allegations establish Plaintiffs' entitlement to claim their attorney's fees as special damages. Setting aside the fact that due to the recent and substantial motion practice, Defendant is well aware of Plaintiffs' claims for attorney fee damages (and the basis therefore), the proposed Second Amended Complaint fully satisfies *Sandy Valley* and the Nevada Rules of Civil Procedure on its own. Under each cause of action, Plaintiffs specifically state their claim for attorney's fees as special damages for that particular cause of action—fulfilling the requirements of *Sandy Valley* and N.R.C.P. 9(g)—and Plaintiffs state their claim of damages exceeding \$10,000.00—complying with N.R.C.P. 8(a).³ *Id.* at ¶¶ 19, 21, 25, 27, 31, 33. These allegations appropriately alert Defendant to the damages in question and therefore the Court should put these "matters into issue" as they are "fairly noticed to the adverse party." *Hall*, 112 Nev. at 1391.

C. The Examples of Actions in *Sandy Valley* Do Not Serve as an Exhaustive List of Cases Where Attorney's Fees may be Properly Claimed as Special Damages

Defendant's chief argument against the Proposed Second Amended Complaint is that certain decisions after *Sandy Valley* (specifically *Horgan*) serve to eliminate the general criteria for attorney fee damages in favor of the finite list of actions cited in *Sandy Valley* that would be eligible for such damages. However, this argument is meritless. The Nevada Supreme Court in *Sandy Valley* set forth the general test for attorney fee damages, followed by a list of specific examples of types of claims that could fall under that general test, stating:

In contrast, when a party claims it has incurred attorney fees as foreseeable damages arising from tortious conduct or a breach of contract, such fees are considered special damages. They

³ Any suggestion that the amount of attorney's fees claimed as special damages must be pled more specifically than N.R.C.P. 8(a)'s requirements, or must be pled "with particularity," is not supported by Nevada law. The Nevada Supreme Court has repeated in multiple decisions that attorney's fees, when claimed as special damages, "shall be specifically stated." See *Sandy Valley*, 117 Nev. at 956; *Horgan*, 123 Nev. at 586, n. 26. The pleading of attorney's fees as damages is proper when such damage claims are specifically stated under N.R.C.P. 9(g) and put Defendant on notice of the damage claims it faces for each cause of action alleged against it.

1 must be pleaded as special damages in the complaint pursuant
2 to NRCP 9(g) and proved by competent evidence just as any
3 other element of damages. The mention of attorney fees in a
4 complaint's general prayer for relief is insufficient to meet this
5 requirement. Finally, when attorney fees are considered as an
6 element of damages, they must be the natural and proximate
7 consequence of the injurious conduct. If more than one claim is
8 presented in a complaint, the party claiming fees as damages
9 must prove the fees as to each claim.

10 As a practical matter, attorney fees are rarely awarded as
11 damages simply because parties have a difficult time
12 demonstrating that the fees were proximately and necessarily
13 caused by the actions of the opposing party and that the fees
14 were a reasonably foreseeable consequence of the breach
15 970*970 or conduct. Because parties always know lawsuits are
16 possible when disputes arise, the mere fact that a party was
17 forced to file or defend a lawsuit is insufficient to support an
18 award of attorney fees as damages.

19 Attorney fees may be an element of damage in cases when a
20 plaintiff becomes involved in a third-party legal dispute as a
21 result of a breach of contract or tortious conduct by the
22 defendant. The fees incurred in defending or prosecuting the
23 third-party action could be damages in the proceeding between
24 the plaintiff and the defendant. This type of action could arise
25 from claims against title insurance or bonds and breaches of
26 duty to defend clauses in insurance or indemnity actions.

27 Attorney fees may also be awarded as damages in those cases
28 in which a party incurred the fees in recovering real or personal
property acquired through the wrongful conduct of the
defendant or in clarifying or removing a cloud upon the title to
property. Finally, actions for declaratory or injunctive relief may
involve claims for attorney fees as damages when the actions
were necessitated by the opposing party's bad faith conduct.

21 *Sandy Valley*, 117 Nev. at 956-958. A close reading of these four paragraphs confirms the
22 validity of Plaintiffs' position.

23 Nothing in *Sandy Valley* or its progeny suggests that the only actions qualifying for
24 attorney fee damages are limited to those specifically listed therein. First, *Sandy Valley* is
25 clear that the test governing the availability of such damages is whether the fees are the
26 natural and proximate consequence of Defendant's conduct. The Nevada Supreme Court
27 repeats itself no fewer than three times in enunciating this criteria, stating, "they must be
28 the natural and proximate consequence of the injurious conduct;" "the fees were

proximately and necessarily caused by the actions of the opposing party;" and "the fees were a reasonably foreseeable consequence of the breach or conduct." *Id.* at 957. Defendant's position ignores and effectively nullifies these clear and repeated holdings and must therefore be rejected.

Second, *Sandy Valley*, in footnote 7, cites eleven Nevada decisions involving issues relating to attorney's fees as an element of damages (and not fees considered pursuant to agreement, rule, or statute). *Id.* at 955, n. 7. Out of these eleven cases, ten fall within the scope of the examples listed in the body of *Sandy Valley* (that is they are suits for injunctive/declaratory relief; for recovery of personal or real property; or for fees caused by litigation with a third party, etc.). However, one case, *Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1989), does not involve claims listed in *Sandy Valley* and the citation to *Works* with approval further suggests that the court was not limiting the availability of attorney fee damages to the causes of action it specifically identified. In *Works*, the court granted fees "to defray the expenses and costs that respondents have incurred in retaining counsel to represent them..." in an appeal concerning claims for breach of accord and satisfaction and malicious prosecution. *Works*, 103 Nev. at 69.⁴ As the Court is surely aware, the two types of claims in *Works* are not listed in the body of the opinion in *Sandy Valley*, yet the *Sandy Valley* Court approved of the *Works* fee award as special damages. If the court in *Sandy Valley* intended to restrict the causes of action qualifying for attorney fee damages, it would not have cited *Works* with approval.

Third, the three Nevada cases citing or interpreting *Sandy Valley* on the issue of attorney's fees as damages, *Horgan, Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005), and *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc.*, 255 P.3d 268, 127 Nev. Adv. Op. 26 (2011), all support Plaintiffs' position. In *Shuette*, the court reaffirmed the *Sandy Valley* test, stating that for attorney's fees to be

⁴ While the court cites N.R.A.P. 38(b) for support for the fee award, the court in *Sandy Valley* is clear that this was a case concerning fees as damages, and any language suggesting that the award was made pursuant to agreement, rule or statute, is disapproved.

1 awarded as damages, "claimants have the arduous task of proving [that the fees] were a
2 natural and proximate consequence of the injurious conduct." *Shuette*, 121 Nev. at 863.
3 In *Horgan*, the court reversed *Sandy Valley* on the limited issue of the availability of fees as
4 damages for claims for removing clouds of title. See *Horgan*, 123 Nev. at 586. The
5 *Horgan* Court held:

6 Accordingly, our statement in *Sandy Valley* that attorney fees
7 are available in a case "of clarifying or removing a cloud upon
8 the title to property" and similar statements in *Summa I* and
9 *Michelsen* inadvertently expanded the scope of real property
10 cases in which attorney fees are available as special damages.
11 Therefore, we retreat from these statements and now clarify
12 that attorney fees are only available as special damages in
13 slander of title actions and not simply when a litigant seeks to
14 remove a cloud upon title.

15 *Id.* (citations omitted). Contrary to what Defendant's counsel has argued, no suggestion is
16 made in *Horgan* that the general *Sandy Valley* criteria for attorney fee damages has been
17 limited to the examples of claims listed in *Sandy Valley*. This is confirmed by the *Reyburn*
18 decision in 2011 (which post-dates *Horgan* by four years). The court in *Reyburn* again
19 reaffirmed *Sandy Valley*'s test for the propriety of fees as damages, stating, "attorney fees
20 that are considered special damages are fees that are foreseeable arising from the breach
21 of contract or tortious conduct." *Reyburn*, 255 P.3d at 279, n. 11. If the *Horgan* Court did
22 in fact limit *Sandy Valley* as Defendant argues, that limitation should have been stated or
23 referenced in *Reyburn*; instead, the *Reyburn* Court paraphrased the *Sandy Valley* test as
24 being good law.

25 Fourth, Defendant in its Opposition to the Motion for Leave to File a Second
26 Amended Complaint has implicitly agreed with Plaintiffs that *Horgan* did not restrict *Sandy*
27 *Valley* to the types of claims listed therein. In Defendant's Opposition, counsel argues that
28 attorney's fees are available as damages in the following cases: "third-party actions
involving title insurance or bonds, insurance or indemnity actions, slander of title actions,
malicious prosecution, trademark infringement, or false imprisonment." *Opp.* at 7 (citing

1 *Horgan*, 123 Nev. at 587). The support for this statement comes from Justice Maupin's
2 concurrence in *Horgan*, stating:

3 I want to stress that the clarification of *Sandy Valley Associates*
4 *v. Sky Ranch Estates* does not preclude the prosecution of
5 claims for attorney fees as damages in other contexts; e.g., in
6 connection with actions for malicious prosecution, abuse of
process, wrongful attachment, trademark infringement, false
imprisonment or arrest.

7 *Horgan*, 123 Nev. at 587 (J. Maupin concurring).⁵ If Defendant believes that *Horgan* or
8 another decision limits *Sandy Valley*, it makes no sense to adopt the contrary position as
9 articulated by Justice Maupin in the Opposition to Plaintiffs' Motion. This admission by
10 Defendant in its primary opposition brief is compelling evidence that Plaintiffs' interpretation
11 of *Sandy Valley* and its progeny is correct and that as long as the proposed Second
12 Amended Complaint passes the general criteria for claiming attorney's fees as damages in
13 *Sandy Valley*, it is not futile.

14 **D. Plaintiffs' Cause of Action for Breach of the Implied Covenant of Good**
15 **Faith and Fair Dealing Appropriately Pleads Bad Faith and Therefore the**
16 **Proposed Second Amended Complaint Fits Within the Specific Examples**
17 **of Cases in *Sandy Valley* for which Attorney's Fees may be Claimed as**
18 **Damages**

19 As referenced above, if the Court is persuaded that Nevada law permits the
20 pleading of attorney's fees as damages so long as the *Sandy Valley* test is met, it need not
21 decide if Plaintiffs' proposed Second Amended Complaint fits within the specific examples
22 of claims in *Sandy Valley* for which attorney's fees are available as damages because the
23 Proposed Second Amended Complaint meets the *Sandy Valley* test. However, if the Court
24 prefers not to consider the boundaries of *Sandy Valley* before deciding whether the
25 proposed amendment fits neatly under one of the causes of action listed in that decision,
26 the following section explains in detail that the Second Amended Complaint does, in fact,

27 ⁵ Justice Maupin, one of the three Justices on the panel delivering the Per Curiam Opinion
28 in *Sandy Valley*, is confirming here, without disagreement from in the *Horgan* opinion, that
"Sandy Valley does not preclude the prosecution of claims for attorney fees as damages in
other contexts..." *Id.*

1 fall under at least one of the listed claims in *Sandy Valley* which are eligible for attorney fee
2 damages.

3 The crux of the dispute between Plaintiffs and Defendant is whether the claim for
4 the breach of the implied covenant of good faith and fair dealing adequately pleads
5 Defendant's bad faith. As discussed above, under *Sandy Valley*, "actions for declaratory or
6 injunctive relief may involve claims for attorney fees as damages when the actions were
7 necessitated by the opposing party's bad faith conduct." *Sandy Valley*, 117 Nev. at 958.
8 It was undisputed at the hearing that Plaintiffs' claim for an accounting was a claim for
9 injunctive relief (specifically mandatory injunctive relief). See *State ex rel. Delhi Tp. v.*
10 *Wilke*, 27 Ohio App. 3d 349, 351-352, 501 N.E. 2d 97, 99 (Ohio Ct. App. 1986) ("the
11 complaint was by its very terms an action for... a mandatory injunction enforcing an
12 accounting."); *Lichtenstein v. Anvan Co.*, 62 Ill. App. 3d 91, 378 N.E. 2d 1171 (Ill. App. Ct.
13 1978) (action for mandatory injunction requiring accounting). Therefore, the only matter at
14 issue is whether Plaintiffs have adequately pled bad faith in the proposed Second
15 Amended Complaint. And Plaintiffs have. Nevada law is clear that claims for breaches of
16 the implied covenant of good faith and fair dealing are "bad faith" claims no matter if they
17 are claims founded on contract principles or tort principles.

18 1. Under the Common Law, A Claim for Breach of the Covenant of Good
19 Faith and Fair Dealing is a Claim On a Party's Bad Faith Conduct

20 As the Court well knows, the implied covenant of good faith and fair dealing is a
21 fundamental concept of contract law.⁶ Under common law, "every contract imposes upon
22 each party a duty of good faith and fair dealing in its performance and its enforcement."
23 Restatement (Second) Contracts § 205 (2012). The duty of good faith and fair dealing
24 described in § 205 is defined by its opposite—that is, a party may not fulfill its duty of good
25

26
27 ⁶ E. Allan Farnsworth, Good Faith Performance and Commercial Reasonableness Under
28 the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 669 (1963) ("The inclusion of an
obligation of good faith performance in the Code revives an ancient, although largely
forgotten, principle.").

1 faith without also ensuring that its conduct does not involve bad faith.⁷ The Restatement
2 defines "good faith" as follows:

3 a. Meanings of "good faith." Good faith is defined in Uniform
4 Commercial Code § 1-201(19) as "honesty in fact in the
5 conduct or transaction concerned." "In the case of a merchant"
6 Uniform Commercial Code § 2-103(1)(b) provides that good
7 faith means "honesty in fact and the observance of reasonable
8 commercial standards of fair dealing in the trade." The phrase
9 "good faith" is used in a variety of contexts, and its meaning
10 varies somewhat with the context. Good faith performance or
11 enforcement of a contract emphasizes faithfulness to an
12 agreed common purpose and consistency with the justified
13 expectations of the other party; it excludes a variety of types of
14 conduct characterized as involving "bad faith" because they
15 violate community standards of decency, fairness or
16 reasonableness. The appropriate remedy for a breach of the
17 duty of good faith also varies with the circumstances.

18 *Id.*, cmt a. The Restatement further elaborates on the meaning of "Good Faith
19 Performance" when stating:

20 d. Good faith performance. Subterfuges and evasions violate
21 the obligation of good faith in performance even though the
22 actor believes his conduct to be justified. But the obligation
23 goes further: bad faith may be overt or may consist of inaction,
24 and fair dealing may require more than honesty. A complete
25 catalogue of types of bad faith is impossible, but the following
26 types are among those which have been recognized in judicial
27 decisions: evasion of the spirit of the bargain, lack of diligence
28 and slacking off, willful rendering of imperfect performance,
abuse of a power to specify terms, and interference with or
failure to cooperate in the other party's performance.

Id., cmt d.

Bernard Witkin's analysis of the implied covenant of good faith and fair dealing is
consistent with the Restatement. Witkin writes:

There is a implied in every contract a covenant by each party
not to do anything which will deprive the other parties thereto of
the benefits of the contract. This covenant not only imposes
upon each contracting party the duty to refrain from doing
anything which would render performance of the contract
impossible by any act of his own, but also the duty to do
everything that the contract presupposes that he will do to

⁷ And vice versa; noncompliance with the duty of good faith necessarily involves some
level of bad faith.

1 accomplish its purpose... If the cooperation of the other party is
2 necessary for successful performance of an obligation, a
3 promise to give that cooperation and not to do anything that
prevents realization of the fruits of performance will often be
implied.

4 Witkin 1 Summary of California Law (10th), Contracts § 798 (2010).

5 While the Court is surely familiar with the general principles governing the implied
6 covenant of good faith and fair dealing, it is important to carefully examine how these
7 treatises analyze and discuss compliance with and violation of the duty of good faith. Both
8 the Restatement and Witkin adopt the view that fulfillment of the implied covenant of good
9 faith and fair dealing does not lend itself to a middle ground. A party cannot just partly act
10 in good faith. For Witkin, the duty requires not only doing all affirmative acts to ensure the
11 purpose of the contract is accomplished but also refraining from doing anything "which will
12 deprive the other parties thereto of the benefits of the contract." *Id.* Similarly, under the
13 Restatement, fulfillment of the implied covenant of good faith and fair dealing "excludes"
14 conduct characterized as involving bad faith. Restatement (Second) Contracts § 205, cmt d
15 (2012). And bad faith may involve nothing more than inaction. *Id.* The mutually exclusive
16 nature of good faith and bad faith conduct is further recognized by Cornell Professor
17 Robert S. Summers. Professor Summers argues in his seminal article on the implied
18 covenant of good faith and fair dealing that good faith cannot be defined and may only be
19 understood by reference to "bad faith."⁸

20 These treatises and publications confirm what the Court so clearly recognized at the
21 hearing on Plaintiffs' Motion for Leave to File a Second Amended Complaint—the failure to
22 act in good faith necessarily implies conduct involving bad faith. Nevada caselaw supports
23 this position and adopts the Second Restatement as it pertains to the implied covenant of
24 good faith and fair dealing.

25
26 ⁸ Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provision of the
27 Uniform Commercial Code, 54 Va. L. Rev. 195 (1968), "In contract law, taken as a whole,
28 good faith is an 'excluder.' It is a phrase without general meaning (or meanings) of its own
and serves to exclude a wide range of heterogeneous forms of bad faith." *Id.* at 201
(citation omitted).

2. The Nevada Supreme Court Consistently Holds that a Party Failing to Act in Good Faith Necessarily Implicates the Opposite: that the Party has Acted in Bad Faith

The Nevada Supreme Court has consistently interpreted the term "good faith" alongside its opposite, "bad faith," recognizing that there can be no compromise—either an individual acts in good faith, or he/she conducts themselves in bad faith. See *Hulse v. Sheriff, Clark County*, 88 Nev. 393, 398, 498 P.2d 1317, 1320 (1972) ("The term 'good faith' has been defined as honest, lawful intent, and as the opposite of fraud and bad faith."); *Land Resources Development v. Kaiser Aetna*, 100 Nev. 29, 33-34, 676 P.2d 235, 238 (1984) ("[Plaintiff] did not present a prima facie case of bad faith against [defendant] under any definition of the term. The evidence shows that throughout its negotiations with [plaintiff], [defendant] exhibited the utmost good faith."). In the context of a workman's compensation claim, the Nevada Supreme Court held that the failure to grant a claim without reasonable basis is an act of bad faith. In *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991), the Nevada Supreme Court stated:

Bad faith, the converse of good faith, has been defined as "the absence of a reasonable basis for denying benefits and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim...[T]o act in bad faith, i.e. without a reasonable basis or with the knowledge of reckless disregard of the lack of reasonable basis in the processing or denial of claims.

Id. (citations omitted). And in the family law context, the Nevada Supreme Court has held that a party has a "good faith" reason to move when the move "is not designed to frustrate the visitation rights of the noncustodial parent." *Halbrook v. Halbrook*, 114 Nev. 1455, 1458, 971 P.2d 1262, 1264 (1998). The common thread between all of these decisions is the Nevada Supreme Court's consistent recognition that good faith is identified by the absence of bad faith and vice versa. Whether it is by reference to the opposite of the term under consideration ("good faith" or "bad faith"), or to the implications of certain behavior (denying workman's comp claims or frustrating the noncustodial parent's visitation), it is

1 clear that Nevada law does not recognize any middle ground between good faith and bad
2 faith—a party can only be in one of those two camps.

3 3. In Nevada, Allegations of a Party's Breach of the Implied Covenant of
4 Good Faith and Fair Dealing are the Equivalent of Allegations of a Party's
5 Bad Faith Conduct

6 In Nevada, allegations in support of a claim for breach of the implied covenant of
7 good faith and fair dealing have the same meaning and effect as allegations of the
8 opposite party's bad faith conduct. A number of Nevada Supreme Court cases confirm
9 this. For example, in *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043,
10 862 P.2d 1207 (1993), the court described the only way Defendant could have breached
11 the implied covenant of good faith and fair dealing is by engaging in bad faith actions.
12 Specifically the court stated, "It is apparent that Lewis would have had a great difficulty
13 exercising bad faith to the point of breaching the implied covenant of good faith and fair
14 dealing without the cooperation of others." *Id.* at 1047. Indeed, the court went so far as to
15 describe the implied covenant by stating "the duty not to act in bad faith or deal unfairly
16 thus becomes part of the contract..." *Id.* at 1046. In so describing the behavior necessary
17 to breach the implied covenant of good faith and fair dealing (bad faith conduct) and
18 converting the duty of good faith into the duty not to act in bad faith, the Nevada Supreme
19 Court equates acts necessary to breach the implied covenant with conduct involving bad
20 faith. By replacing the affirmative duty to act in good faith with its inverse, the duty not act
21 in bad faith, the Nevada Supreme Court effectively held that a breach of the covenant of
22 good faith and fair dealing requires, by definition, an exercise of bad faith, since the only
23 way to breach the inverse duty, the duty not to act in bad faith, is to engage in bad faith
24 conduct.

25 This holding by itself defeats Defendant's arguments and demonstrates that
26 Plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing is
27 the same as an allegation that Defendant acted in bad faith, therefore placing the proposed
28 amendment into a specific category of claims eligible for attorney fee damages as stated in
Sandy Valley. There are several additional decisions supporting this position.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 72371

Electronically Filed
~~Feb 28 2018~~ 11:32 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

PARDEE HOMES OF NEVADA

Appellant,

v.

JAMES WOLFRAM and WALT WILKES, et al.

Respondents.

Appeal Regarding Judgment and Post-Judgment Orders
Eighth Judicial District Court
District Court Case No.: A-10-632338-C

JOINT APPENDIX – VOLUME 16 OF 88

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07/25/2014	Notice of Entry of Order Granting Motion to Expunge Lis Pendens	48	JA007574- JA007578
06/05/2013	Notice of Entry of Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002665- JA002669
01/13/2017	Notice of Entry of Order on Defendant's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	86	JA013652- JA013656
05/13/2015	Notice of Entry of Order on Findings of Fact and Conclusions of Law and Supplemental Briefing re Future Accounting	49	JA007712- JA007717
07/10/2015	Notice of Entry of Order on Pardee's Emergency Motion to Stay Execution of Judgment; and Ex Parte Order Shortening Time	62	JA009755- JA009758
01/12/2017	Notice of Entry of Order on Plaintiffs' Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60	86	JA013645- JA013648
04/03/2013	Notice of Entry of Order re Order Denying Defendants Motion for Summary Judgment	16	JA002465- JA002470

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03/15/2013	Notice of Entry of Order re Order Granting Plaintiffs Countermotion for Summary Judgment	14	JA002354-JA002358
10/13/2017	Notice of Entry of Order Re: Defendant Pardee Homes of Nevada's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014147-JA014151
12/16/2011	Notice of Entry of Stipulated Confidentiality Agreement and Protective Order	1	JA000040-JA000048
08/30/2012	Notice of Entry of Stipulation and Order to Extend Discovery Deadlines (First Request)	1	JA000055-JA000060
07/14/2017	Notice of Entry of Supplemental Order Regarding Plaintiffs' Entitlement to, and Calculation of, Prejudgment Interest	88	JA014111-JA014117
11/07/2012	Opposition to Defendant's Motion for Summary Judgment and Plaintiffs' Counter Motion for Partial Summary Judgment	2	JA000322-JA000351
07/14/2014	Opposition to Pardee's Motion to Expunge Lis Pendens	48	JA007495-JA007559
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion for Attorney's Fees and Costs	86	JA013619-JA013621
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Defendants Motion to Amend Judgment	86	JA013613-JA013615
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Plaintiff's Motion for Attorney's Fees and Costs	86	JA013616-JA013618
10/23/2013	Order Denying Motion for Partial Summary Judgment	21	JA003210-JA003212

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04/26/2016	Order from January 15, 2016 Hearings	71	JA011385- JA011388
07/24/2014	Order Granting Motion to Expunge Lis Pendens	48	JA007571- JA007573
05/30/2013	Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002659- JA002661
06/05/2013	Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002662- JA002664
01/12/2017	Order on Defendant's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	86	JA013649- JA013651
07/10/2015	Order on Pardee's Emergency Motion to Stay Execution of Judgment; and Ex Parte Order Shortening Time	62	JA009753- JA009754
01/12/2017	Order on Plaintiffs' Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60	86	JA013643- JA013644
04/02/2013	Order re Order Denying Defendants Motion for Summary Judgment	16	JA002462- JA002464
03/14/2013	Order re Order Granting Plaintiffs Countermotion for Summary Judgment	14	JA002351- JA002353
10/12/2017	Order Re: Defendant Pardee Homes of Nevada's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014144- JA014146
11/29/2011	Order Setting Civil Non-Jury Trial	1	JA000031- JA000032
11/02/2017	Pardee Amended Notice of Appeal	88	JA014152- JA014154

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07/15/2015	Pardee Homes of Nevada's Consolidated Opposition To: (1) Plaintiff's Motion to Strike Judgment Entered on June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59; and (2) Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015	63	JA009919- JA009943
09/12/2015	Pardee Homes of Nevada's Consolidated Reply in Support of (1) Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015; and (2) Motion for Attorney's Fees and Costs	68	JA010812- JA010865
12/30/2015	Pardee Homes of Nevada's Consolidated Response to: (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiffs' Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees; and (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	69	JA010946- JA010953
06/01/2016	Pardee Homes of Nevada's Motion to Amend Judgment	72	JA011455- JA011589
07/02/2015	Pardee Homes of Nevada's Motion to Amend Judgment	59	JA009207- JA009283
06/27/2016	Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	82	JA013025- JA013170
07/15/2015	Pardee Homes of Nevada's Opposition to Plaintiff's Motion for Attorney's Fees and Costs	62	JA009759- JA009771

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08/10/2015	Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Reconsideration of the Order on Pardee's Emergency Motion to Stay Execution of Judgment	67	JA010582-JA010669
06/30/2016	Pardee Homes of Nevada's Reply in Support of Motion for Attorney's Fees and Costs	82	JA013171-JA013182
06/30/2016	Pardee Homes of Nevada's Reply in Support of Motion to Amend Judgment; and Opposition to Plaintiffs' Countermotion for Attorney's Fees	82	JA013183-JA013196
07/01/2016	Pardee Homes of Nevada's Reply in Support of Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	82	JA013197-JA013204
03/23/2016	Pardee Homes of Nevada's Response to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders	71	JA011214-JA011270
08/25/2014	Pardee Homes of Nevada's Supplemental Brief Regarding Future Accounting	49	JA007699-JA007707
02/08/2017	Pardee Notice of Appeal	86	JA013657-JA013659
07/08/2015	Pardee's Emergency Motion to Stay Execution of Judgment: and Ex Parte Order Shortening Time	62	JA009663-JA009710
06/06/2016	Pardee's Motion for Attorney's Fees and Costs	72	JA011590-JA011614
05/28/2015	Pardee's Motion for Attorney's Fees and Costs	49	JA007718-JA007734
06/24/2014	Pardee's Motion to Expunge Lis Pendens – section filed under seal	48	JA007411-JA007456

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06/24/2015	Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015	52	JA008192- JA008215
05/31/2016	Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	71	JA011442- JA011454
04/07/2017	Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders	86	JA013660- JA013668
05/10/2017	Pardee's Reply in Support of Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014069- JA014071
10/17/2016	Pardee's Supplemental Brief Regarding Pre- and Post-Judgment Interest Pursuant to the Court's Order	86	JA013591- JA013602
07/08/2015	Pardee's Supplemental Briefing in Support of its Emergency Motion to Stay Execution of Judgment	62	JA009711- JA009733
08/25/2014	Plaintiff's Accounting Brief Pursuant to the court's Order Entered on June 25, 2014	49	JA007647- JA007698
09/12/2016	Plaintiffs' Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016	86	JA013566- JA013590
05/23/2016	Plaintiffs' Memorandum of Costs and Disbursements	71	JA011397- JA011441
06/08/2016	Plaintiffs' Motion for Attorney's Fees and Costs	77	JA012115- JA012182
06/29/2015	Plaintiffs' Motion for Attorney's Fees and Costs	52-53	JA008216- JA008327
07/24/2015	Plaintiffs' Motion for Reconsideration, Ex Parte (With Notice) of Application for Order Shortening Time Regarding Stay of Execution and Order Shortening Time Regarding Stay of Execution	67	JA010482- JA010522

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07/18/2013	Plaintiffs' Motion in Limine To Permit James J. Jimmerson, Esq. To Testify Concerning Plaintiffs' Attorney's Fees and Costs (MIL #25)	17	JA002732- JA002771
06/29/2015	Plaintiffs' Motion Pursuant to NRCp 52(b) and 59 to Amend The Court's Judgment Entered on June 15, 2015, to Amend the Findings of Fact/conclusions of Law and Judgment Contained Therein, Specifically Referred to in the Language Included in the Judgment at Page 2, Lines 8 Through 13 and the Judgment At Page 2, Lines 18 Through 23 to Delete the Same or Amend The Same to Reflect the True Fact That Plaintiff Prevailed On Their Entitlement to the First Claim for Relief For an Accounting, and Damages for Their Second Claim for Relief of Breach of Contract, and Their Third Claim for Relief for Breach of the Implied Covenant for Good Faith and Fair Dealing and That Defendant Never Received a Judgment in its Form and Against Plaintiffs Whatsoever as Mistakenly Stated Within the Court's Latest "Judgment – sections filed under seal	54-56	JA008395- JA008922
03/14/2016	Plaintiffs' Motion to Settle Two (2) Competing Judgments and Orders	70	JA011168- JA011210
06/21/2016	Plaintiffs' Opposition to Defendant, Pardee Homes of Nevada's, Motion to Amend Judgment and Plaintiffs' Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60	81	JA012813- JA013024
08/06/2013	Plaintiffs Opposition to Defendants Motion for Partial Summary Judgment	17	JA002830- JA002857

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03/20/2013	Plaintiffs Opposition to Defendant's Motion in Limine to Exclude Plaintiffs Claim for Attorney's Fees as an Element of Damages MIL 1	15	JA002359- JA002408
03/20/2013	Plaintiffs Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the form of compensation for time MIL 2	15	JA002409- JA002433
07/17/2015	Plaintiffs' Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees	65-67	JA010203- JA010481
06/30/2015	Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	57-58	JA008923- JA009109
06/21/2016	Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	80	JA012625- JA012812
05/12/2017	Plaintiffs' Opposition to Pardee's Motion Stay Execution of Judgment and Post-Judgment Orders	88	JA014072- JA014105
07/08/2015	Plaintiffs' Opposition to Pardee's Motion to Retax Costs	60-61	JA009284- JA009644
06/20/2016	Plaintiffs' Opposition to Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	77-79	JA012183- JA012624
11/04/2016	Plaintiffs' Reply Brief in Support of Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016	86	JA013603- JA013612
04/23/2013	Plaintiffs Reply in Further Support of Motion for Leave to File Second Amended Complaint	16	JA002503- JA002526

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01/17/2013	Plaintiffs' Reply in Further Support of Their Counter Motion for Partial Summary Judgment	13	JA002102- JA002144
08/02/2016	Plaintiffs' Reply in Support of Countermotion for Attorney's Fees and Costs	84-85	JA013358- JA013444
08/02/2016	Plaintiffs' Reply in Support of Motion for Attorney's Fees and Costs	83-84	JA013205- JA013357
01/11/2016	Plaintiffs' Reply to Defendants Consolidated Response to (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiff's Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees And (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	69	JA010954- JA010961
07/15/2013	Plaintiffs Reply to Defendants Counterclaim	17	JA002724- JA002731
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion for Attorney's Fees and Costs	68	JA010680- JA010722
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion Pursuant to NRCP 52(b) and NRCP 59 to Amend the Court's Judgment Entered on June 15, 2015	68	JA010768- JA010811
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion to Strike "Judgment" Entered June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59	68	JA010723- JA010767
04/20/2016	Plaintiffs' Reply to Defendant's Response and Supplement to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders	71	JA011271- JA011384

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04/27/2017	Plaintiffs' Response to Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014066- JA014068
05/10/2013	Plaintiffs Supplement to Motion for Leave to File a Second Amended Complaint Pursuant to the Courts order on Hearing on April 26, 2013	16	JA002627- JA002651
12/08/2015	Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	68	JA010866- JA010895
09/27/2013	Plaintiffs Supplement to Their Opposition to Defendants Motion for Partial Summary Judgment	19-21	JA002988- JA003203
07/22/2013	Plaintiffs Supplemental Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the Form of Compensation for Time MIL 2	17	JA002787- JA002808
10/25/2013	Plaintiffs Trial Brief Pursuant to EDCR 7.27	31	JA004818- JA004847
06/19/2015	Plaintiffs, James Wolfram and Walt Wilkes' Memorandum of Costs and Disbursements	52	JA008159- JA008191
03/16/2016	Release of Judgment	71	JA011211- JA011213
01/07/2013	Reply Brief in Support of Defendant's Motion for Summary Judgment	13	JA002081- JA002101
09/16/2013	Reply in Support of Defendant's Motion for Partial Summary Judgment	17	JA002858- JA002864
09/16/2013	Reply in Support of Defendant's Motion in Limine to Exclude Plaintiff's Claim for Attorney's Fees as An Element of Damages	17	JA002865- JA002869

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09/16/2013	Reply in Support of Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Damages in the Form of Compensation for Time	17	JA002870- JA002874
07/15/2014	Reply in Support of Pardee's Motion to Expunge Lis Pendens	48	JA007560- JA007570
08/17/2015	Reply Points and Authorities in Support of Motion for Reconsideration	67	JA010670- JA010678
11/08/2011	Scheduling Order	1	JA000028- JA000030
06/06/2013	Second Amended Complaint	16	JA002670- JA002677
04/17/2013	Second Amended Order Setting Civil Non-Jury Trial	16	JA002501- JA002502
12/15/2011	Stipulated Confidentiality Agreement and Protective Order	1	JA000033- JA000039
08/29/2012	Stipulation and Order to Extend Discovery Deadlines (First Request)	1	JA000051- JA000054
06/30/2015	Supplement to Plaintiffs' Pending Motion for Attorney's Fees and Costs, Motion to Strike Judgment, Motion Pursuant to NRCP 52(b) and NRCP 59 to Amend the Court's Judgment, and Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	59	JA009110- JA009206
09/27/2013	Supplemental Brief in Support of Defendant's Motion for Partial Summary Judgment	21	JA003204- JA003209
07/12/2007	Supplemental Order Regarding Plaintiffs' Entitlement to, and Calculation of, Prejudgment Interest	88	JA014106- JA014110

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03/05/2013	Transcript of Proceedings - March 5, 2013	14	JA002211- JA002350
10/25/2011	Transcript re Discovery Conference	1	JA000024- JA000027
08/27/2012	Transcript re Hearing	1	JA000049- JA000050
04/26/2013	Transcript re Hearing	16	JA002527- JA002626
07/09/2013	Transcript re Hearing	17	JA002688- JA002723
09/23/2013	Transcript re Hearing	18	JA002875- JA002987
07/17/2014	Transcript re Hearing	49	JA007579- JA007629
07/31/2014	Transcript re Hearing	49	JA007630- JA007646
07/10/2015	Transcript re Hearing	62	JA009734- JA009752
01/15/2016	Transcript re Hearing	70	JA010962- JA011167
08/15/2016	Transcript re Hearing - August 15, 2016	86	JA013445- JA013565
12/06/2012	Transcript re Status Check	13	JA002066- JA002080
07/23/2013	Transcript re Status Check	17	JA002809- JA002814
10/23/2013	Transcript re Trial	22	JA003213- JA003403

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10/24/2013	Transcript re Trial	29-30	JA004463- JA004790
10/28/2013	Transcript re Trial – filed under seal	32-33	JA004848- JA005227
10/29/2013	Transcript re Trial – filed under seal	35	JA005264- JA005493
10/30/2013	Transcript re Trial	37-38	JA005512- JA005815
12/09/2013	Transcript re Trial – filed under seal	40-41	JA005821- JA006192
12/10/2013	Transcript re Trial	42-43	JA006193- JA006530
12/12/2013	Transcript re Trial – filed under seal	44-45	JA006533- JA006878
12/13/2013	Transcript re Trial - Part 1	46	JA006953- JA007107
12/13/2013	Transcript re Trial - Part 2	47-48	JA007108- JA007384
10/23/2013	Trial Exhibit A	23	JA003404- JA003544
10/23/2013	Trial Exhibit B – filed under seal	23	JA003545- JA003625
10/23/2013	Trial Exhibit C	23	JA003626- JA003628
10/23/2013	Trial Exhibit D	23	JA003629- JA003631
10/23/2013	Trial Exhibit E – filed under seal	23	JA003632- JA003634

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10/23/2013	Trial Exhibit F	23	JA003635- JA003637
10/23/2013	Trial Exhibit G	23	JA003638
10/23/2013	Trial Exhibit H	23	JA003639- JA003640
10/23/2013	Trial Exhibit I	23	JA003641- JA003643
10/23/2013	Trial Exhibit J – filed under seal	24	JA003644- JA003669
10/23/2013	Trial Exhibit K	24	JA003670- JA003674
10/23/2013	Trial Exhibit L	24	JA003675- JA003678
10/23/2013	Trial Exhibit M	24	JA003679- JA003680
10/23/2013	Trial Exhibit N	24	JA003681- JA003683
10/23/2013	Trial Exhibit O – filed under seal	25-26	JA003684- JA004083
10/23/2013	Trial Exhibit P	27	JA004084
10/23/2013	Trial Exhibit Q	27	JA004085
10/23/2013	Trial Exhibit R	27	JA004086- JA004089
10/23/2013	Trial Exhibit S	27	JA004090

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10/23/2013	Trial Exhibit T	27	JA004091- JA004092
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10/23/2013	Trial Exhibit V	27	JA004094
10/23/2013	Trial Exhibit W	27	JA004095- JA004096
10/23/2013	Trial Exhibit X	27	JA004097
10/23/2013	Trial Exhibit Y	27	JA004098
10/23/2013	Trial Exhibit Z	27	JA004099- JA004100
10/23/2013	Trial Exhibit 1	27	JA004289- JA004292
10/23/2013	Trial Exhibit 10 – filed under seal	27	JA004320- JA004329
10/23/2013	Trial Exhibit 11 – filed under seal	28	JA004330- JA004340
10/23/2013	Trial Exhibit 12 – filed under seal	28	JA004341- JA004360
10/23/2013	Trial Exhibit 13 – filed under seal	28	JA004361- JA004453
10/28/2013	Trial Exhibit 15	34	JA005228- JA005232
10/28/2013	Trial Exhibit 18	34	JA005233- JA005235

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10/28/2013	Trial Exhibit 19	34	JA005236- JA005237
10/28/2013	Trial Exhibit 20	34	JA005238- JA005254
10/23/2013	Trial Exhibit 21	28	JA004454
10/28/2013	Trial Exhibit 23	34	JA005255- JA005260
10/30/2013	Trial Exhibit 23a	39	JA005816- JA005817
10/28/2013	Trial Exhibit 24	34	JA005261- JA005263
10/23/2013	Trial Exhibit 25	28	JA004455- JA004462
10/24/2013	Trial Exhibit 26	31	JA004792- JA004804
10/30/2013	Trial Exhibit 27	39	JA005818- JA005820
10/29/2013	Trial Exhibit 28	36	JA005494- JA005497
10/29/2013	Trial Exhibit 29	36	JA005498- JA005511
10/24/2013	Trial Exhibit 30	31	JA004805- JA004811
12/13/2013	Trial Exhibit 31a	48	JA007385- JA007410
12/12/2013	Trial Exhibit 39	46	JA006936- JA006948

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12/12/2013	Trial Exhibit 40	46	JA006949- JA006950
12/12/2013	Trial Exhibit 41	46	JA006951- JA006952
10/23/2013	Trial Exhibit 6 – filed under seal	27	JA004293- JA004307
10/23/2013	Trial Exhibit 7 – filed under seal	27	JA004308- JA004310
10/23/2013	Trial Exhibit 8 – filed under seal	27	JA004311- JA004312
10/23/2013	Trial Exhibit 9 – filed under seal	27	JA004313- JA004319
10/23/2013	Trial Exhibit AA	27	JA004101- JA004102
10/23/2013	Trial Exhibit BB	27	JA004103
10/23/2013	Trial Exhibit CC	27	JA004104
10/23/2013	Trial Exhibit DD	27	JA004105
10/23/2013	Trial Exhibit EE	27	JA004106- JA004113
10/23/2013	Trial Exhibit FF	27	JA004114- JA004118
10/23/2013	Trial Exhibit GG	27	JA004119- JA004122
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10/23/2013	Trial Exhibit II	27	JA004124
10/23/2013	Trial Exhibit JJ	27	JA004125
10/23/2013	Trial Exhibit KK	27	JA004126- JA004167
10/23/2013	Trial Exhibit LL	27	JA004168
10/23/2013	Trial Exhibit MM	27	JA004169
10/23/2013	Trial Exhibit NN	27	JA004170- JA004174
10/23/2013	Trial Exhibit OO	27	JA004175- JA004183
10/23/2013	Trial Exhibit PP	27	JA004184- JA004240
10/23/2013	Trial Exhibit QQ	27	JA004241- JA004243
10/23/2013	Trial Exhibit RR	27	JA004244- JA004248
10/23/2013	Trial Exhibit SS	27	JA004249- JA004255
10/23/2013	Trial Exhibit TT	27	JA004256- JA004262
10/23/2013	Trial Exhibit UU	27	JA004263- JA004288
10/24/2013	Trial Exhibit VV	31	JA004791

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12/10/2013	Trial Exhibit WW	43	JA006531- JA006532
12/12/2013	Trial Exhibit XX	46	JA006879- JA006935

Dated this 28th day of February, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 28th day of February, 2018, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson

An Employee of McDonald Carano LLP



CLERK OF THE COURT

1 **ORDR**
2 JAMES J. JIMMERSON, ESQ.
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15 Attorneys for Plaintiffs

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 JAMES WOLFRAM and)
13 WALT WILKES,)
14) CASE NO.: A-10-632338-C
15 Plaintiffs,) DEPT. NO.: IV
16 vs.)
17)
18 PARDEE HOMES OF NEVADA,)
19 Defendant.)

20 **ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

21 This matter coming on for a hearing on the 5th day of March, 2013, on the issue of
22 Defendant's Motion for Summary Judgment and Plaintiffs' Countermotion for Partial
23 Summary Judgment, James J. Jimmerson, Esq., Lynn M. Hansen, Esq., and James M.
24 Jimmerson, Esq. appearing on behalf of Plaintiffs, and Plaintiff Jim Wolfram being present,
25 and Pat Lundvall, Esq. and Aaron D. Shipley, Esq. appearing on behalf of Defendant
26 Pardee Homes of Nevada, and the Court having reviewed the papers and pleadings on
27 file,

28 **///**

1 Defendant's Motion for Summary Judgment, Plaintiffs' Opposition thereto, and Defendant's
2 Reply, and the Court having heard the arguments of counsel, and admitted evidence and
3 for good cause appearing,

4 THE COURT FINDS that a party seeking Summary Judgment under Rule 56 of the
5 Nevada Rules of Civil Procedure bears the burden of demonstrating that there are no
6 genuine issues of material fact, and that it is entitled to Judgment as a matter of law. In
7 considering such a Motion the Court must view all of the evidence in the light most
8 favorable to the non-moving party, unless it is clear that there are no genuine issues of
9 fact.

10 THE COURT FURTHER FINDS a dispute of fact is genuine if a jury could return a
11 verdict for the non-moving party on that issue. Whether a fact is material is determined by
12 the governing substantive law applicable to the underlying cause of action(s).

13 THE COURT FURTHER FINDS the Plaintiffs' Complaint alleges three different
14 causes of action, namely, Breach of Contract, Breach of the Covenant of Good Faith and
15 Fair Dealing, and for an Accounting. However, all three causes of action rest upon the
16 terms of the Commission Agreement dated September 1, 2004, between the parties.

17 THE COURT FURTHER FINDS, based upon the papers, pleadings, and hearing
18 extensive oral argument, that there are genuine issues of material facts as to whether
19 Defendant has breached the Commission Agreement dated September 1, 2004, regarding
20 its purchases of property from Coyote Springs Investment, LLC.

21 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
22 Defendant's Motion for Summary Judgment is DENIED.

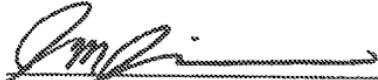
23 Dated 20 this day of March, 2013.

24 
25 DISTRICT COURT JUDGE
26
27
28

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
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1 Respectfully Submitted:

2 JIMMERSON HANSEN, P.C.

3 

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13 *James Wolfram and*

14 *Walt Wilkes*

15 Reviewed as to form and content:

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17 

18 PAT LUNDVALL, ESQ.

19 Nevada Bar No.: 3761

20 AARON D. SHIPLEY, ESQ.

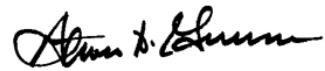
21 Nevada Bar No.: 8258

22 2300 W. Sahara Avenue, Suite 1000

23 Las Vegas, Nevada 89102

24 Attorneys for Defendant

25 *Pardee Homes of Nevada*



CLERK OF THE COURT

NEOJ
JAMES J. JIMMERSON, ESQ.
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LYNN M. HANSEN, ESQ.
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lmh@jimmersonhansen.com
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Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES WOLFRAM and WALK WILKES,)
Plaintiffs,)
vs.)
PARDEE HOMES OF NEVADA,)
Defendant.)

CASE NO.: A-10-632338-C
DEPT. NO.: IV

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying Defendant's Motion for Summary
Judgment was entered in the above-entitled matter on the 2nd day of April, 2013, a file-

///

///


///

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 • Facsimile (702) 387-1167

1 stamped copy of which is attached hereto.

2 Dated 3rd this day of April, 2013.

JIMMERSON HANSEN, P.C.


JAMES J. JIMMERSON, ESQ.

Nevada State Bar No.: 00264

LYNN M. HANSEN, ESQ.

Nevada State Bar No.: 00244

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Attorneys for Plaintiffs

James Wolfram and

Walt Wilkes

CERTIFICATE OF SERVICE

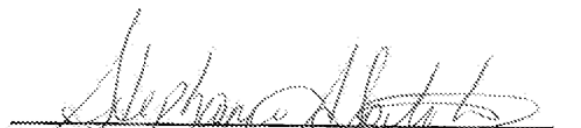
I hereby certify that service of a true and correct copy NOTICE OF ENTRY OF ORDER was made on the 3RD day of April, 2013, as indicated below:

 X By first class mail, postage prepaid from Las Vegas, Nevada pursuant to N.R.C.P. 5(b) addressed as follows below

 By facsimile, pursuant to EDCR 7.26 (as amended)

 By receipt of copy as indicated below

Pat Lundvall, Esq.
Aaron D. Shipley, Esq.
MCDONALD CARANO WILSON, LLP
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An employee of JIMMERSON HANSEN, P.C.



CLERK OF THE COURT

1 **ORDR**

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15 Attorneys for Plaintiffs

16 **DISTRICT COURT**

17 **CLARK COUNTY, NEVADA**

18 JAMES WOLFRAM and)

19 WALT WILKES,)

20 Plaintiffs,)

21 vs.)

22 PARDEE HOMES OF NEVADA,)

23 Defendant.)

CASE NO.: A-10-632338-C

DEPT. NO.: IV

24 **ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

25 This matter coming on for a hearing on the 5th day of March, 2013, on the issue of
26 Defendant's Motion for Summary Judgment and Plaintiffs' Countermotion for Partial
27 Summary Judgment, James J. Jimmerson, Esq., Lynn M. Hansen, Esq., and James M.
28 Jimmerson, Esq. appearing on behalf of Plaintiffs, and Plaintiff Jim Wolfram being present,
and Pat Lundvall, Esq. and Aaron D. Shipley, Esq. appearing on behalf of Defendant
Pardee Homes of Nevada, and the Court having reviewed the papers and pleadings on
file,

///

1 Defendant's Motion for Summary Judgment, Plaintiffs' Opposition thereto, and Defendant's
2 Reply, and the Court having heard the arguments of counsel, and admitted evidence and
3 for good cause appearing,

4 THE COURT FINDS that a party seeking Summary Judgment under Rule 56 of the
5 Nevada Rules of Civil Procedure bears the burden of demonstrating that there are no
6 genuine issues of material fact, and that it is entitled to Judgment as a matter of law. In
7 considering such a Motion the Court must view all of the evidence in the light most
8 favorable to the non-moving party, unless it is clear that there are no genuine issues of
9 fact.

10 THE COURT FURTHER FINDS a dispute of fact is genuine if a jury could return a
11 verdict for the non-moving party on that issue. Whether a fact is material is determined by
12 the governing substantive law applicable to the underlying cause of action(s).

13 THE COURT FURTHER FINDS the Plaintiffs' Complaint alleges three different
14 causes of action, namely, Breach of Contract, Breach of the Covenant of Good Faith and
15 Fair Dealing, and for an Accounting. However, all three causes of action rest upon the
16 terms of the Commission Agreement dated September 1, 2004, between the parties.

17 THE COURT FURTHER FINDS, based upon the papers, pleadings, and hearing
18 extensive oral argument, that there are genuine issues of material facts as to whether
19 Defendant has breached the Commission Agreement dated September 1, 2004, regarding
20 its purchases of property from Coyote Springs Investment, LLC.

21 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that
22 Defendant's Motion for Summary Judgment is DENIED.

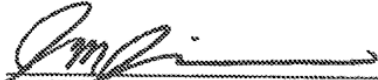
23 Dated 20 this day of March, 2013.

24 
25 DISTRICT COURT JUDGE
26
27
28

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 385-7171 - Facsimile (702) 387-1167

1 Respectfully Submitted:

2 JIMMERSON HANSEN, P.C.

3 

4 JAMES J. JIMMERSON, ESQ.

5 Nevada Bar No.: 00264

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11 Las Vegas, Nevada 89101

12 Attorneys for Plaintiffs

13 *James Wolfram and*

14 *Walt Wilkes*

15 Reviewed as to form and content:

16 McDONALD CARANO WILSON, LLP

17 

18 PAT LUNDVALL, ESQ.

19 Nevada Bar No.: 3761

20 AARON D. SHIPLEY, ESQ.

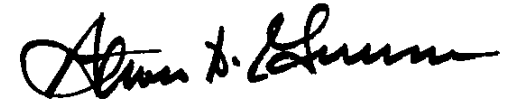
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24 Attorneys for Defendant

25 *Pardee Homes of Nevada*



CLERK OF THE COURT

OPPS
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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,
WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,

Defendant.

CASE NO.: A-10-632338-C
DEPT NO.: IV

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION FOR LEAVE TO
FILE A SECOND AMENDED
COMPLAINT**

Hearing Date: April 26, 2013
Hearing Time: 8:30 a.m.

Pardee Homes of Nevada ("Pardee" or "Defendant") submits the following Opposition ("Opposition") to the Plaintiffs' Motion for Leave to File a Second Amended Complaint ("Motion"). This Opposition is supported by the following Memorandum of Points and Authorities, supporting exhibits, the papers and pleadings on file in this matter, and any argument the Court may permit at the hearing of this matter.

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1 RESPECTFULLY SUBMITTED this 8th day of April, 2013.

2 McDONALD CARANO WILSON LLP

3
4 /s/ Aaron D. Shipley
5 Pat Lundvall (#3761)
6 Aaron D. Shipley (#8258)
7 2300 West Sahara Avenue, Suite 1000
8 Las Vegas, Nevada 89102
9 *Attorneys for Defendant Pardee Homes of Nevada*

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. INTRODUCTION**

12 One year after the deadline to file motions to amend pleadings, nearly five
13 months after the close of discovery, and within 60 days of the current trial date,
14 Plaintiffs filed the instant Motion requesting leave to file a Second Amended Complaint.
15 Yet, it is clear that the Motion and the proposed amended complaint are rife with the
16 same deficiencies previously identified by Pardee in its Motion in Limine to Exclude
17 Attorneys' Fees as an Element of Damages (MIL #1). Even under NRCP 15(a)'s liberal
18 standard, leave to amend to allow Plaintiffs to add an additional element of damages at
19 this extremely late date would greatly prejudice Pardee. Discovery closed months ago
20 and Pardee never received an opportunity to conduct any discovery on the topic of the
21 Plaintiffs' new claim that they are entitled to present their attorneys' fees as special
22 damages at trial. Further, Pardee did not have the opportunity to retain an expert to
23 review Plaintiffs' counsel invoices for their attorneys' fees and to develop an opinion as
24 to the reasonableness thereof. Without the benefit of discovery and an expert witness,
25 Pardee would be unable to adequately defend against the Plaintiffs' presentation of this
26 purported element of their damages at trial. This would be severely prejudicial to
27 Pardee.

28 Beyond these procedural problems, the proposed amendments to the complaint
would be futile because attorneys' fees cannot be rightfully claimed as an element of

1 consequential or special damages in the context of this case. Rather, the issue of
2 attorneys' fees and costs ought to be dealt with at the conclusion of trial through motion
3 practice, not at trial. This case is not the type of rare exception to the general rule that
4 the Nevada Supreme Court has contemplated. In other words, in this case attorneys'
5 fees ought to be handled and decided as a cost of litigation rather than as an element
6 of damage. Therefore, Plaintiffs' Motion should be denied because the proposed
7 purpose of the Second Amended Complaint is futile because it contradicts Nevada
8 law.

9 **II. BRIEF STATEMENT OF RELEVANT FACTS.**

10 By now the Court is familiar with the facts and procedural history in this case.
11 Therefore, only a brief statement of relevant procedural facts is provided for purposes
12 of this Opposition. Plaintiffs filed their original complaint on December 29, 2010.
13 Subsequently, Plaintiffs filed their Amended Complaint on January 14, 2011. The
14 deadline for all parties to file motion to amend pleadings or add parties was March 14,
15 2012. See Scheduling Order filed on November 8, 2011, a copy of which is attached
16 hereto as **Exhibit A**. That deadline did not change despite the parties' stipulation to
17 extend the discovery period 60 days, which was submitted on August 29, 2012. See
18 Stipulation and Order to Extend Discovery Deadlines, a copy of which is attached
19 hereto as **Exhibit B**. The extension was only for the limited purpose of completing
20 depositions. Id. at p.1. All other due dates and deadlines remained the same. Id. at
21 p.2 (¶4). Discovery closed on October 29, 2012. Id.

22 Now, over one year past the deadline to seek leave of the Court to amend their
23 complaint yet again, Plaintiffs filed the instant Motion. Having refused to properly modify
24 their pleading in a timely fashion, Plaintiffs request leave to file a Second Amended
25 Complaint that comports with the Plaintiffs' ever changing and new theory of the case.
26 The Plaintiffs did not put forth this new theory of damages until their fifth supplemental
27 disclosure of witnesses and documents, which was served on October 26, 2012—three
28 days before the discovery cutoff. See Plaintiffs' Fifth Supplement to NRCP 16.1

1 Disclosure of Witnesses and Documents, at p. 7-8, a copy of which is attached hereto as
2 **Exhibit C** (without attached exhibits). In effect, this ambush attack made it impossible for
3 Pardee to conduct any discovery whatsoever regarding this newly advanced theory of
4 Plaintiffs' alleged damages. This is problematic because their new theory of damages
5 requires that they plead with specificity and present their claims for attorneys' fees at trial
6 rather than in post-trial motion practice. If the Court allowed Plaintiffs to proceed in this
7 fashion, Pardee would, in effect, be forced to defend Plaintiffs presentation of damages
8 at trial without the benefit of any discovery or an expert witness. By definition, this would
9 be prejudicial to Pardee.

10 The Court must require plaintiffs to proceed on their first Amended Complaint.
11 The Court should deny Plaintiffs' Motion because it seeks to allow Plaintiffs in this action
12 to have an unfair advantage. But even if the Court were to ignore Plaintiffs' eleventh hour
13 tactics, the Court should also deny the motion as futile because Plaintiffs are not entitled
14 to an award of their attorneys' fees as an element of their alleged damages under
15 Nevada law.

16 **III. LEGAL ARGUMENT**

17 **A. Legal Standard.**

18 Pursuant to NRCP 15(a) a party may amend its pleadings "by leave of court ...
19 and leave shall be freely given when justice so requires." The decision to grant or deny
20 the motion to amend lies with the discretion of the district court. University & Cmty.
21 Coll. Sys. v. Sutton, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004). While NRCP 15(a)
22 provides that leave to amend should be "freely given," a denial is warranted if undue
23 delay, bad faith, or dilatory motives on the part of the movant are involved. See Kantor
24 v. Kantor, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000); see also Stephens v. S. Nevada
25 Music Co., 89 Nev. 104, 105, 507 P.2d 138, 139 (1973). Also, leave to amend is not
26 appropriate when the amendment would be futile. See Reddy v. Litton Industries, Inc.,
27 912 F.2d 291, 296-97 (9th Cir. 1990). Futility occurs when the proposed amendment is
28 frivolous or attempts to advance a claim that is legally insufficient. See Allum v. Valley

1 Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (citation omitted) (“It is
2 not an abuse of discretion to deny leave to amend when any proposed amendment
3 would be futile.”). Likewise, if the amendment could not withstand a motion to dismiss,
4 then the amendment should be denied as futile. See 6 Charles Alan Wright, Arthur R.
5 Miller & Mary Kay Kane, Federal Practice and Procedure Civ. 2d §1487 (2006).

6 The proposed Second Amended Complaint is Plaintiffs’ third bite at the apple.
7 As the Ninth Circuit has found, a “district court’s discretion to deny leave to amend is
8 particularly broad where plaintiff has previously amended the complaint.” Sisseton-
9 Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, N.D. & S.D v. United
10 States, 90 F.3d 251, 355 (9th Cir. 1996) (upholding district court’s denial of leave to
11 amend) (quoting Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)). The
12 proposed Second Amended Complaint remains as it was – well short of pleading a
13 claim for attorneys’ fees as damages with any sort of viable specificity. Further,
14 Plaintiffs’ claim that it is entitled to an award of their attorneys’ fees as special damages
15 is legally insufficient under Nevada law.

16 Plaintiffs’ Motion should be denied because: (1) it is untimely and highly
17 prejudicial; and (2) their claim for attorneys’ fees as an alleged element of their
18 damages in the context of this case is futile and unfounded under Nevada law.

19 **B. Plaintiffs’ Motion Should be Denied Because it is Untimely and**
20 **Highly Prejudicial to Pardee.**

21 Plaintiffs’ Motion should be denied because it is untimely, and therefore, highly
22 prejudicial to Pardee. Even under NRCP 15(a)’s liberal standard, leave to amend to
23 add an entirely new theory of damages to be presented at trial must be denied because
24 it would not serve justice. The deadline for all parties to seek leave to amend pleadings
25 or add parties was March 14, 2012. That deadline was never extended. Further,
26 discovery closed on October 29, 2012. Now, over one year past the deadline, Plaintiffs
27 have filed the instant Motion with the intention of putting forth an entirely new theory of
28 damages at trial. This alone should warrant denial of Plaintiffs’ Motion in its entirety.

Beyond the grossly late filing, the leave requested by Plaintiffs is highly prejudicial to Pardee. The Plaintiffs' did not put forth their new theory of damages until their Fifth Supplement to NRCP 16.1 Disclosure of Witnesses & Docs, which was served on October 26, 2012. See Exhibit C. This was three days before the discovery cutoff. In doing this, Plaintiffs made it impossible for Pardee to conduct any discovery regarding this newly advanced theory concerning damages. Pardee did not have the benefit of addressing this topic in any real detail during the depositions of either of the Plaintiffs. Further, Pardee did not have the opportunity to consult or retain an expert witness to review Plaintiffs' counsel's late produced invoices and concerning the reasonableness of these alleged damages. Put simply, Pardee will be put in the position of having no witnesses or adequate defense to Plaintiffs' attempts to put forth their attorneys' fees as an element of their damages at the trial in this matter. Putting Pardee in this position would be extremely prejudicial, and would amount to an unfair ambush attack on the part of Plaintiffs. For these reasons alone the Motion should be denied.

C. Plaintiffs' Motion Should be Denied Because Nevada Law Does Not Permit the Recovery of Attorneys' Fees as Damages in This Case.

Plaintiffs' Motion should be denied because Plaintiffs' claim for their attorneys' fees as an element of their alleged damages is futile under Nevada law in context of this breach of contract case. Plaintiffs argue that they have suffered special damages in the form of their attorneys' fees. However, neither the original Complaint nor the Amended Complaint pled attorneys' fees as a specific element of damages as required under Nevada law. See Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc., 117 Nev. 948, 35 P.3d 964, (2001). Now, on the eve of trial, Plaintiffs are attempting to modify their Complaint a second time in an attempt to salvage their new theory of their alleged damages.

In Sandy Valley, the seminal case on this particular issue, the Nevada Supreme Court discussed the difference between attorney fees as a cost of litigation and attorney fees as an element of damages. See id., 117 Nev. at 955, 35 P.3d at 968-969. The

1 court acknowledged that attorney fees cannot be recovered as a cost of litigation unless
2 authorized by agreement, statute, or rule. See id., 117 Nev. at 956, 35 P.3d at 969
3 (internal citation omitted). “As an **exception to the general rule**, a district court may
4 award attorney fees as special damages in **limited circumstances**.” Horgan v. Felton,
5 123 Nev. 577, 583, 170 P.3d 982, 986 (2007) (emphasis added).

6 In 2011 the Nevada Supreme Court succinctly summarized the development of
7 Sandy Valley and its progeny as follows:

8 In Sandy Valley Associates v. Sky Ranch Estates, we distinguished
9 between attorney fees as a cost of litigation and as special damages. 117
10 Nev. 948, 955–60, 35 P.3d 964, 968–71 (2001), *receded from on other*
11 *grounds as stated in Horgan v. Felton*, 123 Nev. 577, 579, 170 P.3d 982,
12 983 (2007). Attorney fees that are a cost of litigation arise from an
13 agreement, statute, or rule authorizing the fees, whereas attorney fees
14 that are considered special damages are fees that are foreseeable arising
15 from the breach of contract or tortious conduct. Id. at 956, 35 P.3d at 969.
16 In Shuette v. Beazer Homes Holdings Corp., we supplemented Sandy
17 Valley by explaining that fees as special damages “constitute a rather
18 **narrow exception** to the rule prohibiting attorney fees awards absent
19 express authorization.” 121 Nev. 837, 862, 124 P.3d 530, 547
20 (2005)(emphasis added).

21 Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc., 127 Nev. Adv.
22 Op. 26, ---, 255 P.3d 268, 279 n. 11 (Jun. 2, 2011).

23 The Nevada Supreme court has clarified that attorneys’ fees may only be
24 awarded as special damages in only a handful of circumstances, such as: third-party
25 actions involving title insurance or bonds, insurance or indemnity actions, slander of title
26 actions, malicious prosecution, trademark infringement, or false imprisonment. See
27 Sandy Valley, 117 Nev. at 957-58, 35 P.3d at 970; see also Horgan, 123 Nev. at 586-
28 87, 170 P.3d at 988-89.

Therefore, under Sandy Valley and its progeny, the question regarding whether
attorneys’ fees may be considered as an element of damages in those rare cases is
whether they were “reasonably foreseeable” and the “natural and proximate
consequence of the injurious conduct.” 117 Nev. at 957, 35 P.3d at 969. “[T]he mere

1 fact that a party was forced to file or defend a lawsuit is insufficient to support an award
2 of attorney fees as damages.” Id., 117 Nev. at 957, 35 P.3d at 970.

3 This is a breach of contract case which involves a contract with a prevailing party
4 attorneys’ fees provision. Therefore, unless this case fits a narrow exception to the
5 general rule, attorneys’ fees may be sought as a cost of litigation at the conclusion of
6 trial in post-trial motions practice. The fact that the Commission Agreement at issue in
7 this case contains an attorneys’ fees provision does not automatically imply that
8 litigation was reasonably foreseeable and/or the natural and proximate consequence of
9 injurious conduct. Frankly, Plaintiffs cannot show that there has even been any
10 injurious conduct in this case. Plaintiffs acknowledge they have been compensated in
11 full under the terms of the Commission Agreement. When boiled down, Plaintiffs’ only
12 remaining claim is that Pardee has allegedly failed to provide Plaintiffs with documents
13 and information pertaining to option exercises that have never transpired. This is hardly
14 considered a reasonably foreseeable and proximate consequence of the Commission
15 Agreement.

16 Plaintiffs argue that Nevada law allows attorneys’ fees as special damages in
17 this case because “Plaintiffs were only able to get the documents and information they
18 were entitled to once they filed suit and were granted the tools of discovery to get some
19 of those records.” See Motion, at 8:17-21. Plaintiffs cite to the Sandy Valley and
20 Horgan decisions to support this position. This is a crude stretching of Nevada law. In
21 interpreting Sandy Valley, the Horgan decision is very careful to limit, not expand, the
22 types of cases that would warrant attorneys’ fees as special damages. For example, an
23 action to quiet or clarify title does not rise to the level to warrant attorneys’ fees as
24 damages. Horgan, 123 Nev. at 587, 170 P.2d at 988. Rather, attorneys’ fees are
25 available only in slander of title cases. Id., 123 Nev. at 587, 170 P.2d at 988. As
26 quoted by Plaintiffs in the Motion, the Horgan decision makes it clear that in order to
27 support the proposition that attorneys’ fees are available as special damages, there
28 must be elements of “intentional malicious” and “calculated” acts on the part of a

1 defendant that forced the plaintiff into litigation. 123 Nev. at 585-86, 170 P.2d at 987-88
2 (internal quotation omitted); see also Plaintiffs' Motion, at 8:3-10.

3 The instant case does not fit the narrow circumstances contemplated by the
4 Nevada Supreme Court in Horgan. Plaintiffs cannot prove, nor have they even alleged,
5 that Pardee acted intentionally or maliciously to hide information and documents from
6 Plaintiffs. The facts of this case show otherwise. Plaintiffs were provided with
7 information and commission payments until every dollar of the commissions owed to
8 them under the Commission Agreement was paid. Then, when Plaintiffs began
9 inquiring about other takedowns of Option Property, Pardee explained to them (on
10 multiple occasions) that no such exercise of Option Property had occurred. There has
11 been no evidence produced in this case that shows that Pardee acted in a calculated,
12 intentional, or malicious manner when dealing with Plaintiffs. The timely commission
13 payments and multiple communications regarding the status of the project indicate the
14 opposite. Therefore, this is not the type of case that warrants attorneys' fees as special
15 damages. Rather, the attorneys' fees provision in the Commission Agreement allows
16 for attorneys' fees and costs to the prevailing party, which is a determination that out of
17 necessity will be made post trial, not during the trial.

18 For all the foregoing reasons, the Motion should be denied because the
19 amendment sought to be approved is futile under Nevada law.

20 **D. Plaintiffs' Motion Should be Denied Because It Fails to Plead**
21 **Attorneys' Fees as Special Damages With the Requisite Specificity.**

22 Aside from the substantive defects in the Plaintiffs' purported Second Amended
23 Complaint, the Motion should be denied because it is procedurally defective. The
24 Nevada Supreme Court also recognizes that when parties seek attorneys' fees as a
25 cost of litigation, documentary evidence of the fees is presented generally by post-trial
26 motion. In contrast, however, when attorneys' fees are claimed as foreseeable
27 damages arising from tortious conduct or a breach of contract, they are considered
28 special damages and must be pled in the complaint pursuant to NRCP 9(g). See

1 Sandy Valley, 117 Nev. at 956, 35 P.3d at 969. “When attorney fees are alleged as
2 damages, they must be specifically pleaded and proven by competent evidence at trial,
3 just as any other element of damages.” 117 Nev. at 957, 35 P.3d at 969. Further, “the
4 party claiming fees as damages must prove the fees as to each claim.” 117 Nev. at
5 960, 35 P.3d at 971.

6 If the context of the case warrants the presentation of attorneys’ fees as element
7 of damages, then the plaintiff must plead such with Rule 9(g) specificity in order to allow
8 the alleged damages to be properly litigated. In this case, the proposed Second
9 Amended Complaint still fails to meet the requisite specificity. Plaintiffs have simply
10 added the same boilerplate language under each cause of action alleging that as a
11 “direct, natural and proximate result” of Pardee’s actions, “Plaintiffs have been forced to
12 retain an attorney” and have “been damaged in the amount of fees and costs expended
13 to retain the services...” See generally Exhibit 1 to the Motion, at ¶¶ 19, 25, and 31.
14 There are no allegations of the attorneys’ time spent, billable rate, or overall damage
15 amount. More glaring, there are no allegations to specific the amount of damages
16 specific to **each claim** as required by Nevada law. Because of all these deficiencies
17 the Motion should be denied.

18 **IV. CONCLUSION**

19 This Court should deny Plaintiffs’ Motion for Leave to File Second Amended
20 Complaint because the request for leave is untimely, the purported amendment is futile
21 under Nevada law, and if leave is granted Pardee would suffer unfair prejudice.

22 RESPECTFULLY SUBMITTED this 8th day of April, 2013.

23 McDONALD CARANO WILSON LLP

24
25 /s/ Aaron D. Shipley
26 Pat Lundvall (#3761)
27 Aaron D. Shipley (#8258)
28 2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Attorneys for Defendant Pardee Homes of Nevada

CERTIFICATE OF SERVICE

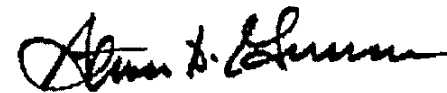
I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 8th day of April, 2013, I served a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT** by e-service through the Wiznet e-filing system utilized by the Eighth Judicial District Court, Clark County, Nevada:

James J. Jimmerson
Lynn M. Hansen
James M. Jimmerson
JIMMERSON, HANSEN, P.C.
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101
Attorney for Plaintiffs

/s/ Melissa A. Merrill
An Employee of McDonald Carano Wilson
LLP

275253

EXHIBIT A



CLERK OF THE COURT

DSO

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM, WALT WILKES,
Plaintiffs,
v.
PARDEE HOMES OF NEVADA,
Defendant.

CASE NO. A632338
DEPT NO. IV

SCHEDULING ORDER

(Discovery/Dispositive Motions/Motions to Amend or Add Parties)

NATURE OF ACTION: Breach of contract

DATE OF FILING JOINT CASE CONFERENCE REPORT(S): 9/26/11

TIME REQUIRED FOR TRIAL: 5-7 days

Counsel for Plaintiffs:

Amanda J. Brookhyser, Esq., Jimmerson Hansen

Counsel for Defendant:

Aaron D. Shipley, Esq., McDonald Carano Wilson

Counsel representing all parties have been heard and
after consideration by the Discovery Commissioner,

IT IS HEREBY ORDERED:

1. all parties shall complete discovery on or before
8/28/12.

2. all parties shall file motions to amend pleadings or
add parties on or before 3/14/12.

DISCOVERY
COMMISSIONER

EIGHTH JUDICIAL
DISTRICT COURT

RECEIVED

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3. all parties shall make initial expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on or before 3/14/12.

4. all parties shall make rebuttal expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on or before 5/16/12.

5. all parties shall file dispositive motions on or before 9/28/12.

Certain dates from your case conference report(s) may have been changed to bring them into compliance with N.R.C.P. 16.1.

Within 60 days from the date of this Scheduling Order, the Court shall notify counsel for the parties as to the date of trial, as well as any further pretrial requirements in addition to those set forth above.


Unless otherwise directed by the court, all pretrial disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least 30 days before trial.

Motions for extensions of discovery shall be made to the Discovery Commissioner in strict accordance with E.D.C.R. 2.35. Discovery is completed on the day responses are due or the day a deposition begins.

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2 Unless otherwise ordered, all discovery disputes (except
3 disputes presented at a pre-trial conference or at trial) must
4 first be heard by the Discovery Commissioner.

5 Dated this 7 day of November, 2011.

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7 
8 DISCOVERY COMMISSIONER

9 CERTIFICATE OF SERVICE

10 I hereby certify that on the date filed, I placed a copy
11 of the foregoing DISCOVERY SCHEDULING ORDER in the folder(s)
12 in the Clerk's office or mailed as follows:

13 Amanda J. Brookhyser, Esq.
14 Aaron D. Shipley, Esq.

15 
16 COMMISSIONER DESIGNEE
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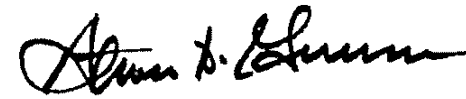
DISCOVERY
COMMISSIONER

EIGHTH JUDICIAL
DISTRICT COURT

EXHIBIT B

ORIGINAL

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CLERK OF THE COURT

1 **DISC**
2 PAT LUNDVALL
3 Nevada Bar No. 3761
4 AARON D. SHIPLEY
5 Nevada Bar No. 8258
6 McDONALD CARANO WILSON LLP
7 2300 West Sahara Avenue, Suite 1000
8 Las Vegas, Nevada 89102
9 (702) 873-4100
10 (702) 873-9966 Facsimile
11 lundvall@mcdonaldcarano.com
12 ashipley@mcdonaldcarano.com
13 *Attorneys for Defendant*
14 *Pardee Homes of Nevada*

DISTRICT COURT

CLARK COUNTY, NEVADA

10 JAMES WOLFRAM,
11 WALT WILKES

12 Plaintiffs,

13 vs.

14 PARDEE HOMES OF NEVADA,

15 Defendant.

CASE NO.: A-10-632338-C
DEPT NO.: IV

**STIPULATION AND ORDER
TO EXTEND DISCOVERY
DEADLINES**

(First Request)

(Discovery Commissioner)

17 IT IS HEREBY STIPULATED AND AGREED by and among JAMES WOLFRAM and
18 WALT WILKES ("Plaintiffs") and Defendant PARDEE HOMES OF NEVADA ("Pardee" or
19 "Defendant") that the discovery deadline be extended **60 days** for the limited purpose of taking
20 the depositions of Linda Jones, Jon Lash and Harvey Whitmore.

21 In accordance with EDCR 2.35, good cause exists for this extension because Plaintiffs
22 are still waiting for a third party, Coyote Springs, Inc. ("CSI"), to produce documents in
23 response to Plaintiffs' subpoena. Plaintiffs contend that they cannot conduct and complete the
24 depositions of the aforementioned witnesses until CSI produces the requested documents and the
25 parties have had adequate time to review them. Continuing the current discovery deadline is in
26 the interest of the parties and judicial economy. Thus, the parties request a sixty (60) day
27
28

extension from the August 28, 2012 discovery cutoff date to complete the limited discovery identified herein.

1. Completed Discovery: Plaintiffs and Defendant each provided initial disclosures. Subsequently, Defendants deposed each of the Plaintiffs. The parties have each exchange and responded to each other's written discovery requests. Plaintiffs have issued several third-party subpoenas requesting the production of documents.

2. Discovery that Remains to be Completed: Plaintiffs would like to take three remaining depositions: Linda Jones, Jon Lash and Harvey Whitmore. The parties also reserve the right to propound additional written discovery limited in scope as to any new issues of fact raised in the documents produced by CSI.

3. Reasons Why Remaining Discovery Has Not Been Completed: Plaintiffs contend that they cannot conduct and complete the depositions of the aforementioned witnesses until CSI produces the requested documents and the parties have had adequate time to review them.

4. A Proposed Schedule for Completing Remaining Discovery: The parties propose a 60 day extension of the discovery deadline to October ~~28~~²⁹, 2012. All other discovery deadlines dates are to remain the same.

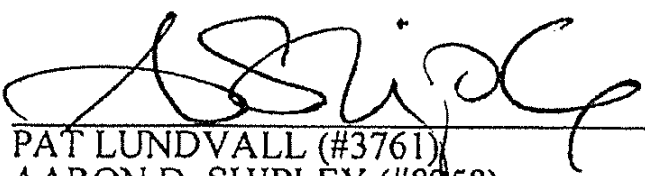
5. The Current Trial Date: Trial is presently scheduled for a five-week non-jury stack beginning November 13, 2012. This matter previously received preferential status pursuant to NRS § 16.025. The parties request a continuance of the current trial date for a period of not less than 60 days.

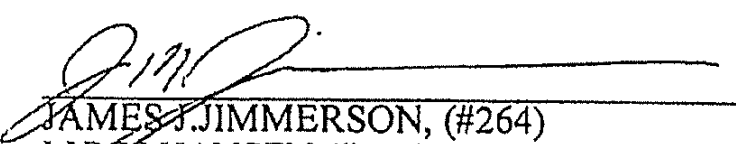
DATED this 23rd day of August, 2012

DATED this 23rd day of August, 2012

MCDONALD CARANO WILSON LLP

JIMMERSON, HANSEN, P.C


PAT LUNDVALL (#3761)
AARON D. SHIPLEY (#8258)
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Attorneys for Defendant Pardee Homes of Nevada


JAMES J. JIMMERSON, (#264)
LYNN HANSEN (#244)
JAMES M JIMMERSON (#12599)
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101
Attorney for Plaintiffs

1 extension from the August 28, 2012 discovery cutoff date to complete the limited discovery
2 identified herein.

3 1. Completed Discovery: Plaintiffs and Defendant each provided initial disclosures.
4 Subsequently, Defendants deposed each of the Plaintiffs. The parties have each exchange and
5 responded to each other's written discovery requests. Plaintiffs have issued several third-party
6 subpoenas requesting the production of documents.

7 2. Discovery that Remains to be Completed: Plaintiffs would like to take three
8 remaining depositions: Linda Jones, Jon Lash and Harvey Whitemore. The parties also reserve
9 the right to propound additional written discovery limited in scope as to any new issues of fact
10 raised in the documents produced by CSI.

11 3. Reasons Why Remaining Discovery Has Not Been Completed: Plaintiffs contend
12 that they cannot conduct and complete the depositions of the aforementioned witnesses until CSI
13 produces the requested documents and the parties have had adequate time to review them.

14 4. A Proposed Schedule for Completing Remaining Discovery: The parties propose
15 a 60 day extension of the discovery deadline to October 28, 2012. All other discovery deadlines
16 dates are to remain the same. 29

17 5. The Current Trial Date: Trial is presently scheduled for a five-week non-jury
18 stack beginning November 13, 2012. This matter previously received preferential status pursuant
19 to NRS § 16.025. The parties request a continuance of the current trial date for a period of not
20 less than 60 days.

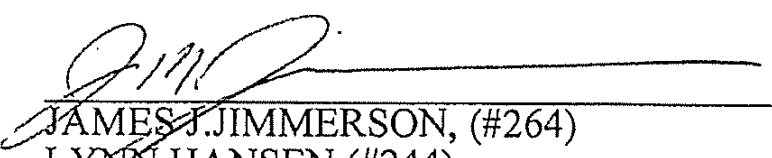
21 DATED this ____ day of August, 2012

DATED this 23rd day of August, 2012

22 McDONALD CARANO WILSON LLP

JIMMERSON, HANSEN, P.C

23
24 PAT LUNDVALL (#3761)
25 AARON D. SHIPLEY (#8258)
26 2300 West Sahara Avenue, Suite 1000
27 Las Vegas, Nevada 89102
28 *Attorneys for Defendant Pardee Homes of Nevada*


JAMES J. JIMMERSON, (#264)
LYNN HANSEN (#244)
JAMES M JIMMERSON (#12599)
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101
Attorney for Plaintiffs

A-10-632338-C

ORDER

TRIAL DATE TO BE SET

IT IS SO ORDERED this 27th day of August, 2012.

ON OR AFTER 1/14/13

Discovery Commissioner

Submitted by:

McDONALD CARANO WILSON LLP

Patricia Lundvall #10162

PAT LUNDVALL (#3761)

AARON D. SHIPLEY (#8258)

2300 West Sahara Avenue, Suite 1000

Las Vegas, Nevada 89102

Attorneys for Defendant Pardee Homes of Nevada

McDONALD-CARANO-WILSON³

100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

EXHIBIT C

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 - Facsimile (702) 387-1167

SUPP

JAMES J. JIMMERSON, ESQ.
Nevada Bar No. 000264
LYNN M. HANSEN, ESQ.
Nevada Bar No. 0244
JAMES M. JIMMERSON, ESQ.
Nevada Bar No. 12599
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jjj@jimmersonhansen.com
lmh@jimmersonhansen.com
jmj@jimmersonhansen.com

Attorney for Plaintiffs
James Wolfram and Walt Wilkes

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES WOLFRAM AND WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,

Defendant.

CASE NO.: A-10-632338-C
DEPT NO.: IV

**PLAINTIFFS' FIFTH SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF
WITNESSES AND DOCUMENTS**

COME NOW Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through their attorneys, Lynn M. Hansen, Esq., and James M. Jimmerson, Esq., of the law firm of Jimmerson Hansen, P.C., and hereby submits the following Fifth Supplement to list of witnesses and production of documents, as follows (*new items in bold*):

///

///

///

I.

WITNESSES

Plaintiffs provide the following witnesses' identities, last known address and telephone numbers:

1. James Wolfram
c/o Jimmerson Hansen, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171

This person most knowledgeable is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

2. Walt Wilkes
c/o Jimmerson Hansen, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171

This person most knowledgeable is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

3. Frances Butler Dunlap
Chicago Title Company
Las Vegas, Nevada

This person was the head of the Real Estate Commercial Department of Chicago Title Company, is most knowledgeable, and is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

4. PARDEE HOMES OF NEVADA
Custodian of Records
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
(775) 788-2000

Pardee Homes of Nevada is a named Defendant in this matter. Its present or former employees, representatives, agents, person to be designated pursuant to NRCP 30(b)(6) and/or custodians of records are expected to testify regarding the facts and background of this case.

1 5. PARDEE HOMES OF NEVADA
2 Person Most Knowledgeable
3 McDonald Carano Wilson LLP
4 100 West Liberty Street, 10th Floor
5 Reno, Nevada 89501
6 (775) 788-2000

7 Pardee Homes of Nevada is a named Defendant in this matter. Its present or former
8 employees, representatives, agents, person to be designated pursuant to NRCP 30(b)(6)
9 and/or Person Most Knowledgeable are expected to testify regarding the facts and background
10 of this case.

11 6. Jon Lash
12 c/o McDonald Carano Wilson LLP
13 100 West Liberty Street, 10th Floor
14 Reno, Nevada 89501
15 (775) 788-2000

16 Mr. Lash is an employee of PARDEE HOMES OF NEVADA and is expected to testify
17 regarding the facts and background of this case.

18 7. Clifford Anderson
19 c/o McDonald Carano Wilson LLP
20 100 West Liberty Street, 10th Floor
21 Reno, Nevada 89501
22 (775) 788-2000

23 Mr. Anderson is an employee of PARDEE HOMES OF NEVADA and is expected to
24 testify regarding the facts and background of this case.

25 8. Harvey Whitemore
26 c/o Coyote Springs
27 Address Unknown

28 Mr. Whitemore is the owner of the property involved in this lawsuit and is expected to
testify regarding the facts and background of this case.

9. Chicago Title Company
Las Vegas, Nevada
Custodian of Records

The Custodian of Records is expected to testify regarding the facts and background of
this case.

10. Chicago Title Company
Las Vegas, Nevada
Person Most Knowledgeable

1 The Person Most Knowledgeable is expected to testify regarding the facts and
2 background of this case.

3 11. Peter J. Dingerson
4 D&W Real Estate
5 5455 S. Durango Dr., Ste 160
6 Las Vegas, NV 89113

7 Mr. Dingerson is the owner of D&W Real Estate and is expected to testify
8 regarding the facts and background of this case.

9 12. Jay Dana
10 General Realty Group
11 6330 S. Eastern Ave Ste 2
12 Las Vegas, NV 89119

13 Mr. Dana is the owner of General Realty Group Inc. and is expected to testify
14 regarding the facts and background of this case.

15 13. Jerry Masini
16 Award Realty Corp.
17 3015 S. Jones Blvd.
18 Las Vegas, NV 89146

19 Mr. Masini is the owner of Award Realty and is expected to testify regarding
20 the facts and background of this case.

21 Plaintiffs reserve the right to call any and all witnesses who may be disclosed or
22 deposed throughout the course of discovery.

23 Plaintiffs reserve the right to call any and all of Defendant's witnesses; and

24 Plaintiffs reserve the right to call any and all rebuttal witnesses.

25 Plaintiffs' experts, if any, as yet unidentified.

26 Plaintiffs reserve the right to supplement this list of witnesses as discovery
27 progresses and until the time of trial in this case.

28 II.

DOCUMENTS

Pursuant to NRCP 16.1(a)(1)(B), Plaintiffs provide the following documents relating to
Plaintiffs and Defendants:

- 1 1. Any and all written agreements between the Parties;
- 2 2. Any and all documents evidencing damages to the Plaintiffs;
- 3 3. Any and all correspondence between the Parties;
- 4 4. Any and all appropriate Custodian of Record documents;
- 5 5. Any and all pleadings in this matter;
- 6 6. Documents labeled Bates Numbers PLTL0001-PLTL00244;

7 These documents are being reproduced as Plaintiffs' Initial NRCP 16.1 Disclosures of
8 Witnesses and Documents had duplicate documents. The duplicate copies have been
removed and the documents are listed as follows:

- 9 A. Option Agreement for the Purpose of Real Property and Joint Escrow
10 Instructions dated May 2004 (Bates No. PLTF0001-0080);
- 11 B. Amended and Restated Option Agreement for the Purchase of Real Property
12 and Joint Escrow Instructions dated March 28, 2005, (Bates No. PLTF0081-
13 0152);
- 14 C. Two Assignments of Real Estate Commission and Personal Certification
15 Agreement (Bates No. PLTF0153-0157A)
- 16 D. Letter dated September 2, 2004 from Pardee Homes to Mr. Walt Walkes
17 regarding the attached Commission letter dated September 1, 2004, (Bates No.
18 PLTF0158-0162);
- 19 E. Amendment No. 2 to Option Agreement for the Purchase of Real Property and
20 Joint Escrow Instructions, (Bates No. PLTF0163-0174);
- 21 F. Letter dated April 6, 2009 from Pardee Homes to Mr. Jim Wolfram, (Bates No.
22 PLTF0175-0179);
- 23 G. Letter dated April 23, 2009 from James J. Jimmerson, Esq., to Jim Stringer,
24 Esq., (Bates No. PLTF0180-0187);
- 25 H. Letter dated May 19, 2011 from James J. Jimmerson, Esq., to Jim Stringer,
26 Esq., (Bates No. PLTF0188-0191);
- 27 I. Letter dated July 10, 2009 from Charles E. Curtis to James J. Jimmerson, Esq.,
28 (Bates No. PLTF0192-0193);
- J. Letter dated August 26, 2009 from James J. Jimmerson, Esq., to Charles E.
Curtis, (Bates No. PLTF0194-0196);
- K. Letter dated November 24, 2009 from Jon E. Lash to Mr. Jim Wolfram, (Bates
No. PLTF0197-0202);
- L. Letter dated April 21, 2010 from Jim Wolfram to Mr. Jon Lash, (Bates No.
PLTF0203-0205);
- M. Letter dated May 17, 2010 from James J. Jimmerson, Esq., to Mr. John E. Lash,
(Bates No. PLTF0206-0209);

- 1 N. Letter dated June 14, 2010 from Charles E. Curtis to James J. Jimmerson, Esq.,
2 (Bates No. PLTF0210-0211);
- 3 Bates Nos. PLTF0212-0244 are the duplicative documents produced in
4 Plaintiffs' Initial 16.1 Disclosure of Documents and Witnesses.
- 5 7. Documents produced by Stewart Title in response to Plaintiffs' Subpoena Duces
6 Tecum on CD, (Bates No. PLTF0245-PLTF1423);
- 7 8 Documents produced by Chicago Title in response to Plaintiffs' Subpoena
8 Duces Tecum on CD, (Bates No. PLTF1424-PLTF10414);
- 9 9. Documents produced by Coyote Springs Investments in response to Plaintiff's
10 Duces Tecum on CD, (Bates No. CSI_Wolfram 000014 -
11 CSI_Wolfram0003004), attached hereto;
- 12 10. Coyote Springs Investment, LLC's Privilege Log, (Bates No. PLTF10415 -
13 PLTF10417), attached hereto;
- 14 11. Affidavit of Custodian of Records, (Bates No. PLTF10418-PLTF10419); attached
15 hereto;
- 16 12. Non-Party Coyote Springs Investments, LLC.'s Supplement and Amended
17 Objection and Response to Plaintiff's Subpoena Duces Tecum, (Bates
18 PLTF10420-PLTF10424, attached hereto.
- 19 13. **Chicago Title Company's previously bates stamped documents no. PLTF
20 1424 through PLTF 10414 (on bottom right of documents bates stamped)
21 and rebated as bates nos: Cht 00001 through Cht 08998 (on bottom left of
22 documents bates stamped), including the Custodian of Records Subpoena
23 to Chicago Title Company including the executed Certificate of Custodian
24 of Records bates stamped as Cht 08997.**
- 25 14. **Stewart Title Company's previously bates stamped documents no. PLTF
26 0245 through PLTF 1423 and rebated as bates nos: Stwt 0001 through
27 1202. Documents Stwt 0699 and Stwt 0731 are copy coversheets and were
28 inadvertently bates stamped.**
15. **Copy of Plat Map recorded in the Clark County Recorder's Office in Book
138, page 51, bates PLTF 10427 through PLTF 10438.**
16. **Copy of Parcel Map recorded in the Clark County Recorder's Office in File
116, page 35, bates PLTF 10439 through PLTF 10440.**
17. **Copy of Parcel Map recorded in the Clark County Recorder's Office in File
117, page 18, bates PLTF 10441 through PLTF 10443.**
18. **Copy of Plat Map recorded in the Clark County Recorder's Office in Book
140, page 57, bates PLTF 10444 through PLTF10456.**
19. **Copy of Parcel Map recorded in the Clark County Recorder's Office in File
113, page 55, bates PLTF 10457 through PLTF 10462.**
20. **Copy of Parcel Map recorded in the Clark County Recorder's Office in File
98, page 57, bates PLTF 10463 through PLTF 10468.**
21. **Copy of redacted billing sheets representing attorney's fees charged by**

Jimmerson Hansen, P.C. from November 3, 2010 through October 19, 2012, bates PLTF 10469 through PLTF 10481.

22. Affidavit of Peter J. Dingerson, bates PLTF 10482 through PLTF 10484.

23. Assignment of Rights, Title and Interest from Jay Dana on behalf of General Realty Group Inc. to Walt Wilkes, dated January 11, 2011, bates PLTF 10485.

24. Assignment of Rights, Title and Interest from Jerry Masini on behalf of Award Realty to James Wolfram, dated December 20, 2010, bates PLTF 10486.

25. Letter from Jeffrey King, M.D. dated November 1, 2011 regarding the health of Walt Wilkes, bates PLTF 10487.

Plaintiffs reserve the right to any and all documents the Defendants disclosed by any parties or used at any depositions.

Plaintiffs reserve the right to any and all other relevant documents to this matter.

Plaintiffs reserve the right to identify and produce different and/or additional documents as the investigation and discovery in this case proceeds.

III.

COMPUTATION OF DAMAGES

Plaintiffs calculate their damages to be in excess of \$1,900,000.00 associated with the Defendant's breach of contract and the Defendant's failure to faithfully meet their obligations to the Plaintiffs.

There are two primary components to this calculation. The first component is the loss of future commissions from future sales or takedowns of property located in Clark County, subject to the September 1, 2004 Commission Letter Agreement. There appears to be at least 3,000 acres of property, defined as Option Property under the Option Agreement effective June 1, 2004, currently owned by Coyote Springs Investment, LLC in Township 13 South, Range 63 East M.D.M., Clark County, Nevada. Under the Option Agreement effective June 1, 2004, these 3,000 acres can be purchased by Pardee and designated as Production Residential Property—a purchase and designation that would entitle Plaintiffs to a 1.5% commission on a per-acre price of \$40,000.00. If 3,000 acres were purchased by Pardee under this scenario, Plaintiffs would be entitled to \$1,800,000 in commissions. However, Pardee's course of conduct

1 in failing to appropriately discharge its duties under the Commission Letter Agreement
2 has robbed Plaintiffs of this opportunity to be paid these commissions. Pardee's
3 actions have served to reclassify the land originally labeled as Purchase Property and
4 Option Property, and under the new reclassification, all Option Property has been
5 removed from Clark County, thereby divesting Plaintiffs of any hope to collect any part
6 of the \$1.8 million in commissions they could be paid had no reclassification occurred.

7 The second component of this calculation is attorney's fees. Plaintiffs' attorney's
8 fees currently exceed \$102,700.00. This amount represents all work from the date of
9 drafting of the Complaint in November 2010 through October 19, 2012. These attorney's
10 fees constitute damages pursuant to the September 1, 2004 Commission Letter
11 Agreement. As stated in the Agreement, "In the event, either party brings an action to
12 enforce its rights under this Agreement, the prevailing party shall be awarded
13 reasonable attorneys' fees and costs." Plaintiffs in bringing this suit expect to be the
14 prevailing party and, as such, are entitled to their reasonable attorney's fees as
15 damages for Defendant's breach of contract and breach of the covenant of good faith
16 and fair dealing.

17 Finally, Plaintiffs must be compensated for the time and effort expended
18 attempting to discover from public records what information was owed to them under
19 the Commission Letter Agreement. Discovery is still ongoing therefore the Plaintiffs reserve
20 the right to amend and supplement this response as the investigation and discovery in this
21 case proceeds.

22 Dated this 26th October, 2012

23 JIMMERSON HANSEN, P.C.

24 
25 JAMES J. JIMMERSON, ESQ.
26 Nevada Bar No. 000264

27 LYNN M. HANSEN, ESQ.

28 Nevada Bar No. 0244

JAMES M. JIMMERSON, ESQ.

Nevada Bar No. 12599

415 So. Sixth St., Ste. 100

Las Vegas, NV 89101

Attorney for Plaintiffs

James Wolfram and Walt Wilkes

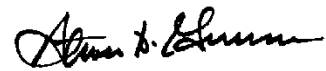
RECEIPT OF COPY

The undersigned hereby acknowledges receipt of copy of PLAINTIFFS' FIFTH
SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF WITNESSES AND DOCUMENTS
on this 26th day of October, 2012, at 4:40 a.m./p.m. + 2 CDs

McDONALD CARANO WILSON, LLP

AARON D SHIPLEY / KLC

AARON D. SHIPLEY, ESQ
PAT LUNDVALL, ESQ.,
2300 W. Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Attorneys for Defendant
Pardee Homes of Nevada



CLERK OF THE COURT

1 ACNJ

2
3
4 DISTRICT COURT
CLARK COUNTY, NEVADA

5 JAMES WOLFRAM,
6 WALT WILKES

7 Plaintiffs,

CASE NO.: A-10-632338
DEPT. NO.: IV

8 Vs.

9
10 PARDEE HOMES OF NEVADA,

11 Defendants.
12

13
14 SECOND AMENDED ORDER SETTING CIVIL NON-JURY TRIAL

15 IT IS HEREBY ORDERED THAT:

16 A. The above entitled case is set to be tried on a Firm Date to begin, **Monday,**
17 **September 9, 2013, at 9:30 a.m.**

18 B. A Pre-Trial Conference/Calendar Call with the designated attorney and/or parties in
19 proper person will be held on **Monday, August 19, 2013, at 8:30a.m.** Parties must bring to
20 Calendar Call the following:

- 21 (1) Typed exhibit lists;
22 (2) List of depositions;
23 (3) List of equipment needed for trial; and
(4) Courtesy copies of any legal briefs on trial issues.

24 C. The Pre-trial Memorandum must be filed no later than noon on August 16, 2013, with
25 a courtesy copy delivered to Department IV. All parties, (Attorneys and parties in proper person)
26 **MUST** comply with **All REQUIREMENTS** of E.D.C.R. 2.67 and 2.69.

27
28 D. All pre-trial motions, including but not limited to motions in limine, must be in
writing and **filed no later than July 18, 2013**, and must be heard not less than 14 days prior to

KERRY L. EARLEY
DISTRICT JUDGE
DEPARTMENT IV

1 trial(see EDCR 2.47). **Orders shortening time will not be signed except in extreme emergencies.**

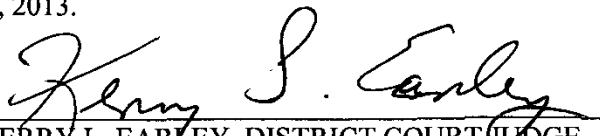
2 **An upcoming trial date is not an extreme emergency.**

3 E. All discovery deadlines, deadlines for filing dispositive motions and motions to
4 amend the pleadings or add parties are controlled by the previously issued Stipulation and Order to
5 Extend Discovery Deadlines.

6 **Failure of the designated trial attorney or any party appearing in proper person to**
7 **appear for any court appearances or to comply with this Order shall result in any of the**
8 **following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation**
9 **of trial date; and/or any other appropriate remedy or sanction.**

10 Counsel is required to advise the Court immediately when the case settles or is otherwise
11 resolved prior to trial. A stipulation which terminates a case by dismissal shall also indicate
12 whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A
13 copy should be given to Chambers.

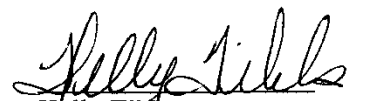
14 DATED this 17 day of April, 2013.

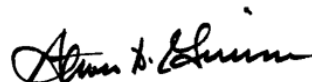
15 
16
17 KERRY L. EARLEY, DISTRICT COURT JUDGE

18
19 **CERTIFICATE OF SERVICE**

20 I hereby certify that on or about the date filed, a copy of this Order was mailed or placed in
21 the attorney's folder on the first floor of the Regional Justice Center as follows:

22 James M. Jimmerson, Esq. – Jimmerson and Hansen
23 Pat Lundvall, Esq. – McDonald Carano Wilson

24 
25 Kelly Tibbs
26 Judicial Executive Assistant
27
28



CLERK OF THE COURT

RPLY

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DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES WOLFRAM and WALT WILKES,)
)
Plaintiffs,)
)
v.)
)
PARDEE HOMES OF NEVADA,)
)
Defendant.)

Case No.: A-10-632338-C
Department No. IV

HEARING DATE: April 26, 2013
HEARING TIME: 8:30 a.m.

**PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR
MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

COME NOW, Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through
counsel of record, James J. Jimmerson, Lynn M. Hansen, Esq., and James M. Jimmerson,
Esq., of the Law Firm JIMMERSON HANSEN, P.C., and hereby files Plaintiffs' Reply in
Further Support of Their Motion for Leave to File a Second Amended Complaint. This
Reply is based upon the papers and pleadings on file in this case, the exhibits attached to

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the original moving brief and hereto, the Memorandum of Points and Authorities attached
hereto, and any argument adduced at the time of hearing on this matter.

DATED this 23rd day of April, 2013.

JIMMERSON HANSEN, P.C.



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JAMES WOLFRAM and WALT WILKES

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF**
2 **PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

3 **I. INTRODUCTION**

4 Plaintiffs brought this action after years of attempting to acquire documents owed to
5 them by Defendant Pardee Homes of Nevada ("Pardee") under the September 1, 2004
6 Commission Letter Agreement. Despite every effort to avoid litigation, Defendant's
7 insistence on providing Plaintiffs with none of the operative documents concerning the land
8 sales at Coyote Springs—effectively ensuring that Plaintiffs were not kept reasonably
9 informed as to all matters related to the amounts and due dates of their commissions—left
10 Plaintiffs no choice but to file suit, avail themselves of the tools of discovery, and ultimately
11 the power of the Court to compel an accounting to get the needed documents (and if
12 appropriate, any commissions owed to them). Despite these facts, and the pleading of
13 Plaintiffs' entitlement to attorney's fees as damages in the Initial and Amended Complaints,
14 Defendant has taken the position that the current operative pleading insufficiently pleads
15 attorney fee damages, making them unavailable without further amendment. Thus,
16 Plaintiffs submit this Motion for Leave to File a Second Amended Complaint for the Court's
17 consideration.

18 In their original moving brief, Plaintiffs James Wolfram and Walt Wilkes requested
19 that the Court grant leave for them to file a Second Amended Complaint in order to more
20 specifically plead their claims for damages. One of the principal amendments in the
21 proposed Second Amended Complaint was the further articulation of Plaintiffs' claims for
22 damages in the form of their attorney's fees incurred as a result of Defendant's wrongful
23 and improper conduct. As the Court is well aware, this issue has been briefed at length:
24 first in Defendant's Motion for Summary Judgment; then in Defendant's Motion in Limine to
25 Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages ("MIL #1"); and
26 now in Plaintiffs' Motion for Leave to File a Second Amended Complaint.¹ Now is the
27 Court's opportunity to decide the issue once and for all after a full and thorough briefing.

28 ¹ Plaintiffs' Motion for Leave to File a Second Amended Complaint is cited herein as "Mot.
at ____." Defendant's Opposition to Plaintiffs' Motion for Leave to File a Second Amended

1 Plaintiffs' Motion for Leave to Amend is based on the text of Nevada Rule of Civil
2 Procedure 15(a)—that when justice so requires, leave to amend a pleading “shall be freely
3 given.” N.R.C.P. 15(a). On this basis, and in the absence of any reason, such as undue
4 delay, bad faith, undue prejudice, or futility, justifying denial of the Motion, leave should be
5 freely granted to file the Second Amended Complaint. In further support of their Motion,
6 Plaintiffs incorporate by reference their position as stated in their Opposition to Defendant's
7 MIL #1 regarding the availability of attorney's fees as damages. Mot. at 2. While Plaintiffs
8 still maintain that the Amended Complaint, as pleaded, satisfies the requirements to claim
9 attorney's fees as damages, the Motion is brought in response to Defendant's claim to the
10 contrary at the hearing on the motions for summary judgment.

11 Defendant makes three arguments in its Opposition to the Motion: (1) that granting
12 the Motion would be prejudicial to Defendant since it has not taken discovery on the
13 damages at issue; (2) that such damages are not available to Plaintiffs under *Sandy Valley*
14 *Assoc. v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948, 35 P.3d 964 (2001) and its
15 progeny; and (3) that the proposed Second Amended Complaint fails to properly plead
16 attorney's fees as damages. However, none of these arguments pass muster.

17 Defendant's claim that the Second Amended Complaint would cause undue
18 prejudice is founded on the false premise that Defendant has taken advantage of all
19 possible discovery opportunities. In fact, the record reveals that Defendant has steadfastly
20 refused any additional discovery. From the offer of additional expert discovery at the
21 December 6, 2012 status check, to the most recent offer as of last week to permit
22 discovery into issues raised in this Motion as well as the motions in limine, Defendant has
23 not accepted any of the chances to further investigate the claims in question. Further,
24 Defendant has repeatedly requested continuances of trial while passing over such
25 discovery offers. Defendant cannot now have it both ways. It cannot take the position that
26

27 Complaint is cited herein as “Opp. at ____.” Plaintiffs' Opposition to Defendant's Motion in
28 Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages (MIL #1)
is cited herein as “Opp. MIL #1 at ____.”

1 the Motion should be denied because Defendant has not taken discovery on matters over
2 which it had the opportunity. The Court must not allow a party to bathe in its own
3 ignorance and later seek an advantage as a result of such willful blindness.

4 Nonetheless, Plaintiffs suggest the reopening of discovery so as to allow for any
5 cleanup on issues either side deems necessary. As the Court is aware, discovery is set to
6 be closed for over ten months until the start of trial. Reopening discovery now with over
7 four months until trial would neutralize any prejudice resulting from the proposed
8 amendment. It also would provide some relief to Plaintiffs, who were ordered a preferential
9 trial setting and yet have had to battle Defendant for their day in court.

10 Defendant's additional arguments concerning the availability of attorney fee
11 damages to Plaintiffs and the adequacy of their pleading in the proposed Second Amended
12 Complaint are just as faulty as Defendant's argument on the prejudicial effect of granting
13 the Motion. As was apparent at the hearing on the motions for summary judgment, if
14 Plaintiffs are successful in establishing that Defendant failed to provide them with the
15 necessary documents—documents only made available through the use of discovery tools
16 and the Court's power to compel an accounting—the natural and foreseeable consequence
17 of Defendant's wrongful actions is Plaintiffs' expenditure of attorney's fees. As such, the
18 fees are appropriately characterized as damages. Further, the proposed amendment
19 satisfies the pleading requirements of N.R.C.P. 9(g). Defendant's suggestion that the
20 absence of allegations containing the total amount of fees expended warrants denial of the
21 Motion is baseless. Defendant provides no caselaw in support of its argument, whereas
22 Plaintiffs follow the standard set forth in *Sandy Valley*. As such, and without any other
23 arguments in opposition to the Motion, the Court should grant the Motion for Leave to
24 Amend.

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1 II. LEGAL ARGUMENT

2 A. Defendant Implicitly Concedes that Justice Requires Granting the
3 Motion for Leave to Amend

4 The Motion established that leave to file a Second Amended Complaint should be
5 granted as justice so requires. Specifically, the Motion conclusively demonstrated that (1)
6 Plaintiff brought the Motion at Defendant's insistence; (2) the Motion was not brought in
7 bad faith or for the purposes of undue delay; and (3) upon establishing Defendant's liability,
8 Plaintiffs also would have established the existence of their damages. See Mot. at 2-4.
9 Defendant does not dispute these facts in its Opposition and thereby concedes them.
10 *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009). Defendant's
11 concessions require the Court to grant the Motion.

12 As was stated in the original moving brief, Plaintiffs requested leave to file a Second
13 Amended Complaint only after counsel for Defendant argued at the hearing on the motions
14 for summary judgment that the attorney's fees pled in the Amended Complaint were not
15 properly pled as special damages. Mot. at 1-2. When asked by the Court if Plaintiff must
16 "plead more" under *Sandy Valley*, Defendant's counsel replied, "You have to plead more
17 and you have to plead them as special damages as the portion of relief." *Id.* Despite
18 Plaintiffs' position that the Amended Complaint satisfied the *Sandy Valley* pleading
19 standard, the Motion was brought to address Defendant's concern that under the law,
20 Plaintiffs must "do more." *Id.* Defendant, in not disputing these facts, effectively concedes
21 them. *Ozawa*, 125 Nev. at 563. And, in so doing, Defendant cuts against its own
22 arguments on the alleged prejudice caused by the Motion. If the Court agrees that the
23 current operative pleading sufficiently puts Defendant on notice of Plaintiffs' claims for
24 attorney's fees, any prejudicial effect of the Motion is irrelevant since: (1) Defendant has
25 been on notice of Plaintiffs' damage claims since the commencement of the action; and (2)
26 the Motion is a product of Defendant's own wishes and doing.

27 Additionally, Defendant does not dispute that the Motion was not brought in bad
28 faith or for the purposes of delay. Mot. at 3. Instead, the only arguments forwarded by

1 Defendant in Opposition to the Motion are that the Second Amended Complaint would (1)
2 unduly prejudice Defendant; and (2) would be futile. Opp. at 2-3. The Court, therefore,
3 can limit its consideration of the Motion to these two concerns, prejudice and futility. If the
4 Court finds that the Second Amended Complaint would be neither futile, nor prejudicial, the
5 Court must grant the Motion. Mot. at 3 (citing *Stephens v. S. Nevada Music Co.*, 89 Nev.
6 104, 507 P.2d 138 (1973)).

7 Furthermore, it is undisputed that if Plaintiffs are successful in establishing
8 Defendant's liability for failing to properly inform them, they also succeed in establishing
9 that they have been harmed. Mot. at 4. This is significant because it is an implicit
10 acknowledgment that Plaintiffs' attorney's fees are properly characterized as damages and
11 not simply costs of litigation. Since filing suit was the only way for Plaintiffs to get access
12 to the tools of discovery and retrieve at least some of the documents owed to them before
13 trial, establishing that Defendant was liable for failing to produce documents to Plaintiffs
14 confirms that the legal expenses incurred to gain discovery and prosecute a claim for
15 accounting are one element of damages suffered by Plaintiffs.² The California Court of
16 Appeals in *Burch v. Argus Properties, Inc.*, 92 Cal. App. 3d 128, 132, 154 Cal Rptr. 485
17 (Cal. Ct. App. 1979), held the same, that the failure to account created the need to litigate
18 and warranted the award for attorney's fees. *Id.* ("Here Burch would have known the
19 \$5,000 advanced for costs was not to be returned and would not have needed to litigate
20 this issue if Argus had provided him with the quarterly accounting required under section
21 10146. The fees here were reasonable.").³ Consequently, Plaintiffs' attorney's fees should
22 be properly categorized as damages and not just costs of litigation. Therefore, justice
23 requires that the Motion be granted and that Plaintiffs be permitted leave to file a Second
24 Amended Complaint.

25
26 ² As Plaintiffs stated in their Opposition to MIL #1, Defendant did not produce the
27 agreements reflecting the purchases of Option Property at issue, despite numerous
28 Requests for Production for the same. Instead, it took a subpoena to third parties to
receive those records. See Opp. MIL #1 at 6-7.

³ *Burch* is cited in Plaintiffs' Opposition to MIL #1 at 7.

1 **B. Leave to File the Second Amended Complaint does not Prejudice**
2 **Defendant Pardee**

3 Defendant makes the specious argument that the Motion is "untimely" and therefore
4 "highly prejudicial" to Defendant, warranting its denial. Opp. at 5. However, this argument
5 does not survive scrutiny. Defendant has cited no Nevada caselaw in support of its
6 argument that a motion for leave to amend may be denied simply because it was filed after
7 the deadline. In fact, the jurisprudence cited by Defendant in its motion implicitly rejects
8 this position in holding that the Court has broad discretion in deciding the motion, even
9 when it is brought on the eve of trial—well after the scheduling order's deadline. See Opp.
10 at 4 (citing *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (denying motion
11 for leave to amend because defendant was unreasonably dilatory,⁴ and not for its failure to
12 be filed before the deadline)). A host of Nevada caselaw closely resembling the present
13 action supports granting the Motion.

14 Further, Defendant's argument that it would be prejudiced by the amendment since
15 it has not taken discovery on Plaintiffs' attorney's fees is equally hollow. Defendant's
16 appeal to its lack of discovery is particularly puzzling since Defendant has constantly
17 rejected offers to take discovery on this issue (and others). If taking discovery on these
18 matters were necessary to avoid what Defendant has repeatedly called an "ambush
19 attack," Defendant should not be able to hide behind its refusal to take that offered
20 discovery and argue that the amendment is prejudicial. Opp. at 4, 6. It would sanction a
21 grave injustice to permit a party to defeat a motion for leave to amend on the grounds that
22 the amendment would open up issues yet to be discovered, when all the while that party
23 rejected the opportunity to take such discovery. Such is the case with Defendant and its
24 position must be rejected.

25
26 ⁴ One of the acceptable reasons to deny a motion for leave to amend pleadings cited by
27 the Nevada Supreme Court in *Stephens v. S. Nevada Music Co.*, 89 Nev. 104, 507 P.2d
28 138 (1973). As went undisputed by Defendant, Plaintiffs were not dilatory in filing the
 Motion as it was filed three weeks after the Court's verbal order requiring the Motion. As
 such, *Kantor's* applicability is limited.

1 1. The Court has Discretion to Grant the Motion even if it was Filed After the
2 Deadline has Passed—Especially since the Current Operative Pleading
3 Properly Placed Defendant on Notice of Plaintiffs' Claims for Attorney's Fees

4 On the issue of timeliness, Defendant would have the Court deny the Motion
5 because "the deadline for all parties to seek leave to amend pleadings or add parties was
6 March 14, 2012," and "discovery closed on October 29, 2012." *Id.* at 5. However, this
7 does not bar the Motion for Leave to Amend. As the Defendant knows (and even states in
8 its Opposition), "the decision to grant or deny a motion to amend lies with the discretion of
9 the district court." *Id.* at 5. Even after a plaintiff closes its case-in-chief, the Court is well
10 within its discretion to grant leave to amend, especially where, as here, "the amendment
11 allowed by the court, and which was to the prayer of the complaint, introduced no new
12 allegations, made no additional parties, did not complicate the suit, nor increase the
13 expense of the litigation, nor did it make new issues of fact or encumber the record."⁵ See
14 *Miller v. Thompson*, 40 Nev. 35, 160 P. 775, 777 (1916).

15 Moreover, not only is the Court permitted to grant leave to amend after the deadline
16 has passed, but the Nevada Supreme Court has reversed a denial of such a motion when
17 the operative complaint sufficiently put Defendant on notice of the issues to be litigated.
18 See *Hall v. SSF, Inc.*, 112 Nev. 1384, 930 P.2d 94 (1996) (reversing district court's denial
19 of amendment of pleadings when allegations in the complaint were "so closely related" to
20 the issues litigated at trial that defendant was properly given notice of them). Where, as
21 here, the Complaint has put Defendant on notice of the attorney's fees to be claimed as
22 damages (pled in both the Initial and Amended Complaints), and has also supplied
23 Defendant with copies of redacted bills, the Court must conclude that the "timeliness" of the
24 proposed amendment is not a barrier to its filing—especially considering that Defendant
25 will not be prejudiced by the proposed Second Amended Complaint.

26 Additionally, Plaintiffs' suggested solution of permitting discovery into these issues
27 would be consistent with the scheduling rules set forth in Nevada Rule of Civil Procedure

28 ⁵ Since the issue of attorney's fees will be addressed either during trial or after the
conclusion of trial, new no issues, costs, or complications could be caused by granting
Plaintiffs' Motion.

1 16.1 and solve any timeliness problems. As the Court knows, N.R.C.P. 16.1(c)(6) provides
2 that the deadline for motions for leave to amend pleadings should be set no later than 90
3 days before the close of discovery. Further, without a court order to the contrary, motions
4 in limine should be filed no later than 45 days before trial. As applied to the present
5 situation, the Court may permit limited discovery for 90 days after the hearing on this
6 Motion set for April 26, 2013. That would set the close of discovery for July 25, 2013.
7 Likewise, motions in limine, if any were necessary, would be due by July 26, 2013, allowing
8 for full briefing before the August 19, 2013 calendar call. Any expert discovery Defendant
9 wanted to conduct could be easily completed within the first 45 days of reopened
10 discovery, while still permitting Plaintiffs to file a rebuttal to any expert disclosure they feel
11 necessary.

12 2. The Proposed Second Amended Complaint is not Unduly Prejudicial

13 The proposed Second Amended Complaint is not unduly prejudicial and justice
14 requires it to be allowed to be filed. As has been discussed above, Plaintiffs have put
15 Defendant on notice of their claims for attorney's fees since the filing of the Initial
16 Complaint and the Amended Complaint. As stated in Plaintiffs' Opposition to MIL #1:

17 Plaintiffs' Amended Complaint states three claims for relief: (1)
18 accounting; (2) breach of contract; and (3) breach of the
19 implied covenant of good faith and fair dealing. Under each of
20 these three claims for relief Plaintiffs specifically state an
21 entitlement to attorney's fees for that particular cause of action.
22 Under the claim for relief for accounting, the Amended
23 Complaint states, "Plaintiffs are also entitled to an award of
24 reasonable attorneys' fees and costs." See Amended
25 Complaint at ¶ 20, a true and correct copy of which is attached
26 hereto as Exhibit 2. Under the claim for relief for breach of
27 contract, the Amended Complaint states, "As a result of
28 Defendant's breach of contract, Plaintiffs have been forced to
bring this matter before the Court. Accordingly, Plaintiffs are
entitled to an award of reasonable attorneys' fees and costs."
Id. at ¶ 25. And under the third claim for relief breach of the
covenant of good faith and fair dealing, "As a direct and
proximate result of Defendant's breach of the covenant of good
faith and fair dealing, Plaintiffs have been forced to bring this
matter before the Court. Accordingly, Plaintiffs are entitled to
an award of reasonable attorneys' fees and costs." *Id.* at ¶ 30.

1 Finally, in the prayer for relief, the Amended Complaint states,
2 "WHEREFORE, Plaintiffs pray as follows:...4. For reasonable
3 attorney's fees." *Id.*

4 Opp. MIL #1 at 4-5. As such, Defendant was well aware that Plaintiffs were claiming their
5 attorney's fees as damages and thus, any further amendment to their Complaint would not
6 prejudice Pardee.

7 Additionally, Defendant is fully informed as to Plaintiffs' attorney's fees. Defendant
8 has been in possession of Plaintiffs' redacted attorney's fees for over six months and has
9 bills current as of February 2013 (further disclosures will include current billing statements).
10 But still, Defendant constantly tells the Court in its Opposition that it has not had the
11 opportunity to take discovery into these bills and that it has "no witnesses or adequate
12 defense to Plaintiffs' attempts to put forth their attorney's fees as an element of their
13 damages..." Opp. at 6. However, the Court must view this statement with substantial
14 skepticism for multiple reasons.

15 First, Defendant has outright rejected multiple opportunities to take the discovery it
16 now claims are critical to avoid an "unfair ambush attack." *Id.* As the Court will remember,
17 at the December 6, 2012 status check, counsel for Plaintiffs suggested the Court reopen
18 discovery for experts. However, this offer was refused by counsel for Defendant. The
19 exchange was as follows:

20 MR. JIMMERSON: And in that regard, I did want to ask, with
21 the delay of the trial by two months, are we now delaying or
22 slipping other dates, like disclosure of expert witnesses and
23 other items approximately the same time period?

24 MS. LUNDVALL: There would be no agreement, at least from
25 Pardee, that the extension of discovery would be – or the
26 discovery close, which is already closed, would be extended or
27 anything of that nature. The time frames for disclosure of
28 expert witnesses is long, long ago past. We would not agree.

1 See Exhibit 1, a true and correct copy of page 9 of the transcript from the December 6,
2 2012 status check attached hereto. If Defendant was concerned over not getting discovery
3 on the attorney's fees, it makes no sense to reject the suggestion of additional discovery.

4 But this is not the only example of Defendant not accepting an offer to allow
5 discovery on these issues. On Tuesday April 16, 2013, counsel for Plaintiffs emailed
6 counsel for Defendant, Pat Lundvall and Aaron Shipley, offering to agree to the taking of
7 discovery on this issue and others. See Exhibit 2, a true and correct copy of an email from
8 James M. Jimmerson Esq. to Aaron Shipley, Esq. and Pat Lundvall, Esq. on April 16, 2013
9 attached hereto. To date, counsel for Defendant has not yet responded to the offer.
10 Again, if the discovery is so important, it is baffling that such offers would go unaccepted.

11 Second, Defendant's Opposition to the Motion for Leave to Amend is the first time
12 that Defendant has claimed that it has been prejudiced by the disclosure of Plaintiffs'
13 attorney's fees information. Defendant did not make this argument in any of the following:
14 (1) the Reply in Support of its Motion for Summary Judgment; (2) the Opposition to
15 Plaintiffs' Countermotion for Partial Summary Judgment; (3) Defendant's Motion to
16 Continue Trial; or (4) Defendant's MIL #1. Considering that Defendant is asking the Court
17 to exclude evidence of Plaintiffs' attorney's fees as an element of damages, it is puzzling
18 that Pardee would not argue that Plaintiffs' disclosures were prejudicial. The only
19 conclusion the Court can draw from Defendant's conspicuous silence is that the proposed
20 Second Amended Complaint would not be unduly prejudicial and thus it must grant the
21 Motion.

22 Finally, if Defendant believes that it needs the discovery, Plaintiffs are still offering
23 the discovery Defendant seeks. The timeline suggested above would allow for any and all
24 discovery the parties may believe they need. It would also eliminate any prejudice from the
25 proposed Second Amended Complaint. Should the Court find such a solution attractive, it
26 would have Plaintiffs' full support, especially since otherwise discovery will have been
27 closed for over ten months once trial begins.

1 C. The Proposed Second Amended Complaint Satisfies the Pleading
2 Requirements under *Sandy Valley* and the Nevada Rules of Civil
3 Procedure

4 Plaintiffs' proposed Second Amended Complaint pleads the claims for attorney's
5 fees consistent with *Sandy Valley* and Nevada Rules of Civil Procedure 8 and 9. Defendant
6 counters this position by making a two-pronged argument that the proposed amendment is
7 futile under Nevada law. First, Defendant once again argues that Nevada law does not
8 permit Plaintiffs to claim their attorney's fees as damages, citing to *Sandy Valley* and
9 *Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007). Opp. at 6-9. Second, the
10 Opposition argues that the proposed amendment fails to plead special damages with the
11 requisite specificity and thus would be futile. *Id.* at 9-10. Both of these claims lack merit.

12 1. Plaintiffs' Claims for Attorney's Fees are Proper under *Sandy Valley* and its
13 Progeny

14 Plaintiffs' attorney's fees are compensable damages and are not simply costs of
15 litigation to be reimbursed in post-trial proceedings. As the Court knows, the Nevada
16 Supreme Court set forth the requirements for claiming attorney's fees as damages in
17 *Sandy Valley*. While the holding in *Sandy Valley* regarding the availability of attorney's
18 fees as damages for cases involving the removal of clouds upon title and slander of title
19 was clarified in *Horgan*, *Sandy Valley* still remains, as Defendant states, "the seminal case
20 on this particular issue." Opp. at 6. And it is the analysis in *Sandy Valley*, which confirms
21 the propriety of Plaintiff's damage claims.

22 *Sandy Valley*'s requirements for properly stating a claim for attorney's fees as
23 damages are straightforward: "[W]hen attorney fees are considered as an element of
24 damages, they must be the natural and proximate consequence of the injurious conduct."
25 *Sandy Valley*, 117 Nev. at 957. However, satisfying these requirements is not an easy
26 task. The court observed:

27 As a practical matter, attorney fees are rarely awarded as
28 damages simply because parties have a difficult time
 demonstrating that the fees were proximately and necessarily
 caused by the actions of the opposing party and that the fees
 were a reasonably foreseeable consequence of the breach or
 conduct. Because parties always know lawsuits are possible
 when disputes arise, the mere fact that a party was forced to

1 file or defend a lawsuit is insufficient to support an award of
2 attorney fees as damages.

3 *Id.* This is why attorney's fees are awarded only in "limited circumstances" and why the
4 availability of attorney's fees as damages has been considered "a rather narrow exception
5 to the rule prohibiting attorney fees awards absent express authorization." Opp. at 7.

6 The Opposition is quick to cite to Nevada decisions confirming the limited
7 availability of the requested relief, but it is less than swift in explaining the basis for such
8 holdings—no doubt hoping that the Court would fail to notice that a motion for leave to
9 amend is not the ideal device to test the availability of attorney's fees as damages. Indeed,
10 *Sandy Valley* is clear that once a party properly pleads a claim for attorney's fees as
11 damages, a court may only deny such an award upon hearing evidence and rendering a
12 decision as to whether the fees were "proximately and necessarily caused by the actions of
13 the opposing party" and if "the fees were a reasonably foreseeable consequence of the
14 breach of conduct." *Sandy Valley*, 117 Nev. at 957. It is, in no uncertain terms, a fact-
15 intensive endeavor and not proper for the present Motion.⁶

16 However, Defendant mistakenly argues that the Motion should be denied because
17 Plaintiffs' damage claims can hardly be "considered a reasonably foreseeable and
18 proximate consequence of the Commission Agreement." Opp. at 8. In support, Defendant
19 erroneously states that (1) Plaintiffs concede that they have been paid all of the
20 commissions owed to them; and (2) that Plaintiffs only claim is for Defendant's failure to
21 produce documents "pertaining to option exercises that have never transpired." *Id.*
22 Neither of these claims is true. As to the alleged concession of commission payments, in
23 their Opposition to MIL #1, Plaintiffs state to the contrary, that, "it is apparent that Plaintiffs
24 have not been paid the commissions as owed to them according to the Option Property
25 formula stated in the Commission Letter Agreement..." Opp. MIL #1 at 1. And on the
26 issue of Plaintiffs' claims to records and documents concerning the sales of real property,

27 ⁶ This is one of the reasons why *Sandy Valley*, *Horgan*, *Reyburn*, and *Shuette* (the four
28 cases cited by Defendant in its Opposition) were all opinions on the propriety of the award
decided after trial, and were not cases testing the adequacy of damage claims in a motion
to dismiss.