

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

**Case No.: 72371**

Electronically Filed  
~~Feb 28 2018~~ 11:33 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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PARDEE HOMES OF NEVADA

Appellant,

v.

JAMES WOLFRAM and WALT WILKES, et al.

Respondents.

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Appeal Regarding Judgment and Post-Judgment Orders  
Eighth Judicial District Court  
District Court Case No.: A-10-632338-C

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**JOINT APPENDIX – VOLUME 18 OF 88**

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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

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Labeled</b>
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

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Labeled</b>
10/24/2013	Transcript re Trial	29-30	JA004463- JA004790
10/28/2013	Transcript re Trial – <b>filed under seal</b>	32-33	JA004848- JA005227
10/29/2013	Transcript re Trial – <b>filed under seal</b>	35	JA005264- JA005493
10/30/2013	Transcript re Trial	37-38	JA005512- JA005815
12/09/2013	Transcript re Trial – <b>filed under seal</b>	40-41	JA005821- JA006192
12/10/2013	Transcript re Trial	42-43	JA006193- JA006530
12/12/2013	Transcript re Trial – <b>filed under seal</b>	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 – <b>filed under seal</b>	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 – <b>filed under seal</b>	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 – <b>filed under seal</b>	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 – <b>filed under seal</b>	25-26	JA003684- JA004083
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10/23/2013	Trial Exhibit R	27	JA004086- JA004089
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10/23/2013	Trial Exhibit U	27	JA004093
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 – <b>filed under seal</b>	27	JA004320- JA004329
10/23/2013	Trial Exhibit 11 – <b>filed under seal</b>	28	JA004330- JA004340
10/23/2013	Trial Exhibit 12 – <b>filed under seal</b>	28	JA004341- JA004360
10/23/2013	Trial Exhibit 13 – <b>filed under seal</b>	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
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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
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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
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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 – <b>filed under seal</b>	27	JA004293- JA004307
10/23/2013	Trial Exhibit 7 – <b>filed under seal</b>	27	JA004308- JA004310
10/23/2013	Trial Exhibit 8 – <b>filed under seal</b>	27	JA004311- JA004312
10/23/2013	Trial Exhibit 9 – <b>filed under seal</b>	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
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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 28<sup>th</sup> day of February, 2018.

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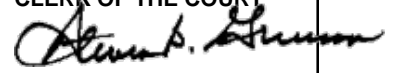
Attorneys for Appellant

## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of McDonald Carano LLP, and on the 28<sup>th</sup> 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



DISTRICT COURT  
CLARK COUNTY, NEVADA

JAMES WOLFRAM, )  
 )  
Plaintiff, )  
 )  
vs. ) CASE NO. A-10-632338-C  
 )  
PARDEE HOMES OF NEVADA, )  
 )  
 ) **ORIGINAL**  
Defendant. )  
 )

**TRANSCRIPT  
OF  
PROCEEDINGS**

BEFORE THE HONORABLE KERRY L. EARLEY  
DISTRICT COURT JUDGE  
HELD ON MONDAY, SEPTEMBER 23, 2013  
AT 8:30 a.m.

**APPEARANCES:**

For the Plaintiff: JAMES M. JIMMERSON, ESQ.  
JAMES J. JIMMERSON, ESQ.  
For the Defendant: PATRICIA K. LUNDVALL, ESQ.  
AARON D. SHIPLEY, ESQ.

Reported by: Loree Murray, CCR No. 426

Loree Murray, CCR #426  
District Court IV

1 LAS VEGAS, NEVADA, MONDAY, SEPTEMBER 23, 2013

2 8:30 A.M.

3 \* \* \* \* \*

4  
5 THE COURT: Good morning, counsel. I  
6 apologize, we were waiting for a marshal. Thank you.

7 Thank you, Karl, you did excellent.

8 THE MARSHAL: Thank you.

9 THE COURT: All right. I kind of put all the  
10 piles of what we're doing. I think I have it all  
11 covered, but where do you want to start? I have the  
12 motions in limine from both of you. I have defendant's  
13 motion for partial summary judgment and defendant's  
14 motion to compel production. Wherever you want to  
15 start, I have a pile.

16 Do you want to start with production and the  
17 summary judgments before we go to motions in limine?

18 MR. JAMES M. JIMMERSON: Perfectly fine, your  
19 Honor.

20 MS. LUNDVALL: Good morning, your Honor. I  
21 will go ahead and make an appearance, and we'll follow  
22 whatever direction you wish for us to make.

23 THE COURT: All right.

24 MS. LUNDVALL: I'm Pat Lundvall, and this is  
25 Aaron Shipley from McDonald Carano for Pardee Homes of

1 Nevada.

2 MR. JAMES M. JIMMERSON: Good morning, Judge,  
3 Jim Jimmerson and Jim Jimmerson for the plaintiffs.

4 MS. LUNDVALL: Would the Court would like to  
5 start with our motion to compel?

6 THE COURT: That would be great.

7 MS. LUNDVALL: This one I think is pretty  
8 simple and straightforward, your Honor. It deals with  
9 notes that were used by a witness to prepare himself  
10 for deposition. And I think that it is a fairly  
11 standard practice that every attorney knows that when  
12 you take a deposition, what's one of the first  
13 questions that you ask? You ask what documents that  
14 the witness may have reviewed in preparation for their  
15 deposition.

16 Why are you asking that or why does an  
17 attorney ask that? Because we have a statute that's a  
18 rule of evidence that says if, in fact, you've used  
19 notes or you've used documents or you've used writings  
20 by which then to refresh your recollection to prepare  
21 yourself then by which to testify, in fact, then those  
22 documents are discoverable. And so therefore, we ask  
23 Mr. Wolfram whether or not he'd reviewed any documents,  
24 and he said, Yes, that he had.

25 Also, I think it's fairly common and standard

1 practice that as an attorney, when you prepare your  
2 witness, you are cautious about what documents then  
3 that you show that particular witness in an effort to  
4 try to prepare them for trial or prepare for --

5 THE COURT: Deposition.

6 MS. LUNDVALL: For their depositions. And  
7 the reason we do that is because you're cautious,  
8 because you know that there's -- the statute says if  
9 you use documents to prepare yourself to testify during  
10 the deposition, that, in fact, those documents are  
11 discoverable.

12 During the course of Mr. Wolfram's  
13 deposition, we asked him, and he said that, said he  
14 reviewed two different sets of notes. He apparently,  
15 according to his testimony --

16 THE COURT: On his previous deposition and  
17 then he had some separate notes?

18 MS. LUNDVALL: He had some separate notes on  
19 a separate pad of paper, and I asked him if those  
20 assisted him in being able to testify, and he said,  
21 Yes, I think so. He said, They allowed me to see  
22 things more clearly or to see things in a better way,  
23 and he said he also may have testified differently the  
24 first time around.

25 He very clearly indicated that those notes

1 and those documents that he had reviewed then had  
2 provided help and assistance to him in providing  
3 testimony then during his deposition, so we made a  
4 request for those notes.

5 The response then that we got from opposing  
6 counsel was that those documents were protected by the  
7 attorney/client privilege, and therefore, that we were  
8 not going to get access to those, and therefore, we  
9 brought this motion to compel.

10 THE COURT: Okay.

11 MS. LUNDVALL: The case law, we believe, is  
12 pretty uniform within this jurisdiction, particularly  
13 within the jurisdiction that examines Nevada's statute,  
14 and Nevada's statute is unique in that it differs from  
15 the federal rule of evidence on this.

16 THE COURT: You're talking about NRS 50.125.

17 MS. LUNDVALL: That's correct, your Honor.

18 THE COURT: Right.

19 MS. LUNDVALL: And I compared to the Federal  
20 Rule of Evidence 612, our state statute allows you to  
21 discover those documents, either used while testifying  
22 or before.

23 THE COURT: Or before?

24 MS. LUNDVALL: And so therefore, I believe  
25 that these fall within the category of documents that

1 have been used by Mr. Wolfram to prepare himself to  
2 testify, and then he stated, in fact, they did help and  
3 assist him to be able to provide deposition testimony,  
4 so we would like to have access then to those notes.

5 THE COURT: Okay.

6 I'm actually getting a taller podium. I  
7 actually tried to order one. That's like for miniature  
8 people. Sorry, you're too tall.

9 MR. JAMES M. JIMMERSON: We're just a little  
10 tall, that's all.

11 THE COURT: It's even short for me, and I'm  
12 short, but I appreciate you using it.

13 MR. JAMES M. JIMMERSON: Your Honor, as you  
14 heard, NRS 50.125 is what governs this issue.

15 THE COURT: Right.

16 MR. JAMES M. JIMMERSON: In order to get the  
17 notes, okay, there must be two things that are  
18 established. One, that the notes were actually used to  
19 refresh recollection, and two, that there was a waiver  
20 of the privilege, okay.

21 As to Issue Number 1, okay, the case law on  
22 point is very clear when it says that you must  
23 establish that the notes were used to refresh  
24 recollection. I'll quote from Sipsis (phonetic), okay?  
25 Before refreshing a witness' memory, it must appear the



1 witness has no recollection of the evidence to be  
2 refreshed.

3 THE COURT: The foundation.

4 MR. JAMES M. JIMMERSON: Exactly, and that's  
5 what you saw from Judge Denton's order, is that the  
6 foundation hadn't been laid properly, and they went  
7 back to allow for the foundation to be laid.

8 Now, reading from the deposition transcript,  
9 Question, Did those personal notes then help prepare  
10 you for your deposition here today?

11 Answer, I think so, 'cause I could not look  
12 at, had a chance to really sit down and see things, you  
13 know. I may have made answers a little bit differently  
14 had I had time to reflect like I did when I was reading  
15 the deposition, but mostly everything seemed to be all  
16 right with me.

17 That answer is referring specifically to --

18 THE COURT: The first deposition.

19 MR. JAMES M. JIMMERSON: Exactly. So the  
20 notes he made in the margins of the first deposition, I  
21 don't have those notes. I asked my client to find  
22 those notes, as we gave you for an in camera review  
23 where you read actually the actual notepad notes. He  
24 makes no reference to those notepad notes. He makes no  
25 reference to, Those actually helped refresh my

1 recollection or I had no memory of what I put down  
2 there and I needed to remember in preparation for this  
3 deposition.

4 THE COURT: In the second deposition, that's  
5 where I focused, can I be honest, because I read it  
6 very carefully, and it's very specific on NRS 50.125  
7 that the notes refreshed Mr. Wolfram's memory, either  
8 before or while testifying.

9 The purpose of the second deposition was an  
10 entirely new area. In fact, Ms. Lundvall said, We're  
11 not going to plow old ground, so the whole focus of the  
12 second deposition had nothing to do, in fact, you would  
13 have been objecting if it would have gone over, which  
14 is always a problem. That's why I was very specific  
15 when people get a second deposition, attorneys tend to  
16 want to go over old ground, because maybe they can get,  
17 not that we would, but could get inconsistent answers,  
18 you know, so it was, that's where I focused. That was  
19 entirely different.

20 In fact, Ms. Lundvall was very fair about it  
21 and said, We're not gonna go over old ground, so in my  
22 thoughts for the foundation and my impression from  
23 looking at the it, he basically went over his old  
24 deposition to make himself feel better, that he did  
25 okay.

1 MR. JAMES M. JIMMERSON: Yes.

2 THE COURT: Nothing to do with how he was  
3 gonna testify in this, which was very specific on time  
4 and effort damages, which is what I granted this  
5 deposition for, a very specific focused area.

6 MR. JAMES M. JIMMERSON: Uh-huh.

7 THE COURT: And I would have sustained any  
8 objections if they tried to go through old ground, all  
9 the stuff that was covered in the first, so I looked at  
10 that that way.

11 How, by looking at his first deposition,  
12 entirely different areas of inquiry, how would that  
13 refresh his recollection in any way for the new topic,  
14 which was time and effort damages?

15 MR. JAMES M. JIMMERSON: Exactly.

16 THE COURT: And there was never a moment  
17 where he said, Wait a minute, my notes told me  
18 something, so I honestly looked at it as a foundation  
19 issue.

20 And Ms. Lundvall's right, you have a right to  
21 them, but under our statute, you still have to have  
22 that foundation, and without the foundation, NRS 50.125  
23 doesn't come into play, you know.

24 And the reason I'm comfortable on my decision  
25 in this one is because they were two totally separate,

1 different -- now, if the first deposition had been  
2 continued and it wasn't just focused on this new  
3 additional discovery area, I still didn't see the  
4 foundation, but it would be a little --

5 MR. JAMES M. JIMMERSON: It would be a  
6 different animal.

7 THE COURT: It wouldn't be so clear cut to  
8 me. That's, that's how I look at it before I even get  
9 to the waiver. And the case law is very strong on  
10 foundation. It has to refresh your recollection.

11 MR. JAMES M. JIMMERSON: Exactly, your Honor.

12 THE COURT: And everything he testified to  
13 was nothing that was asked in the previous one. And my  
14 impression was he just made notes, as some witnesses  
15 do, almost preparing for trial when you have them  
16 review their deposition, you know, to meet with you, so  
17 that's how I looked at it, so that's kind of where I  
18 wanted to focus.

19 I'm not even getting to the waiver, because I  
20 feel like the foundation is very explicit, and the case  
21 law says that, and applying the facts to this case, I  
22 didn't see any evidence that it refreshed his  
23 recollection, and it actually makes sense, since it was  
24 a whole different area of inquiry.

25 MR. JAMES M. JIMMERSON: Uh-huh.

1           THE COURT: Is how I have looked at that. I  
2 mean I went over all the notes, I went through page and  
3 line of his deposition to see, you know, the same thing  
4 you said, It may have made my answers a little  
5 different, but she's not asking him about that topic.

6           MR. JAMES M. JIMMERSON: Uh-huh.

7           THE COURT: In fact, she specifically wasn't  
8 supposed to go through that, so that wouldn't refresh  
9 his -- everything seemed all right. That was from the  
10 separate one, same with the notes, so that's how I look  
11 at it.

12           I'm gonna rule -- if you want to address it,  
13 that's where I looked. The foundation in this case was  
14 the area I had a real issue with.

15           MS. LUNDVALL: May I very briefly be heard?

16           THE COURT: Absolutely. I didn't mean to cut  
17 you off, but I don't need other argument, because I  
18 really feel strong on the foundation.

19           MR. JAMES M. JIMMERSON: Okay.

20           MS. LUNDVALL: One of the things -- two  
21 points I would like to make as far as in reply, your  
22 Honor.

23           THE COURT: Sure.

24           MS. LUNDVALL: Is that Mr. Jimmerson makes  
25 reference to Judge Denton's order.

1 THE COURT: It was attached.

2 MS. LUNDVALL: It's my case.

3 THE COURT: I saw that.

4 MS. LUNDVALL: In fact, we litigated this  
5 issue before Judge Denton.

6 THE COURT: I saw that.

7 MS. LUNDVALL: What Judge Denton ordered in  
8 that specific case was that we needed to go back and to  
9 establish which notes were at issue, not whether or not  
10 the notes refreshed someone's recollection, not whether  
11 or not the notes had been used while testifying, not  
12 whether or not the notes had been used before to  
13 prepare himself, but which notes were at issue.

14 THE COURT: Okay. But that doesn't apply. I  
15 still have the statute foundation here, so I really  
16 hate to get into what somebody else did in another  
17 courtroom, because as you know --

18 MS. LUNDVALL: I agree.

19 THE COURT: You know, more facts than I  
20 would, I honestly read it, just because I read  
21 everything, but I didn't use it in any way for my  
22 decision. First of all, I wasn't there. I don't know  
23 the full facts. I've learned that when other counsel  
24 come in front of me and say judge such and such did  
25 that and I research and look at it, and I don't get

1 full facts, so I always do not rely on that unless it's  
2 something -- and if I needed more, if I had to rely on  
3 that, I would have asked for more facts.

4 I focused on the foundation, which it's  
5 explicit under NRS 50.125 that the notes had to refresh  
6 the recollection. That's the whole point of the  
7 statute, is that it refreshed -- and that makes sense,  
8 if it refreshed their recollection, you should have a  
9 right to look at that, because they're testifying to  
10 something that's relevant in your deposition.

11 If something did refresh their recollection  
12 for something they're testifying to, you would have a  
13 right to that, because you need to see what it was that  
14 refreshed, because that also could be relevant to what  
15 your witness is testifying to. That, that's the  
16 purpose of the statute.

17 I looked, you know, which makes sense, that's  
18 why you would have the right, but you've got to have  
19 the foundation, and I just didn't see the foundation  
20 that Mr. Wolfram used these notes or the notes on the  
21 depo or the other ones to refresh his recollection to  
22 testify in the second deposition, and as I, you know,  
23 as I said, it was a whole different area, whole  
24 different, and that was the point of the second.

25 The only reason we did the second was

1 because, as you know, after the second amended  
2 complaint and all the things we've been through, it was  
3 specific for that, and I just don't see any foundation  
4 for that.

5           And he, I mean there's nothing in his  
6 testimony that gives specific foundation, and then when  
7 you do that fact on top of, as your statement, I'm not  
8 gonna plow old ground, which I appreciate and I'm sure  
9 counsel appreciates, I just don't see the foundation  
10 under NRS 50.125, so I'm not gonna, I'm gonna order  
11 they do not produce it.

12           My ruling is I see no foundation in anything  
13 that I reviewed that Mr. Wolfram used, either the notes  
14 he jotted on his old deposition, his previous  
15 deposition, or the hand notes, that refreshed his  
16 recollection to testify in this second deposition on an  
17 entirely new area of inquiry that was very specific.  
18 It was a new area of discovery based on this Court's  
19 ruling.

20           MS. LUNDVALL: Your Honor, what I try hard  
21 not to do is talk over someone, and particularly I'm  
22 not going to talk over the top of you, all right?

23           THE COURT: That's okay.

24           MS. LUNDVALL: There's one last point, and I  
25 would simply --



1           THE COURT: I apologize, because I think it  
2 through, and I like the interaction back, because if my  
3 thought process is wrong or my analysis, I like the  
4 input. It helps me.

5           MS. LUNDVALL: Well, I appreciate that, but  
6 by that same token, I'm not going to talk over the top  
7 of you.

8           THE COURT: Two at one time doesn't work, I  
9 agree.

10          MS. LUNDVALL: I think it's real hard for the  
11 court reporter to take down two people talking at once.

12          Notwithstanding, the Court seems to be  
13 focused on the foundation component, so when I asked  
14 Mr. Wolfram, Did your review of these notes help you to  
15 prepare for this deposition, the deposition that we  
16 were taking at that point in time, his response was, I  
17 think so. I think so.

18          THE COURT: Yeah.

19          MS. LUNDVALL: And so what they wish to  
20 construe that answer as, I think so, I think that those  
21 notes helped me to be able to prepare for this  
22 deposition. They want to construe it as, No, they  
23 didn't refresh my recollection. But what is the  
24 reasonable assumption that comes from, in response to a  
25 question that says, Did these notes help you prepare

1 for this deposition, and his response is, I think so?

2 THE COURT: But that's very qualified. I  
3 mean that's -- and then take that, that's a qualified  
4 answer, and that second deposition was an entirely  
5 different area of inquiry. How could his deposition  
6 notes from a previous deposition that had nothing do  
7 with, as you stated yourself in the deposition, I'm not  
8 gonna plow old ground, how does that refresh his  
9 recollection on a brand new area of inquiry? Common  
10 sense tells you that doesn't make sense.

11 MS. LUNDVALL: May I?

12 THE COURT: Let me just finish. He says, I  
13 think so. It's qualified.

14 MS. LUNDVALL: Mat I?

15 THE COURT: Go ahead.

16 MS. LUNDVALL: So in his prior deposition, we  
17 asked him questions about how much time and effort that  
18 he had put into researching this case, and he says, I  
19 don't know. It would be impossible for me to be able  
20 to tell. I don't know whether or not if his counsel  
21 gave information to him to be able to put words in his  
22 mouth.

23 THE COURT: Then you should have used that  
24 when you asked time and effort and say, We asked you  
25 this before, did those notes refresh you, and, I think

1 so, a qualified answer, does not, to me, open up the  
2 foundation for NRS 50.125.

3 MS. LUNDVALL: I understand what the Court's  
4 ruling is. I appreciate the Court allowing me to make  
5 a record as far as on this point.

6 THE COURT: Oh, absolutely.

7 MS. LUNDVALL: Thank you, your Honor.

8 THE COURT: You're welcome.

9 I'm going to deny the motion to compel.

10 Then it's defendant's motion for partial  
11 summary judgment for the accounting as a remedy as  
12 opposed to a cause of action.

13 MS. LUNDVALL: One of the things I like best  
14 about practicing in the Eighth Judicial is that we have  
15 the opportunity for law and motion day.

16 THE COURT: That is true.

17 MS. LUNDVALL: This is something that you  
18 don't get in Second Judicial,

19 THE COURT: I know you don't.

20 MS. LUNDVALL: You don't get it in Ninth  
21 Judicial. There is only a handful of jurisdictions  
22 that do allow you to do that.

23 THE COURT: That's true. And it is helpful  
24 for a judge. At least for this judge it's helpful very  
25 much to have argument on issues.

1 MS. LUNDVALL: I will tell you it's helpful,  
2 but from the standpoint of a supervising attorney, to  
3 offer different styles, you know, to the people that  
4 you are trying to mentor to suggest that they go in and  
5 sit in the courtroom and be able to see the  
6 differences.

7 THE COURT: Sure.

8 MS. LUNDVALL: The thing that I find too from  
9 my practice is I always learn something.

10 THE COURT: That's what makes it fun, isn't  
11 it? I did it 30 years, and I still, every day, learned  
12 something. I think that's why we're all still doing  
13 this, right?

14 MS. LUNDVALL: Well, it's the idea of being  
15 able to be a perpetual student and still be able to  
16 make your house payment.

17 THE COURT: That's a good way to say it. I  
18 never thought of that. We kind of are, aren't we?

19 MS. LUNDVALL: So when we sat in your  
20 courtroom on July 9th, 2013 of this year, you taught me  
21 something, and it was in the context of Abunadi case, I  
22 know I'm butchering the name, but it was in the context  
23 of looking at a claim that had been plead as a claim  
24 for accounting and whether or not that was a separate  
25 legal theory or whether or not that is a remedy that

1 one is able to retain as a result of the legal theory,  
2 so we looked into that. And the research, I hate to  
3 make this sound presumptuous, but the research  
4 indicates you're absolutely right, that the accounting  
5 is a remedy. It's not a claim for relief.

6           The accounting cause of action is a claim by  
7 which, it is a remedy by which you have to demonstrate,  
8 and in this particular context, the plaintiffs have  
9 contended that we breached a contract, that's their  
10 argument, and that breach of contract is the legal  
11 claim, the remedy by which they seek is an accounting,  
12 and so therefore, accounting as a separate cause of  
13 action should be dismissed, no different than what you  
14 did for in the --

15           THE COURT: Abunadi.

16           MS. LUNDVALL: Abunadi case.

17           The one case I do want to particularly bring  
18 to the Court's attention, it is the decision that our  
19 Nevada Supreme Court had issue, and it was discussed  
20 first in the opposition to our motion, because our  
21 opposition, our motion was --

22           THE COURT: It was very short.

23           MS. LUNDVALL: -- a couple of pages, and in  
24 the opposition, they brought out a Nevada Supreme Court  
25 decision. It's the Botsworth versus Van Ripper case.

1 THE COURT: I got it, okay.

2 MS. LUNDVALL: In the Botsworth versus  
3 Van Ripper case, our Nevada Supreme Court then  
4 identified the fact, and this was in the context of a  
5 partnership dispute, that there were numerous remedies  
6 that flowed from and numerous remedies one could  
7 request by reason of a partnership dispute, and one of  
8 those remedies was an accounting.

9 The Court went on to describe that there's a  
10 difference between money damages, which are referred to  
11 as a legal remedy, what is the consequence of making a  
12 money damage claim? It gives you a foundation for  
13 something.

14 THE COURT: For the accounting?

15 MS. LUNDVALL: It also gives the foundation  
16 for asking for a jury.

17 THE COURT: Again, does --

18 MS. LUNDVALL: But the accounting is an  
19 equitable claim, so therefore, that jurisdiction falls  
20 within the Court's jurisdiction. So to the extent that  
21 in this case, because we are before the Court on a  
22 bench trial, their accounting claim falls within this  
23 Court's equitable jurisdiction, and, in fact, then it  
24 is based upon their breach of contract claim.

25 So the Court has the power by which to order

1 an accounting as a remedy, but it is not a separate  
2 legal theory, and therefore, that's why we want our  
3 motion for partial summary judgment.

4 THE COURT: Right.

5 MR. JAMES M. JIMMERSON: Your Honor, much has  
6 been made about the Abunadi case.

7 THE COURT: Yeah. And I will tell you here's  
8 what I did on that case, because I had the issue she  
9 said, and as I say, I look back at the issues, but what  
10 I did on that case is they were doing a summary  
11 judgment. It was very poorly pled complaint, not to  
12 cast dispersions on anybody, and what I did for that  
13 accounting constructive trust, I granted, the motion  
14 for summary judgment was granted without prejudice  
15 because they did not plead it, and it was confusing on  
16 whether they wanted a constructive trust, whether they  
17 wanted the accounting or what they were doing for the  
18 cause of action, so I did not hold as a matter of law  
19 that accounting is a remedy that meets a legal cause  
20 action, but Ms. Lundvall is right, there's cases both  
21 ways, I have to be honest.

22 That one was not briefed as well as yours,  
23 but when I looked at it, it had an insufficiency, and  
24 that's how I did it, because I then went back and  
25 looked at the cases and whether that issue of whether

1 it's a remedy or cause of action. Constructive trust  
2 really messed it up, because that also is more of a  
3 remedy.

4 So that's what I did on that. I actually  
5 pulled my order up.

6 MR. JAMES M. JIMMERSON: And your order  
7 actually was --

8 THE COURT: Did you look at the order too?

9 MR. JAMES M. JIMMERSON: Yes, your Honor. In  
10 that case, as you said, it was constructive trust and  
11 an accounting, it was not an accounting specific claim,  
12 and really there's only three paragraphs in that  
13 complaint as compared to --

14 THE COURT: Right.

15 MR. JAMES M. JIMMERSON: Here we have, and I  
16 will speak specifically to Botsworth versus Van Ripper,  
17 and I will get on to the evolution of the Nevada case  
18 law here. To quote the Nevada Supreme Court, it says,  
19 It's also well settled in law that one party to a joint  
20 adventure may sue the other at law for breach of  
21 contract or a share of the profits or losses or a  
22 contribution for advances made in excess of his share,  
23 but the remedy at law does not preclude a suit in  
24 equity for an accounting.

25 They are talking there not in terms of just



1 specifically remedy, they're talking about suits at law  
2 and suits in equity for an accounting, so it is very  
3 clear that the cause of action for an accounting for a  
4 suit in equity is appropriate.

5 Furthermore, the State of Nevada Supreme  
6 Court 50 years later in Foster versus Bank National  
7 Trust and Savings Association examined both California  
8 and Utah law for how an accounting should proceed.

9 THE COURT: As a cause of action.

10 MR. JAMES M. JIMMERSON: It's not clear  
11 whether or not --

12 THE COURT: Not -- okay, you're with me then.

13 MR. JAMES M. JIMMERSON: Exactly. It is not  
14 clear whether it was specifically for a cause of  
15 action, but I would submit to you that if a Court who  
16 says 50 years earlier you can proceed in a suit in  
17 accounting, looks to both Utah and California, which  
18 both states permit a cause of action for accounting,  
19 that they would not say, Well, you can only find a  
20 remedy, you cannot use it for an independent cause of  
21 action when in 1993 the California Supreme Court  
22 affirmed the District Court's decision in a single  
23 count, a single count complaint which was for  
24 accounting.

25 THE COURT: Yeah, I saw that.

1           MR. JAMES M. JIMMERSON: Exactly, so if the  
2 Nevada Supreme Court is going to be, at least when it  
3 says a suit in accounting as opposed to a remedy, an  
4 equitable remedy, and 50 years later rely on both Utah  
5 and California who adopt a separate cause of action for  
6 accounting, and when you have case law at least from  
7 the District of Nevada and District of California who  
8 are saying that a constructive trust is a remedy and  
9 not a cause of action, but an accounting is an  
10 independent cause of action, okay.

11           THE COURT: I agree, they mix it up, can I be  
12 honest? They mix up the --

13           MR. JAMES M. JIMMERSON: Exactly.

14           THE COURT: They do. I understand that  
15 completely.

16           MR. JAMES M. JIMMERSON: And the reason, this  
17 is being made, okay, and if you looked at their own  
18 summary judgment motion, they actually identified the  
19 elements of a cause of action for accounting.

20           THE COURT: I saw that.

21           MR. JAMES M. JIMMERSON: Exactly, and to the  
22 extent that we are learning this and reading the Dairy  
23 Queen case from the Supreme Court, it talks about a  
24 very complicated transaction, and Rule 53 eliminates  
25 the need for accounting for the reason to dissect that

1 cause of action. It is not saying the cause of action  
2 doesn't exist, it says the rules of civil procedure  
3 eliminated the need for such a cause of action.

4 THE COURT: They almost infer under Dairy  
5 Queen that there is a cause of action.

6 MR. JAMES M. JIMMERSON: Exactly.

7 THE COURT: They don't say it, they infer it.  
8 And then other cases, you know, I looked at the  
9 Hackett, I know it's district court, I know, and it's  
10 not necessarily precedence, and they just dismissed it  
11 out of hand. I mean it's very interesting.

12 So obviously, it's an -- they're crossovers,  
13 because as a preliminary, I know it's federal district  
14 court, I don't have to follow it as precedent, I face  
15 that every day, I understand that. I mean I just found  
16 it just, the Court says, The Court does not need to  
17 address plaintiffs's request for an accounting and the  
18 imposition of a constructive trust, because they are  
19 remedies, not causes of action, and not even a cite or  
20 anything, so it obviously is an area that's confusing.

21 MR. JAMES M. JIMMERSON: And we're actually a  
22 fairly unique case in this sense, because most claims  
23 for accounting are an accounting for money, you know.

24 THE COURT: Right.

25 MR. JAMES M. JIMMERSON: Because this is such

1 a complicated set of transactions.

2 THE COURT: This is the issue, and you're  
3 asking for money damages too, so can I ask practically,  
4 does it matter?

5 MR. JAMES M. JIMMERSON: Yes.

6 THE COURT: I was trying to get to the bottom  
7 line that there has to be a practical difference here.

8 MR. JAMES M. JIMMERSON: And it ties back  
9 into Sandy Valley.

10 THE COURT: Okay. We wouldn't be going  
11 through all this for just a fun lecture and scholarly  
12 endeavor, right?

13 MR. JAMES M. JIMMERSON: Exactly, your Honor.

14 THE COURT: I got it.

15 MR. JAMES M. JIMMERSON: The reason why it's  
16 important to us and why it's surely important for  
17 defendant is that in this case, it really does hinge on  
18 who the prevailing party is, because the prevailing  
19 party will be granted attorney's fees as per the  
20 contract between the parties.

21 THE COURT: Okay.

22 MR. JAMES M. JIMMERSON: So the prevailing  
23 party analysis will be did you receive any money  
24 damages, that would be a key indicator or a key factor  
25 in your decision as to who the prevailing party is,

1 whether or not you found a breach or whether you found  
2 the covenant of good faith and fair dealing has been  
3 breached.

4           So whether or not the attorney's fees as  
5 damages are awarded is a key element as to --

6           THE COURT: To the accounting.

7           MR. JAMES M. JIMMERSON: As per the  
8 accounting claim is a key element as to whether or not  
9 we're able to proceed as the prevailing party and ask  
10 for attorney's fees, because we're only seeking  
11 information as opposed to --

12          THE COURT: Money damages.

13          MR. JAMES M. JIMMERSON: Exactly. The  
14 information isn't the formula for Coca-Cola, it has  
15 value to our clients only. So it's the information  
16 that's valuable. We'll argue that later. If we didn't  
17 receive attorney's fees as damages, we -

18          THE COURT: I knew there was a bottom line  
19 here. I appreciate it, because I worked hard on this.  
20 There's something here.

21          MR. JAMES M. JIMMERSON: Exactly. And that's  
22 in play at the end of trial. Were there to be a  
23 finding in favor of plaintiff and there would be  
24 attorney's fees as damages, it would strengthen a case  
25 for prevailing party were the case to be appealed or

1 whatnot as opposed to saying you demonstrated a breach.  
2 Whether there were damages, the prevailing party  
3 analysis suggests that if the defendant only had to pay  
4 \$1 in nominal damages, they should get their fees, as  
5 opposed to us who are here because they want the  
6 information, not necessarily some large sum of money in  
7 damages.

8 THE COURT: It impacts their future,  
9 potentially.

10 MR. JAMES M. JIMMERSON: Exactly. So that's  
11 purpose here. It really gets into the prevailing party  
12 analysis later on at the end of trial.

13 THE COURT: Okay. I knew there was  
14 something.

15 And I have to, and I understand I have to  
16 decide it on the law in this, not what the impact will  
17 be, and I understand that too. I just, I knew there  
18 was something else, but I have to focus on the law,  
19 whether it's a remedy or cause of action.

20 MR. JAMES M. JIMMERSON: And I would submit  
21 to you it is both, it is seen as both.

22 THE COURT: It's both.

23 MR. JAMES M. JIMMERSON: Exactly. And the  
24 elements are very clear, there needs to be a special  
25 relationship of trust in order to trigger the duty to

1 account, whether that's by common law, for example,  
2 with an attorney or accountant, or whether it's  
3 establish the by a contract between partners.

4 THE COURT: So you have to prove up the  
5 elements.

6 MR. JAMES M. JIMMERSON: Exactly. There are  
7 other elements here. It's not just, Oh, we're gonna  
8 give you an accounting.

9 THE COURT: No, I understand. It's like any  
10 other cause of action, you have to prove up the  
11 elements or it doesn't happen.

12 MR. JAMES M. JIMMERSON: Exactly. And, you  
13 know, they both have a duty, and they have failed to  
14 account, and we can establish both of those elements.

15 THE COURT: Okay. Ms. Lundvall, because  
16 honestly, this one I really struggled with before  
17 today. I really struggled with this, because the case  
18 law is, you know, all over, so I would appreciate your  
19 reply to help me.

20 MS. LUNDVALL: Your Honor, one of the things  
21 that I'd like to address first is in the argument made  
22 by Mr. Jimmerson --

23 THE COURT: Right.

24 MS. LUNDVALL: That is that their accounting  
25 claim seeks information. Now, this is an interesting

1 issue from my perspective. The reason that we brought  
2 this motion for partial summary judgment is because  
3 that we perceived always that they were trying to use  
4 this accounting claim to water down and to change what  
5 the information obligations were within the breach of  
6 contract.

7 THE COURT: Okay. Water down or change what?  
8 The terms of the contract are what is --

9 MS. LUNDVALL: That's correct.

10 THE COURT: Because that's the reason, the  
11 way that was written, that's pretty broad.

12 Nevermind. I just read it recently, but  
13 asking for information is open to a lot of  
14 interpretations.

15 MS. LUNDVALL: And from his perspective,  
16 that's where the parties had specifically negotiated  
17 language within the commission agreements.

18 THE COURT: Right.

19 MS. LUNDVALL: That language is in a single  
20 paragraph. It has two sentences to it. That first  
21 sentence says that you're entitled to receive the  
22 exercise of the option pursuant to Paragraph 2, all  
23 right? I'm paraphrasing.

24 THE COURT: I just read it this morning, as a  
25 matter of fact, so I understand those two sentences.



1 MS. LUNDVALL: So in other words, under  
2 Paragraph 2 --

3 THE COURT: If there was an option purchase,  
4 you get a commission.

5 MS. LUNDVALL: There's an exercise notice  
6 that has to trigger the option purchase, all right?  
7 There has to be an exercise notice of that, so they're  
8 entitled to know that.

9 THE COURT: Right.

10 MS. LUNDVALL: The second sentence there  
11 says, You are entitled to be reasonably informed of the  
12 amounts and the due dates of your commission payments,  
13 okay, so those --

14 THE COURT: Those are the two sentences.

15 MS. LUNDVALL: Those are the two sentences.  
16 The parties contracted for those two sentences. That's  
17 what they agreed on. That's what they signed their  
18 signature to. That's what they said. This is the  
19 agreement that is going to bind our future  
20 relationship.

21 Now, what we have always perceived this  
22 accounting claim then to be something more than that  
23 they were asking for information, more than what was  
24 specifically contracted for.

25 THE COURT: Well --

1 MS. LUNDVALL: But, and so this is where I'm  
2 going with this, that they claim they want information.  
3 When we get to the time of trial, what we are going to  
4 demonstrate to the Court is that they have every  
5 conceivable piece of information that there is  
6 concerning any of the transactions between CSI and  
7 Pardee. That's what we're intending to prove at the  
8 time of trial, but the issue for this purpose of this  
9 particular cause of action deals with whether or not  
10 they get more than what the parties had contracted for  
11 under the commission agreement.

12 THE COURT: And they're looking, I  
13 understand, for information to make sure that it's not  
14 a trust me, that you're gonna tell me.

15 MS. LUNDVALL: Precisely.

16 THE COURT: Pardee, you're gonna tell me  
17 every option, and without the information, I'm not  
18 going to go where I'm going, but I understand the  
19 difference.

20 MS. LUNDVALL: And that's where, like I said,  
21 at the time of trial the Court is gonna see that not  
22 only have they in the past had every piece of  
23 information, but they've had the availability. And the  
24 simple proposition on this is that land transactions  
25 are public records, and I'm not gonna get into what is

1 going to be proven up at the time of trial, but the  
2 point I guess that I'm trying to make is this: We're  
3 trying to confine them, and the reason why is so that  
4 they can not expand upon the contracting parties'  
5 language that was found within the commission  
6 agreement. Therefore when we looked at.

7 THE COURT: That's where you're doing the  
8 parol evidence.

9 MS. LUNDVALL: That's part of it, but also in  
10 this particular cause of action, because they've tried  
11 to use this cause of action to try to bootstrap  
12 themselves into an argument that they were entitled to  
13 more than what the parties had contracted for in the  
14 commission agreement.

15 THE COURT: So your argument is they're  
16 trying to use it that they're entitled to more  
17 information than how you interpret reasonably informed  
18 of amounts and did dates of commissions for options,  
19 right?

20 MS. LUNDVALL: Correct.

21 THE COURT: That helps me.

22 MS. LUNDVALL: And the one issue,  
23 Mr. Jimmerson makes the point that, well, it is going  
24 to be his concern that somehow that this is going to be  
25 dispositive as to the prevailing party --

1 THE COURT: Right.

2 MS. LUNDVALL: -- routine. In other words,  
3 his arguments is this: That we could lose on the  
4 breach of contract action, that there could be a  
5 demonstration that Pardee has fully performed every  
6 single contractual provision that it was obligated to,  
7 and therefore, under the contract, that they are not  
8 entitled to attorney's fees, but he says though we  
9 might be able to prevail on the accounting cause, and  
10 therefore, I could get my attorney's fees in that  
11 fashion, but what is his argument then? He makes my  
12 argument that they are trying to expand the contractual  
13 obligations.

14 THE COURT: I think that's apparent from  
15 everything I read. I mean that's their interpretation,  
16 Ms. Lundvall. I get that, I went back and read through  
17 all the summary judgments and the motions to amend. I  
18 understand their position, and I, you know, understand  
19 your position. I understand that.

20 MS. LUNDVALL: Now, so let me as far as  
21 getting back then to the specific point then that we  
22 made for purposes of this motion for partial summary  
23 judgment.

24 When we originally brought our motion for  
25 summary judgment, we focused on one thing that was

1 uniform to all the causes of action, and that is there  
2 was not a breach of contract. The Court had indicated  
3 in ruling as far as on our motion for summary judgment  
4 that there were material issues of fact on that. We  
5 understand that. We're going trial on that particular  
6 point.

7           But then the one fact that we sit in your  
8 courtroom and we understand now that an accounting is a  
9 remedy, it is not a separate cause of action, that's  
10 why we brought our motion for partial summary judgment  
11 on this, and what we're trying to do is to confine then  
12 our obligations that we owed to the plaintiffs to the  
13 four corners then of the commission agreement and not  
14 to allow then some type of an expansion of those  
15 contractual obligations. And that's where we get into  
16 then the issue as to whether or not the accounting  
17 claim that they have pled is a remedy.

18           THE COURT: Oh, absolutely, I understand  
19 that. There's a distinction.

20           MS. LUNDVALL: They understand that, in fact,  
21 and they even argue in their opposition that they have  
22 to prove up a breach of the commission agreement by  
23 which to get to an accounting. What does that tell  
24 you? That tells you that they're using, that the  
25 accounting for which they've pled is a remedy. It is

1 an equitable remedy, and, therefore, if it is a remedy  
2 it is not a separate cause of action, and therefore, the  
3 line of cases then that says that an accounting is a  
4 remedy applies in this particular circumstance, and it  
5 is not any different than the ruling that you made back  
6 on July 9th in the Abunadi case so as to be able to  
7 find that an accounting was remedy.

8 THE COURT: I didn't rule that way, but I'm  
9 not counting on that. That was a whole different  
10 circumstance, but I understand your argument. You're  
11 right, there's two sides, very much so.

12 MS. LUNDVALL: And the one thing that they  
13 wish to, as far as try to push upon the Court, is some  
14 cases from the state of California that have identified  
15 then that in certain circumstances, that an accounting  
16 may be a separate cause of action, but when you look at  
17 those cases, each and every one of those cases has a  
18 common denominator, and the common denominator is that  
19 there was a breach of fiduciary duty that had been  
20 alleged. And as the Court well knows, a fiduciary duty  
21 is different than a contractual obligation.

22 THE COURT: Absolutely.

23 MS. LUNDVALL: So therefore, what you would  
24 look for in their complaint then would be some  
25 allegation that says we were fiduciaries. We're not.

1 We were two contracting parties. Each had separate and  
2 sophisticated counsel that negotiated the terms of this  
3 commission agreement, and it was an arm's length  
4 transaction, and that's what has been pled, that is  
5 what the proof is. That's what the disputed facts are.  
6 And so to try to bootstrap their way into claiming that  
7 accounting is something separate based upon a line of  
8 cases that asserts breach of fiduciary duty, those line  
9 of cases, even if it were applicable here in Nevada,  
10 have no application as to the facts of the case at bar,  
11 and so therefore, we would ask the Court then to grant  
12 our motion for summary judgment.

13 MR. JAMES M. JIMMERSON: Your Honor, I would  
14 appreciate a response.

15 THE COURT: Absolutely, because I'm very  
16 honest with you, this one I've really struggled with,  
17 because, you know, the cases seem to, they're not very  
18 precise on how to distinguish or if it is both, in what  
19 circumstances is it both. I understand.

20 MR. JAMES M. JIMMERSON: I'll address the  
21 last issue first on the issue of fiduciary.

22 THE COURT: That's what I'm interested in.  
23 We know it wasn't a fiduciary duty, so we understand  
24 that.

25 MR. JAMES M. JIMMERSON: Exactly, your Honor,

1 and the cases are actually clear there needs to be a  
2 special relationship but not one of fiduciary  
3 relationship.

4 I'll quote from Dahon North America, Inc.  
5 versus Hawn, which is a Central District of California  
6 case, saying an accounting requires a relationship but  
7 not necessarily a fiduciary relationship, citing to  
8 Sell versus McLaughlin.

9 THE COURT: Give up me that case again.

10 MR. JAMES M. JIMMERSON: It's Dahon North  
11 America, Inc. versus hawn.

12 THE COURT: That's a California case?

13 MR. JAMES M. JIMMERSON: 2012.

14 THE COURT: Okay.

15 MR. JAMES M. JIMMERSON: WL 141 3681, and  
16 it's citing to Sell, which is a actually the case that  
17 was cited in the defendant's motion for summary  
18 judgment, and when they're talking about that, I'll  
19 actually quote from Mobias, which is the case we cited  
20 in the District of Nevada, which said, Under Nevada  
21 law, in order to prevail on a claim for inspection and  
22 accounting, a plaintiff must establish the existence of  
23 a relationship of special trust between a plaintiff and  
24 defendant, not necessarily a fiduciary relationship.

25 THE COURT: Okay.



1           MR. JAMES M. JIMMERSON: And later on in  
2 Mobias, and this was quoted at length in our opposition  
3 for summary judgment, you will see it there, it  
4 actually looked to California law and Delaware law  
5 when as to whether or not in a case for accounting what  
6 is necessary in order to trigger the special  
7 relationship status.

8           THE COURT: Relationship of special trust.

9           MR. JAMES M. JIMMERSON: Exactly. And the  
10 way they did that is looking at whether or not there  
11 was a breach of the covenant of good faith and fair  
12 dealing arising from the contract, and the example they  
13 gave was a passive investor relying upon the more  
14 active investor or the operator and whether or not the  
15 passive investor is owed money. They're relying on the  
16 person with superior information.

17          THE COURT: Knowledge.

18          MR. JAMES M. JIMMERSON: Exactly, for whether  
19 or not they owed money. Here, the person with superior  
20 knowledge is the defendant, is Pardee, because our  
21 clients were not only not allowed to go to the  
22 meetings, but they weren't given the contracts so they  
23 could have that same knowledge, which is the contracts  
24 we are claiming they should have handed over to us or  
25 at least give up some information.

1 THE COURT: Between Pardee and Coyote?

2 MR. JAMES M. JIMMERSON: No, between Pardee  
3 and our clients. Our clients were not asked to be in  
4 the meetings, they were asked to stay outside.

5 THE COURT: They went to the first initial  
6 meeting.

7 MR. JAMES M. JIMMERSON: And I think they had  
8 one other meeting six months later.

9 THE COURT: Okay.

10 MR. JAMES M. JIMMERSON: But this, the party  
11 with special knowledge, the party with better  
12 knowledge, it's one who's relied upon to be trustworthy  
13 and truthful in what's going on.

14 THE COURT: In the relationship.

15 MR. JAMES M. JIMMERSON: Exactly. Pardee.

16 So it is not just fiduciary duty, it can be  
17 established through a breach contract, which you have  
18 someone with inferior knowledge relying upon someone  
19 with superior knowledge.

20 THE COURT: Okay.

21 MR. JAMES M. JIMMERSON: As to the issue of  
22 whether or not it is remedy versus a cause of action,  
23 it is both. Everyone can agree it is a remedy. The  
24 question though is --

25 THE COURT: Is it a cause of action.

1           MR. JAMES M. JIMMERSON: Is it a cause of  
2 action, and the answer is yes.

3           THE COURT: And under what circumstances.

4           MR. JAMES M. JIMMERSON: Exactly. There are  
5 elements. You need to establish a duty, you need to  
6 establish failure to account, and Ms. Lundvall said  
7 something that was quite important, and that is that  
8 they're going to show that the plaintiffs have all the  
9 information that they could possibly have right now,  
10 okay?

11          THE COURT: But when did they get it?

12          MR. JAMES M. JIMMERSON: And from whom did  
13 they receive that information? They received it by  
14 subpoena from Coyote Springs, not from Pardee, so the  
15 information we're actually seeking that you'll see is  
16 going to be at issue later today on the motions in  
17 limine is whether or not those documents that we  
18 received were authentic, and do they actually reflect  
19 the transactions between the parties.

20                 She said land transactions are a public  
21 record, you're area, right but this isn't just about  
22 land transactions. Your heard during the motion for  
23 summary judgment that the land needs to be designated  
24 for production residential property.

25          THE COURT: Single family production

1 residential.

2 MR. JAMES M. JIMMERSON: Exactly, and that is  
3 not public record, okay, and the information as to  
4 where the property that is designated for that is  
5 contained in those contracts, the contracts that --

6 THE COURT: That's the key issue, right.

7 MR. JAMES M. JIMMERSON: Exactly.

8 THE COURT: No, that's not, then it's gonna  
9 come out at trial there's divergence.

10 MR. JAMES M. JIMMERSON: It is absolutely one  
11 of the issues we're going to have to establish. If  
12 they weren't entitled to it because it wasn't  
13 residential property, it wasn't designated for that.  
14 We'll find that out, but in order for them to receive  
15 the commission under the option agreement, under the  
16 commission agreement, it needed to be designated for  
17 that.

18 THE COURT: Right.

19 MR. JAMES M. JIMMERSON: So that's --

20 THE COURT: It says that.

21 MR. JAMES M. JIMMERSON: Exactly. The key  
22 information is contained in those contracts, and more  
23 importantly, okay, we didn't get them. We asked for  
24 them. We didn't get them. They were duty bound to get  
25 it.

1           And when they quote the commission letter  
2 agreement, they're missing a couple of key words here.  
3 They're entitled to be reasonably informed not just as  
4 to due dates of commissions, they're entitled to be  
5 reasonably informed as to all matters relating to due  
6 dates and amounts of commissions, so that doesn't just  
7 mean here's what you're getting and here's when you're  
8 receiving, okay? If it's all matters and reasonably  
9 informed, it also includes here's why you're receiving  
10 this, here's the basis, here's the math, here is, you  
11 know, we are purchasing this much property, here's  
12 where it's located, here's what we're purchasing it  
13 for, and under the commission agreement you're entitled  
14 to this much.

15           THE COURT: Here's where it's designated as.

16           MR. JAMES M. JIMMERSON: Exactly, here's the  
17 information, which absolutely would be required to  
18 determine how much they are receiving and when they are  
19 supposed to receive it. That, of course, is what's at  
20 issue here.

21           And those documents were asked to be  
22 produced. We've not just asked before this lawsuit was  
23 filed, we've done, as you now have before you, requests  
24 for production requesting those amendments. They were  
25 not produced. We only could receive them by having to

1 subpoena Coyote Springs.

2           The issues here go to there is a duty, and  
3 this was briefed extensively during the motion for  
4 summary judgment.

5           THE COURT: Right.

6           MR. JAMES M. JIMMERSON: It's not just  
7 receiving the information, the duty must be discharged  
8 by the one who has that duty, okay, it is the party  
9 that needs to --

10          THE COURT: That's the special relationship.

11          MR. JAMES M. JIMMERSON: Exactly, because the  
12 Court, citing from an Illinois decision which actually  
13 was relied upon by the Nevada Supreme Court talking  
14 about what an accounting is, and in that decision they  
15 talked about there's a difference between complying  
16 with the Court's order or the rules of civil procedure  
17 and complying with your duty to account.

18          The rules of civil procedure and the rules of  
19 the Court are distinct. They can apply to third  
20 parties if they receive a subpoena; however, the duty  
21 to account, okay, may go beyond what the Court  
22 requires, because it arises from that duty to produce  
23 information or monies, and so that's the issue.

24          So when you are faced with a conflict on the  
25 law, and there, as you say --

1 THE COURT: Yes.

2 MR. JAMES M. JIMMERSON: You've got one case  
3 from the District of Nevada which says it's a remedy,  
4 not an independent cause of action, without any  
5 explanation, and you have a litany of cases that  
6 actually go into detail as to is an independent cause  
7 of action, here are the elements.

8 THE COURT: Here's the elements and here's  
9 the criteria.

10 MR. JAMES M. JIMMERSON: Exactly. It is very  
11 clear that an accounting is a cause of action, okay and  
12 a remedy, when necessary, okay, because in this case  
13 we're dealing with information, okay? It's the cause  
14 of action that's important. You need to produce  
15 information. Really what's at issue is the  
16 information, which goes to whether or not they're going  
17 to receive monies 30, 35 years from now, because it's a  
18 40 year option.

19 THE COURT: I'm concerned about the future  
20 thing.

21 MR. JAMES M. JIMMERSON: Exactly. So we're  
22 really in a unique situation here, because most of the  
23 times it is for a complicated situation. As Dairy  
24 Queen enunciated here, it's we need information, we  
25 can't get it. We've used the rules of the Court to get

1 it, still haven't gotten it.

2 And they have a duty to provide us that  
3 information. The elements are there. We submit to you  
4 we'll establish those elements at trial. I understand  
5 that's in dispute.

6 THE COURT: Yeah.

7 MR. JAMES M. JIMMERSON: But the final thing  
8 ends with --

9 THE COURT: Okay.

10 MR. JAMES M. JIMMERSON: Ms. Lundvall went on  
11 to say that we're, you know, on the prevailing party  
12 analysis, if they were to win the breach of contract or  
13 the breach of the covenant of good faith case, we could  
14 somehow win the accounting action. No, your Honor,  
15 thinking the opposite, we could win the breach of  
16 contract and have \$1 in nominal damages, and, but it's  
17 the accounting claim that allows you to give special  
18 damages, predominantly under Sandy Valley.

19 You could probably do it under breach of  
20 contract, but the law is not nearly as clear as far as  
21 the claim for accounting for the equitable relief.

22 THE COURT: I understand, right.

23 MR. JAMES M. JIMMERSON: Exactly. So to the  
24 extent that we are protecting our ability to allow the  
25 Court to say firmly, They are the prevailing party,



1 because both, they are receiving the accounting and  
2 they are getting attorney's fees as damages, because it  
3 really is, in terms of monetary issues here, the  
4 attorney's fees represent the bulk of what both sides  
5 have been affected by this.

6 THE COURT: Right.

7 MR. JAMES M. JIMMERSON: So when, you know,  
8 it's that issue.

9 If they win the breach of contract and the  
10 breach of covenant of good faith and fair dealing,  
11 we're gonna be very hard pressed to win the accounting  
12 claim, and I submit it would be almost impossible, but  
13 if the reverse happens and we are successful, they  
14 could still turn around and say, You are not the  
15 prevailing party. We are asking the Court not just in  
16 terms of, of, because the law says there's a claim,  
17 okay, but because policy should dictate that this Court  
18 should uphold the accounting claim for the purposes of  
19 determining whether or not there's a prevailing party.

20 THE COURT: Okay.

21 MS. LUNDVALL: Your Honor, this continues to  
22 be our motion, so I'm hoping the Court will allow me?

23 THE COURT: Absolutely, I want all the input  
24 I can get. This is the one that I'm very honest with  
25 you, I've struggled with, because, so no, I appreciate

1 it.

2 MS. LUNDVALL: I would like to make a couple  
3 of observations in response then to what Mr. Jimmerson  
4 had to present to the Court.

5 Number one, he contends that he doesn't need  
6 a fiduciary duty claim or a fiduciary duty  
7 relationship.

8 THE COURT: Right.

9 MS. LUNDVALL: So as to be able to support  
10 then a claim for an accounting. When he, what he tries  
11 to argue then is that instead what you need is a  
12 special relationship.

13 THE COURT: Right, a relationship of special  
14 trust.

15 MS. LUNDVALL: All right. So this is the  
16 first time this argument has been advanced. Nevada has  
17 a long line of cases dealing with what is a special  
18 relationship in the context of contracting parties.

19 It starts with a female attorney that was in  
20 Reno, Nevada, and her name was Aluwavich (phonetic),  
21 and that Aluwavich claim established a law that was the  
22 first case that our Nevada Supreme Court had analyzed,  
23 whether or not, in the context of contracting parties,  
24 was the state of Nevada going to recognize a special  
25 relationship such that a, someone could bootstrap

1 themselves into claims that were more than breach of  
2 contract.

3           And so therefore, if the Court, as the Court  
4 has demonstrated a great deal of intellectual curiosity  
5 about this case, what I would ask is for the Court to  
6 then allow us to bring that line of cases to your  
7 attention, and what the Court will see as a, as a  
8 result of that is that in Nevada, the only special  
9 relationship in the context of contracting parties that  
10 has ever been recognized is in the insurance context.  
11 And so therefore, we would ask for that opportunity so  
12 the Court, if you're going to take into account his  
13 argument and if you're going to consider his argument  
14 then in making your determination, we ask for us to be  
15 able to bring those cases to you, and it's a very  
16 simple proposition by which to do so.

17           THE COURT: I'm fine with that.

18           MS. LUNDVALL: All right.

19           THE COURT: I think that's the way he has to  
20 go on this, so I, at least I have written the cases  
21 down. I'm going to look back, so I appreciate it,  
22 because I realize this is a very significant issue to  
23 both parties.

24           So she's just asking, and I agree, if she  
25 could give supplemental briefing. I would give you the

1 same right.

2 MR. JAMES M. JIMMERSON: I actually would  
3 support that.

4 THE COURT: Okay. Because it's been very  
5 helpful, but I didn't get a clear answer from this.

6 And once again, I absolutely would request if  
7 you would do it, to give me supplemental briefings on  
8 these, because I honestly didn't look at it this way  
9 either. I didn't. I just was doing the crossover and  
10 trying to figure out how I could apply it as best I  
11 could to this case, which is important, and that's  
12 where oral arguments has focused me.

13 So I would appreciate the supplemental  
14 briefing from both, because obviously it's a  
15 significant issue and it's a complicated issue, because  
16 it's more fact specific to why your case, which is  
17 different from other contractual cases I've had --

18 MS. LUNDVALL: Well, and from this  
19 perspective, your Honor, my suggestion would be to  
20 allow the parties then a specific time frame to do  
21 simultaneous briefing.

22 THE COURT: That would be fine. You tell me,  
23 what would you like?

24 MS. LUNDVALL: I would propose by the close  
25 of business on Friday that we can get that additional

1 briefing then to the Court.

2 MR. JAMES M. JIMMERSON: I would support  
3 that, your Honor.

4 THE COURT: Gave me the date on Friday.

5 MR. JAMES M. JIMMERSON: The 27th.

6 MR. JAMES J. JIMMERSON: The 27th.

7 THE COURT: Okay. If I get them by  
8 September --

9 MR. JAMES J. JIMMERSON: Close of business.

10 THE COURT: I could work on it over the  
11 weekend.

12 MS. LUNDVALL: Thank you, your Honor.

13 THE COURT: Anytime on Friday would be great  
14 so I can take it home.

15 MS. LUNDVALL: And we'll bring that line of  
16 cases to demonstrate that not only does this case not  
17 present a special relationship, but our Nevada Supreme  
18 Court then has been very specific on that.

19 THE COURT: That it's just to the insurance,  
20 they have not opened it to any other context is what  
21 you're telling me?

22 MS. LUNDVALL: That's correct. That's the  
23 last research that I've done as far as on this  
24 particular topic, and I'm more than happy then to be  
25 able to bring that to the Court's attention.

1 THE COURT: Okay.

2 MS. LUNDVALL: The second point though I want  
3 to make to the Court, and that was this: Mr. Jimmerson  
4 said that he could not prevail on his accounting claim  
5 without demonstrating a breach of contract. That, to  
6 me, is dispositive of the issue that is before the  
7 Court, and if he misspoke, I understand, but I'm taking  
8 his word at face value that he presented to the Court.

9 He's saying, If I, I cannot prevail on my  
10 accounting claim without a breach of contract  
11 demonstrated, if that's accurate, what he is  
12 acknowledging is that --

13 THE COURT: They weren't in the alternative.

14 MS. LUNDVALL: Yeah, that accounting is a  
15 remedy for them by reason of proving up a breach of  
16 contract.

17 And with that, your Honor, we would submit  
18 then, subject to the supplemental motions.

19 THE COURT: Okay.

20 MS. LUNDVALL: On this particular issue.

21 THE COURT: Okay.

22 MS. LUNDVALL: I'm not gonna get into as far  
23 as the argument that they've made, how he misspoke  
24 concerning what they requested during the course of  
25 discovery, what they got during the course of

1 discovery.

2 THE COURT: That will all come out during the  
3 trial anyway.

4 MS. LUNDVALL: Exactly.

5 THE COURT: If I could focus just on the  
6 facts that I need which you both have done to make this  
7 legal decision, then I know the rest will come out. I  
8 know that we're reading all the things again --

9 MS. LUNDVALL: Thank you, your Honor.

10 THE COURT: -- over the weekend, all right.

11 Okay. Then if you would give me, I would  
12 really appreciate the supplemental briefing. If you  
13 could do it by 5:00 p.m. Friday, I know your weeks are  
14 busy, then what I will do, I don't want to make you  
15 come back again, what I do is I put them on a chambers  
16 calendar, because I don't want it to fall through the  
17 cracks, and take it under submission, so I'll go ahead,  
18 how about Wednesday?

19 MR. JAMES J. JIMMERSON: We'd be happy to  
20 come back and listen to your decision. It's a 15  
21 minute exercise.

22 THE COURT: Let me do this, let me look at  
23 that, and then I'll decide, but for me, just for my  
24 purposes, so I make sure I do it, I put on a chambers  
25 calendar. It doesn't mean I may not set it for

1 hearing, can we do it that way, and I'm going out of  
2 town on --

3 THE CLERK: Do we want to do October 9th?

4 THE COURT: That would be fine, because I  
5 know we have a trial date, and I understand it's  
6 critical to your preparations for trial.

7 What I will do is put it on my chambers  
8 calendar. It doesn't mean I won't decide before then,  
9 and if it brings more questions to me, I prefer to  
10 bring you back so I can get your -- if I have  
11 questions, that helps me sort it out, Because sometimes  
12 the supplementals may give me more questions than  
13 answers.

14 MR. JAMES J. JIMMERSON: Absolutely.

15 THE COURT: In this kind of area so, let's do  
16 it that way.

17 So supplemental briefing on this issue by  
18 5:00 p.m. September 27th, and then I will either make a  
19 decision by the 9th or actually schedule you to come  
20 back.

21 And I don't have regular court on Monday, so  
22 I can do it on a Monday or Friday, the special  
23 settings.

24 MR. JAMES J. JIMMERSON: Okay. Thank you,  
25 your Honor.



1 THE COURT: You're welcome.

2 Let me get all my notes on that.

3 Okay. All right. Do we wanted to start with  
4 the defendants or the plaintiff's motions in limine?  
5 The plaintiffs motions in limine might be easier,  
6 because I wasn't quite sure what you agreed to. And  
7 what I did, I think I got it.

8 MR. JAMES M. JIMMERSON: There are three  
9 groups generally on the motions in limine.

10 THE COURT: Okay.

11 MR. JAMES M. JIMMERSON: I believe there are  
12 1 through 13.

13 THE COURT: Okay.

14 MR. JAMES M. JIMMERSON: 14 through 19.

15 THE COURT: And 14 through 19.

16 MR. JAMES M. JIMMERSON: And the third is 21  
17 and 22.

18 THE COURT: Okay.

19 MR. JAMES M. JIMMERSON: And just for the  
20 Court's reference, the contracts that, the transaction  
21 between Pardee and Coyote Springs are the 6 through 13.

22 THE COURT: Do it again.

23 MR. JAMES M. JIMMERSON: The transaction, the  
24 contracts between Pardee and Coyote Springs, the  
25 amendments and the amended option agreement.

1 THE COURT: Okay.

2 MS. LUNDVALL: Can you give me the categories  
3 you have again?

4 MR. JAMES M. JIMMERSON: 6 through 13, 14  
5 through 19, and 21 and 22.

6 14 through 19 are the parcel map or the plat  
7 maps, and 21 and 22 are the correspondence from.

8 THE COURT: 14 to 19 are the parcel maps.

9 MR. JAMES M. JIMMERSON: And the plat maps,  
10 and 21 and 22 are the --

11 THE COURT: Correspondence.

12 MR. JAMES M. JIMMERSON: Correspondence from  
13 Mr. Lash from 2007 to 2009. There's been some segments  
14 of agreement. I withdrew 20 and 23 through 25, so  
15 those correspondence have been, that's parts of the  
16 agreement between counsel.

17 THE COURT: And the 1 to 5 are withdrawn  
18 under stipulation.

19 MR. JAMES M. JIMMERSON: Yes.

20 THE COURT: Okay. That's where I was, okay.

21 So let's start with, I'll call it Group  
22 Number 1, which is Motions in Limine 6 through 13.  
23 They're basically the documents under the same  
24 arguments.

25 MR. JAMES M. JIMMERSON: Yes.

1 THE COURT: That's what I thought.

2 MR. JAMES M. JIMMERSON: Given the practice  
3 notice Eighth Judicial District Court of having  
4 separate motions in limine as opposed to omnibus  
5 motions, I apologize. I understand.

6 THE COURT: No, it's fine. Breaking it down  
7 helped me out though, because I was trying to go  
8 through each one, figuring, okay, that helped me.  
9 Thank you.

10 Okay, 6 through 19.

11 MR. JAMES M. JIMMERSON: The issue before the  
12 Court is whether or not these documents are relevant  
13 and whether or not they have been authenticated. As  
14 the opposition stated, the foundation needs to be  
15 established prior to the documents being considered to  
16 be admissible.

17 THE COURT: Right, at trial.

18 MR. JAMES M. JIMMERSON: I'll deal with  
19 authenticity first.

20 As we stated in our motion, we have provided  
21 the affidavit of the custodian of records from Coyote  
22 Springs identifying these as true and correct copies,  
23 the documents that we asked for.

24 Secondly, we have provided the quotation from  
25 John Lash, he identified the documents in his

1 deposition, and finally, we had demonstrated through  
2 the defendant's own reply in support of their motion  
3 for summary judgment as, quote, authenticated  
4 documentary evidence where they proceeded to list each  
5 and every one of the contracts between Pardee and CSI.

6 THE COURT: Okay.

7 MR. JAMES M. JIMMERSON: Never once do they  
8 say they are not authentic, and never once do they say  
9 they are not relevant. The relevance is clear here.  
10 They demonstrate the transactions at issue. The issue  
11 is whether or not they've been authenticated, and we  
12 have provided both sworn testimony from both the  
13 defendant as well as Coyote Springs.

14 And, okay, the standard before you is whether  
15 or not a fact could reasonably conclude that they're  
16 what they say they are. You are the trier of fact.

17 THE COURT: Right.

18 MR. JAMES M. JIMMERSON: And you're able to  
19 make that determination, because we know what the  
20 documents say, okay, and there are some issues on  
21 handwritten notes and stray marks, and we aren't  
22 submitting those handwritten notes or stray marks are  
23 part of the agreement.

24 THE COURT: You're just saying the standard  
25 amendments as produced?

1                   MR. JAMES M. JIMMERSON: Exactly, as  
2 produced. And because they're a party to those  
3 amendments, they are able to tell us whether or not  
4 they are authentic.

5                   THE COURT: Right. Pardee should be able to  
6 say that.

7                   MR. JAMES M. JIMMERSON: Exactly.

8                   THE COURT: Without bringing someone from  
9 CSI.

10                  MR. JAMES M. JIMMERSON: A party is able to  
11 tell us if they weren't authentic.

12                  THE COURT: Is it the reverse?

13                  MR. JAMES M. JIMMERSON: Pardee can tell us  
14 are the documents we presented to you authentic, and  
15 that argument hasn't been made, and the reason is they  
16 can't make the argument unless CSI literally  
17 constructed these documents. The documents are real,  
18 so the only question before you is are they admissible,  
19 so the only possible way they could be considered  
20 admissible is if they are authenticated. They didn't  
21 dispute this issue, unless they claim they are hearsay,  
22 but statements of a party, they are, by definition, not  
23 hearsay. They reflect interest in land, okay? They  
24 are excepted from the hearsay rule.

25                  So the only question for you is: Are they

1 authentic, and the answer is they are, not, not just  
2 because of the words of Coyote Springs and John Lash,  
3 but they are, quote, authenticated documentary  
4 evidence, according to the papers submitted to you.

5 I will be happy to respond to the issue  
6 Ms. Lundvall has on those arguments.

7 THE COURT: Okay, 6 through 13.

8 MS. LUNDVALL: Your Honor, I brought an  
9 entire box of motions in limine that have been filed by  
10 the defendants or filed by the plaintiffs, and let me  
11 set the stage on this a little bit. They took every  
12 single one of their proposed trial exhibits, and they  
13 made it the subject of a motion in limine, so you've  
14 got a motion in limine on every single one of their  
15 proposed trial exhibits, and so to the extent that they  
16 brought these motions before we had our Rule -- I think  
17 it's 2.67 conference, where the parties are supposed to  
18 sit down and stipulate to the admission of documents,  
19 that's why some of these have now been withdrawn,  
20 because we already stipulated.

21 THE COURT: I saw that.

22 MS. LUNDVALL: They brought their motion in  
23 limine, and they asserted one ground for the  
24 admissibility issue, and that was hearsay, and we had  
25 never contested or we never fussed about the fact that

1 these documents were hearsay. That had never been  
2 asserted as to their admissibility.

3 THE COURT: All right.

4 MS. LUNDVALL: All right. But that was the  
5 single ground they brought in their motion in limine.  
6 And what we did fuss about was the fact that the actual  
7 exhibits they are proposing, because they sent them to  
8 us and they gave them to us.

9 THE COURT: Right.

10 MS. LUNDVALL: These are not the documents  
11 that they received in response to a subpoena duces  
12 tecum.

13 THE COURT: It's the wrong format?

14 MS. LUNDVALL: No. It's got handwritten  
15 marks all over it.

16 THE COURT: Didn't you already say you're not  
17 gonna do the ones, you're taking off the handwritten  
18 notes?

19 MR. JAMES M. JIMMERSON: No, your Honor.

20 MS. LUNDVALL: But he hasn't --

21 THE COURT: Hold on.

22 MR. JAMES M. JIMMERSON: Just to quickly  
23 answer the question, your Honor, we produced and  
24 submitted to this Court documents as they were  
25 produced, the identical documents produced from CSI.

1 We're not suggesting the handwritten notes or  
2 underlining or stray marks are submitted as evidence.

3 THE COURT: I mean are you saying -- here's  
4 my question.

5 MR. JAMES M. JIMMERSON: I didn't want to  
6 alter the documents.

7 THE COURT: Exactly. I understand.

8 Here's my question, Pardee. Don't you have  
9 clean copies of these exacts same documents?

10 MS. LUNDVALL: From this perspective, your  
11 Honor, we do have clean copies.

12 THE COURT: Then that solves the issue.

13 MS. LUNDVALL: It does solve the issue, but  
14 what they've been trying to do is to push this issue.  
15 The stray marks are all over these documents, and these  
16 stray marks are not, what we can see, what were put on  
17 here by CSI, they were put on here by the plaintiffs  
18 when they were reviewing documents.

19 THE COURT: It's a non-issue. If you're  
20 telling me you don't want the stray marks anyway, all  
21 we have to do then is if you have what I call clean  
22 copies, then problem solved.

23 MS. LUNDVALL: They are more than happy to  
24 come to our offices and to be able to pull the clean  
25 copies then from the responses to the subpoena duces



1   tecum that was served. Moreover, what these documents  
2   do not have are, some of the exhibits, they're only  
3   partials, and so if, in fact, a party like the  
4   plaintiffs wished to proffer an exhibit --

5               THE COURT: They have to have the complete  
6   exhibit.

7               MS. LUNDVALL: They have to do the complete  
8   exhibit.

9               THE COURT: I don't think you would argue  
10   with that, would you?

11              MR. JAMES M. JIMMERSON: I wouldn't, your  
12   Honor.

13              THE COURT: Because I wouldn't allow partial  
14   unless there is a stipulation or grounds that the other  
15   is irrelevant or has no basis.

16              MR. JAMES M. JIMMERSON: If what we're having  
17   here is an agreement to use the clean copies we have, I  
18   had no idea there were additional exhibits that were  
19   missing. These are, quite literally, Judge --

20              THE COURT: What you got from CSI?

21              MR. JAMES M. JIMMERSON: Exactly.

22              The next question is, your Honor, we made  
23   requests for these documents, and they weren't, and you  
24   have those requests and you have the responses. I mean  
25   this is --

1           THE COURT: We have a lot of old history. We  
2 have so many new things coming up with this. Let's  
3 kind of start with a baseline here.

4           MR. JAMES M. JIMMERSON: If she wants --

5           THE COURT: Let me ask this, from Exhibits 6  
6 through 13, do you have clean complete copies?

7           MS. LUNDVALL: What we have is the same  
8 responses to the subpoena duces tecum that was received  
9 from CSI, and we would be more than happy if they want  
10 to take the time to come to my office because they have  
11 marked up their own copies, we would like to offer it  
12 to them.

13          MR. JAMES J. JIMMERSON: Do you know how  
14 outrageous this is that they have their copies and  
15 won't produce them? Talk about an accounting.

16          MS. LUNDVALL: This is an issue that they  
17 have created, and what they're trying to do is to put  
18 the expense of solving the issue that they created upon  
19 me.

20          THE COURT: I'm sure they will pay copying  
21 charges.

22          MR. JAMES M. JIMMERSON: Of course we will,  
23 your Honor.

24          MS. LUNDVALL: Precisely.

25          THE COURT: Real easy, okay? If you would

1 make copies of these Exhibits 6 through 13, produce  
2 them to Mr. Jimmerson, and Mr. Jimmerson -- and give  
3 them a copying bill that's reasonable, 50 cents a page  
4 or something, right, I think the problem is solved,  
5 correct?

6 Are you willing to do that?

7 MR. JAMES M. JIMMERSON: Absolutely, your  
8 Honor, and if there's no issue as to their --

9 THE COURT: That would take care of this  
10 issue, because you also need to have complete, you  
11 know, and who did what to who at this stage, we have so  
12 many big legal issues, and it's such a big case to both  
13 of you, I would really like to focus my energy on the  
14 legal things for both of you and not who did what to  
15 whom in discovery.

16 MR. JAMES M. JIMMERSON: Exactly.

17 THE COURT: I don't mean to discourage, you  
18 know, but I'd really like to focus on where we need to  
19 go in the future, because this is big for both of you,  
20 and I fully appreciate that.

21 If we could do that, Ms. Lundvall, that would  
22 be great.

23 MS. LUNDVALL: From this perspective, your  
24 Honor --

25 THE COURT: I appreciate it.

1 MS. LUNDVALL: We'll do that. The point I'm  
2 trying to make though is very simply, we pointed out  
3 these deficiencies a long time ago to them, and we, as  
4 far as made them aware of these deficiencies.

5 THE COURT: I understand.

6 MS. LUNDVALL: So to the extent what we're  
7 simply trying to do is to make sure the evidence that  
8 is before you is the proper evidence.

9 THE COURT: And I assume you would want the  
10 same thing.

11 MR. JAMES M. JIMMERSON: Absolutely, your  
12 Honor.

13 THE COURT: The judge would certainly  
14 appreciate having complete copies, so if you would do  
15 that, that would be, I would be very thankful.

16 MR. JAMES M. JIMMERSON: The reason why these  
17 were withdrawn, one correction, these were not every  
18 single trial exhibit. I have, pursuant to the Court's  
19 order, proposed the exhibit list, deposition list, they  
20 are distinct, but --

21 THE COURT: Okay.

22 MR. JAMES M. JIMMERSON: If we could get as  
23 an agreement now as to the admissibility of these new  
24 documents that we're gonna get, I would agree to their  
25 admissibility here.

1           THE COURT:   Okay.   So can we stipulate to the  
2   admissibility of what you are producing regarding  
3   Exhibits 6 through 13?

4           MS. LUNDVALL:   Your Honor.

5           THE COURT:   On authentication?

6           MS. LUNDVALL:   On authentication.   They still  
7   have to lay foundation by which to then --

8           THE COURT:   That they're relevant.

9           MS. LUNDVALL:   That they have witnesses.   I'm  
10   assuming they have witnesses by which they can  
11   establish the foundation as to the importance of these.

12          THE COURT:   Relevance.

13          MS. LUNDVALL:   And to the extent -- so to the  
14   extent they have, then we won't have any type of a --

15          THE COURT:   She has no foundation problems to  
16   the documents themselves, you just have to establish  
17   relevancy, which --

18          MR. JAMES M. JIMMERSON:   Okay.

19          THE COURT:   -- you have to do any way.   I  
20   don't want your cooking recipes from last night.

21          MR. JAMES M. JIMMERSON:   I guess the question  
22   is this:   I mean to the extent that we've made  
23   agreements to all of the prior agreements, to these  
24   amendments, were relevance and admissibility --

25          THE COURT:   What's the difference?

1                   MR. JAMES M. JIMMERSON: Exactly. Do we  
2 really want to have, do I really have to ask someone:  
3 Is this relevant to making this determination, or can  
4 we agree that it's relevant to this case? I mean  
5 that's --

6                   MR. JAMES J. JIMMERSON: CSI and Pardee made  
7 agreements after the fact and never disclosed to the  
8 plaintiffs? They're not stipulating to relevancy.  
9 Come on.

10                  THE COURT: Do you still have an issue on  
11 relevancy as far as the foundation, because that's the  
12 only foundation left.

13                  MS. LUNDVALL: Your Honor, from this  
14 perspective, from my standpoint I believe there is a  
15 difference between relevancy and foundation.

16                  THE COURT: What foundation? Tell me what  
17 foundation are they missing.

18                  MS. LUNDVALL: Understood, but to the extent,  
19 as far as what they're suggesting is that they believed  
20 the relevancy to this is the fact that Pardee and CSI  
21 entered into the agreement, then fine, we don't have  
22 any issue when it comes to that form of relevance.

23                  THE COURT: Once it comes in, it can be used  
24 for whatever I feel is --

25                  MR. JAMES M. JIMMERSON: Exactly.

1 THE COURT: So just stipulate it's relevant?

2 MR. JAMES M. JIMMERSON: Yeah.

3 MS. LUNDVALL: On this one, I will try to  
4 make it easy on them. We have a witness that's gonna  
5 come in, and we'll be able to through, and that witness  
6 will be able to explain to the Court the importance of  
7 these documents then and what these documents were  
8 about, so you're gonna have that evidence.

9 THE COURT: But they don't necessarily want  
10 to wait until you bring that witness, correct?

11 MR. JAMES M. JIMMERSON: Exactly, your Honor.

12 THE COURT: They have to do their case in  
13 chief. They don't want to be waiting until the defense  
14 does --

15 MR. JAMES M. JIMMERSON: Exactly, your Honor.

16 MS. LUNDVALL: They're calling our people  
17 during their case in chief.

18 MR. JAMES M. JIMMERSON: We are, your Honor.

19 MS. LUNDVALL: Please don't talk over the top  
20 of me, if you don't mind.

21 But what I'm trying to do is make this  
22 easier, because the Court is going to have those  
23 witnesses, so to the extent the Court wishes for an  
24 admission on relevance, once the fact they get the  
25 proper document then before the Court, then we won't

1 have any issue with this whatsoever.

2 THE COURT: Okay. So we have the  
3 stipulation.

4 MR. JAMES M. JIMMERSON: Yes, your Honor.  
5 And I would just reserve our right to amend the  
6 proposed trial exhibit list that we have prepared for  
7 today.

8 THE COURT: That's fine.

9 MR. JAMES M. JIMMERSON: To reflect new  
10 documents.

11 THE COURT: That's fine, okay.

12 All right. So on the motions in limine for  
13 plaintiff's motions in limine, it's been withdrawn  
14 pursuant to stipulation?

15 MR. JAMES M. JIMMERSON: Yes, your Honor.

16 THE COURT: That would be the best way to  
17 reflect the record.

18 Let's go to Group 2, Exhibits 14 to 19, which  
19 my understanding are parcel maps and plat --

20 MR. JAMES M. JIMMERSON: Plat maps, parcel  
21 maps and plat maps. They distinguish between the two  
22 --

23 THE COURT: They do?

24 MR. JAMES M. JIMMERSON: -- at the recorder's  
25 office again, your Honor, because this was a response,



1 a group response, an omnibus response to our motions.

2 THE COURT: Right.

3 MR. JAMES M. JIMMERSON: The issues are  
4 against the same authenticity and relevance. Again,  
5 your Honor, as to the issue of authenticity, it's a  
6 certified copy that was presented to the Court. The  
7 actual originals we have are certified copies. They  
8 have been providing copies of those originals. We have  
9 authentic documents. They were presented to you in  
10 smaller font. The originals are much bigger. They are  
11 very large.

12 THE COURT: Right.

13 MR. JAMES M. JIMMERSON: And by statute, they  
14 are --

15 THE COURT: Aren't they public records?

16 MR. JAMES M. JIMMERSON: They are public  
17 records, and by statute they are self-authenticating  
18 documents because they are certified copies of --

19 THE COURT: Public records.

20 MR. JAMES M. JIMMERSON: Exactly.

21 THE COURT: I just want to make sure.

22 MR. JAMES M. JIMMERSON: Exactly. You're a  
23 hundred percent correct, because there is no hearsay.  
24 Again, we addressed the issues as to admissibility, but  
25 as to relevance, they are the maps of the land.

1 THE COURT: That's in issue.

2 MR. JAMES M. JIMMERSON: Exactly.

3 THE COURT: Okay.

4 MR. JAMES M. JIMMERSON: And I'm sure this  
5 Court would very much appreciate to know where, with  
6 respect to the contracts, this land was purchased, so  
7 that is absolutely, the relevance is very clear here as  
8 to why this Court would want to look at --

9 THE COURT: I think that's the dispute --

10 MR. JAMES M. JIMMERSON: Exactly.

11 THE COURT: -- for both parties, okay.

12 Ms. Lundvall, what about these parcel maps  
13 and plat maps, do you have any objection to them?

14 MS. LUNDVALL: This one, your Honor, is very  
15 simple.

16 THE COURT: Oh, good.

17 MS. LUNDVALL: This, being this, we don't  
18 argue as far as the authenticity of these because of  
19 the fact they have certified copies.

20 THE COURT: Right.

21 MS. LUNDVALL: But what counsel tells you and  
22 he's trying to make himself as a witness are these are  
23 the parcel maps of the land that was purchased.

24 THE COURT: That's a decision I would have to  
25 make.

1 MS. LUNDVALL: Bingo, and therefore, the  
2 foundation --

3 THE COURT: I didn't take it that way. I  
4 understand exactly. I understand that's what they want  
5 to prove. That's why I made the comment to  
6 Mr. Jimmerson, that's what's in dispute.

7 MS. LUNDVALL: And that's why they need a  
8 witness by which to lay the foundation for these  
9 particular maps, because taking a parcel map from  
10 anyplace and just putting a certified stamp on it and  
11 saying that this should be admissible without being  
12 able to have a witness --

13 THE COURT: They have to hook up relevancy,  
14 obviously.

15 MS. LUNDVALL: Bingo.

16 THE COURT: That's it.

17 MS. LUNDVALL: Bingo.

18 THE COURT: I wouldn't let it in if it wasn't  
19 relevant. That's true of any piece of evidence at  
20 trial.

21 MR. JAMES M. JIMMERSON: That's true.

22 MS. LUNDVALL: That's why, in fact, the  
23 Court cannot admit these pretrial without being able to  
24 have a witness that would be able to tell you this  
25 parcel map deal was this particular transaction and

1 that this is the land that's at issue, so therefore, we  
2 can't stipulate then to these particular parcel maps,  
3 because they don't have that, and we dispute that.

4 MR. JAMES M. JIMMERSON: Your Honor?

5 THE COURT: Okay, I'm trying to figure out  
6 what her objection, the objection is.

7 MS. LUNDVALL: It's foundation. It's  
8 foundation.

9 THE COURT: Foundation, but not on  
10 authenticity, it's just whether they can make it  
11 relevant, lay the foundation at trial.

12 MS. LUNDVALL: Exactly.

13 MR. JAMES M. JIMMERSON: The agreements we  
14 just made a stipulation to as to admissibility. We'll  
15 have to establish these are the exact maps. We pulled  
16 the maps from the maps referenced in these agreements.

17 THE COURT: But what Ms. Lundvall's saying is  
18 you have to have someone establish what they, that they  
19 say what you say, what you're alleging they say.  
20 They'll get in.

21 MR. JAMES M. JIMMERSON: But the documents  
22 you have before you that have been stipulated to their  
23 admissibility, okay, actually make specific reference  
24 to --

25 THE COURT: The ones before?

1 MR. JAMES M. JIMMERSON: Exactly, your Honor.

2 THE COURT: I skipped those once I got the  
3 stipulation.

4 MR. JAMES M. JIMMERSON: Exactly. You can  
5 look to the agreements, even the first agreement of  
6 this case. The option agreement between Pardee and CSI  
7 defines the purchase property by a map.

8 THE COURT: So that will be easy to hook up,  
9 if the map number matches to the agreement.

10 MR. JAMES M. JIMMERSON: Exactly, and that's  
11 already been stipulated as admissible, so all of the  
12 agreements between the parties, between Pardee and CSI,  
13 have been deemed admissible, and they make specific  
14 reference to these maps. The relevance is clear, you  
15 don't need a witness to establish --

16 THE COURT: I don't know, as you know, but if  
17 it hooks up that way, it's an easy fix.

18 MS. LUNDVALL: It's an easy fix when they put  
19 a witness as far as on the stand to establish that  
20 foundation, but for counsel to be able to try to  
21 substitute his testimony --

22 THE COURT: No.

23 MS. LUNDVALL: That's the point I'm trying to  
24 make.

25 THE COURT: Okay. You know what, the only

1 issue you had really is you don't have an issue with  
2 authenticity. They get in. You're gonna put in the  
3 agreements first anyway, because otherwise they won't  
4 flow properly, so that will hook up real easy is what  
5 you're saying to me?

6 MR. JAMES M. JIMMERSON: Yes.

7 THE COURT: So as far as 14 to 19, basically  
8 the only issue you are concerned about is authenticity.  
9 You don't want any problems like that.

10 Obviously, no one is going to, you know, if  
11 she wants to say it's not relevant, if she has a proper  
12 argument at trial, she can bring it. You know what you  
13 need to do to prove it up. I don't want to make a  
14 ruling that it is relevant and it hooks up, because I  
15 don't know everything, but I think, for our purposes,  
16 for this motion in limine, I just looked at them as  
17 authenticity and getting rid of any document-type  
18 objections, and that's kind of where we need to focus.

19 So you really don't have any objection to  
20 those, correct, as far as authenticity for 14 to 19?

21 MS. LUNDVALL: Correct, your Honor.

22 THE COURT: So we'll make that part of the  
23 stipulation, so that also will be withdrawn, so no  
24 problems with authenticity at trial, per stipulation.

25 MR. JAMES M. JIMMERSON: Yes, your Honor.

1 THE COURT: Okay.

2 MR. JAMES M. JIMMERSON: Finally --

3 THE COURT: 21 and 22, which is Lash's  
4 correspondence.

5 MR. JAMES M. JIMMERSON: Yes, your Honor,  
6 dated specifically from November 24, 2009, and I  
7 believe August 23, 2007.

8 It's very clearly, your Honor, it's a  
9 statement by an agent of the opposing party. Again,  
10 they didn't, because they didn't specifically respond  
11 in their opposition, their opposition was to Motions in  
12 Limine 16 through 19, I just bootstrapped it to the  
13 Motions in Limine 21 and 22 which were not part of the  
14 stipulation. I assumed they would make that same  
15 objection.

16 THE COURT: Okay.

17 MR. JAMES M. JIMMERSON: Again, there's no  
18 issue of authenticity. These were produced by the  
19 defendant, okay, and they were identified as --

20 THE COURT: And I assume Mr. Lash is going to  
21 be a witness?

22 MR. JAMES M. JIMMERSON: Exactly. He's going  
23 to be a witness.

24 THE COURT: Yes.

25 MR. JAMES M. JIMMERSON: And the letters that

1 he wrote to our clients are absolutely relevant,  
2 because the key issue is what information was provided  
3 by the defendant to the plaintiffs, so again, there  
4 shouldn't be any issue as to whether they should be  
5 admissible. They should be deemed admissible, because  
6 they are both authentic documents, copies of the  
7 documents produced by the defendant, and they are the,  
8 they are relevant because they are the embodiment of  
9 the communication and information between the  
10 plaintiffs and defendants.

11 THE COURT: Okay.

12 MS. LUNDVALL: This one is a chicken and an  
13 ego, your Honor. We have a motion before you dealing  
14 with parol evidence, and one of the issues from our  
15 perspective is that while we very much want you to see  
16 these letters, what I didn't want to have is some  
17 arguments that somehow that we've waived --

18 THE COURT: Your parol evidence.

19 MS. LUNDVALL: -- our parol evidence  
20 objection because of these communications, so to the  
21 extent that if the Court denies our motion dealing with  
22 parol evidence --

23 THE COURT: We have no problem.

24 MS. LUNDVALL: We have no problem as far as  
25 with these documents.



1 THE COURT: Okay.

2 MS. LUNDVALL: If, in fact, the Court grants  
3 our motion --

4 THE COURT: Then they wouldn't be relevant,  
5 they would it be excluded under parol evidence, okay.

6 MR. JAMES M. JIMMERSON: Your Honor, in  
7 addition to the parol evidence, it also would go to the  
8 issues of notice. That is, did they provide the  
9 notice, it was not necessarily whether or not --

10 THE COURT: Parol evidence is just in terms  
11 of the contract, I understand that.

12 MR. JAMES M. JIMMERSON: Exactly. It goes to  
13 the issue of whether or not our clients were notified  
14 as to whether or not they had actually fulfilled --

15 THE COURT: These are legitimate issues that  
16 need to come up in trial. That puts me in kind of a  
17 tough position here. That's why I don't want to make  
18 decisions on relevancy, because it may come in for  
19 another purpose.

20 MR. JAMES M. JIMMERSON: Yes.

21 THE COURT: I'm looking at -- you don't have  
22 any problem with authenticity, correct?

23 MS. LUNDVALL: No, your Honor.

24 THE COURT: So I would like to treat this as  
25 the other two groups.

1 MR. JAMES M. JIMMERSON: Yes, your Honor.

2 THE COURT: There is absolutely no problem  
3 with authenticity. Once again, at the time of trial,  
4 the foundation will be laid for relevancy, and your  
5 argument will be, Hey, it goes to notice. If it gets  
6 in for notice, which is a whole separate purpose, okay?

7 MR. JAMES M. JIMMERSON: Yes, your Honor.

8 THE COURT: So Motions in Limine 21 and 22  
9 will also be withdrawn by stipulation that they are  
10 authentic. We don't have to worry about any issues as  
11 to hearsay or anything, it just comes to what is  
12 relevant in this case, and that would make everything  
13 clean for me and for you, okay?

14 MR. JAMES M. JIMMERSON: Yes, your Honor.

15 THE COURT: Okay. So that would be all of  
16 plaintiff's, correct? Am I right?

17 MR. JAMES J. JIMMERSON: Your Honor, would it  
18 be acceptable to the defendants if we could get clean  
19 copies of the contracts of Pardee and CSI by Friday  
20 afternoon?

21 THE COURT: Could you get it by Friday when  
22 your supplemental brief is due?

23 MS. LUNDVALL: I believe so, your Honor.

24 THE COURT: Thank you so much.

25 MR. JAMES J. JIMMERSON: Thank you.

1 THE COURT: That takes care of those.

2 Then we're gonna go to the defendant's  
3 motions in limine, correct?

4 Why do I have number two here? Let's see,  
5 let's start with Defendant's Motion in Limine Number 1,  
6 and I'm confused on this one. That's why I had my law  
7 clerk call you. I thought this was decided and briefed  
8 in the motion for summary judgment and the extensive  
9 briefing on the second amended complaint, and I noticed  
10 this was filed before the ruling, so that's why I  
11 actually had my law clerk call.

12 What is different, Ms. Lundvall, on this  
13 motion in limine than what I already decided.

14 MS. LUNDVALL: Your Honor, from this  
15 perspective, this is, as far as the way that I'm  
16 suggesting as far as how the Court should handle both,  
17 the first of motion that dealt with the attorney's fees  
18 as damages as well as the compensation for time, both  
19 of those, the Court had indicated that there was  
20 evidence that the Court wished to hear at the time of  
21 trial.

22 THE COURT: Right, but I'm not at trial yet.

23 MS. LUNDVALL: I know that.

24 THE COURT: Okay.

25 MS. LUNDVALL: So therefore, my suggestion is

1 that these motions don't get denied, but they get  
2 deferred then until a point then which would actually  
3 be the plaintiff's case in chief.

4 THE COURT: Right, these really aren't  
5 motions in limine. And I looked back through my  
6 ruling, absolutely they have to prove up the elements,  
7 okay?

8 MS. LUNDVALL: So from this perspective,  
9 these motions were filed way back in March.

10 THE COURT: That's why I actually had my law  
11 clerk, but I, I looked at all the timing and pulled up  
12 everything. I understand the timing.

13 MS. LUNDVALL: So I think that the Court's  
14 instinct is correct, that you've made the determination  
15 then on these particular ones, and it's a matter of  
16 then the plaintiffs then offering the evidence that the  
17 Court has identified.

18 THE COURT: Right, under the criteria, right.

19 So why would I continue this? I mean you're  
20 not -- I don't understand why it's really a proper  
21 subject for a motion in limine. Maybe I'm just not  
22 thinking clearly, I'm not sure.

23 I think I already made it clear that they  
24 have to prove it up at trial, so it really isn't -- I  
25 look at motions in limine as specifically excluding

1 evidence or something that can be decided in an  
2 evidentiary hearing. This isn't evidentiary.

3           They know the elements, you know. I guess I  
4 don't understand why it's a motion in limine.

5           MS. LUNDVALL: Well, at the time that the  
6 Court -- when we filed a motion in limine, the Court  
7 had not made the substantive determination.

8           THE COURT: I absolutely, I understood that,  
9 Ms. Lundvall. Like I said, once again, that's why when  
10 I started working on yours, because these were  
11 extensive, I actually had my law clerk call, because I  
12 realized the timing they were done, so before I did, I  
13 had them call and ask if I need to review them, and you  
14 said yes, so I wanted to know.

15           MS. LUNDVALL: The communication I'm trying  
16 to articulate though is that these simply can be set  
17 aside until we can determine if, in fact, plaintiffs  
18 have offered up the evidence.

19           THE COURT: That's what I was hoping when I  
20 called. Maybe I didn't have my law clerk articulate  
21 it.

22           MS. LUNDVALL: Also, we had brought a motion  
23 in limine dealing with a production of evidence, you  
24 know, post the discovery cutoff, and that discovery  
25 cutoff was a long time ago.

1 THE COURT: Right.

2 MS. LUNDVALL: The Court's extended it, so we  
3 have withdrawn --

4 THE COURT: So what do you want to do on this  
5 first motion in limine? Do you want to withdraw it?

6 MS. LUNDVALL: My suggestion is that the  
7 Court, at this point in time, if you want to deal with  
8 that, you just simply hold it in abeyance until the  
9 close of plaintiff's case in chief.

10 THE COURT: Okay. That's fine.

11 MS. LUNDVALL: The only issue then that  
12 really is before the Court then in our motions in  
13 limine deals with the parole evidence.

14 THE COURT: Right, okay. And that's the same  
15 with Motion in Limine Number 2, okay.

16 All right. And now we go to Defendant's  
17 Motion in Limine Number 3 is the parole evidence.

18 MS. LUNDVALL: If I can harken the Court all  
19 the way back as far as to the argument that we had  
20 before you on our motion for summary judgment, there  
21 was an acknowledgement then by the plaintiffs during  
22 that point in time that the commission agreement, which  
23 is the contract that's at issue in this case, was clear  
24 and unambiguous, so if you've got a contract that is  
25 clear and unambiguous, the general rule then is parole

1 evidence is not admissible.

2           The plaintiffs have now changed their  
3 position in opposition to our motion in limine. Their  
4 motion now is that there's some type of an ambiguity in  
5 the paragraph that deals with what information to which  
6 they were entitled.

7           They have the throwaway line at the second  
8 sentence of the paragraph that states, in addition,  
9 that they be entitled to reasonable information on all  
10 matters relating to the amount and the due dates of  
11 their commissions. They have a throwaway line in their  
12 opposition. It says, That is subject to multiple  
13 interpretations. They don't offer what those multiple  
14 interpretations are. They don't offer where there's an  
15 ambiguity within the contractual language. They don't  
16 offer any suggestion that the plain meaning of the  
17 words that are used in that paragraph somehow are  
18 capable of more than one interpretation, and that for  
19 some reason that the plain meaning of that language  
20 cannot be taken at face value by the Court in making  
21 its determination by applying the facts to that plain  
22 meaning.

23           And so we submit that the language contained  
24 in the commission agreement is clear and unambiguous,  
25 exactly like they acknowledged back during the motion

1 practice on the motion for summary judgment, and that,  
2 in fact, there has been no offering to the Court of  
3 some type of an ambiguity, and as long as the Court  
4 makes a finding that the contract at issue, the  
5 commission agreement, is clear and unambiguous, then  
6 the parol evidence is excluded.

7 And what that means from a parol evidence  
8 perspective, it is very important to what evidence then  
9 the Court will hear, and it is whether or not that all  
10 of the contractual documents, the drafts, the  
11 arguments, the portions that came in versus got deleted  
12 from the red lines and the black lines --

13 THE COURT: You're just talking to the terms,  
14 not performance of the contract?

15 MS. LUNDVALL: Precisely.

16 THE COURT: Just the terms, correct?

17 MS. LUNDVALL: Precisely. So I'm not talking  
18 anything about performance, I'm talking about what do  
19 the, does the contractual language mean within the  
20 commission agreement, and so to that extent, your  
21 Honor, that's why we brought the motion, and that there  
22 is specific evidence that it would be excluded by  
23 reason of the Court granting this motion.

24 THE COURT: I understand. Maybe it would be  
25 better if I didn't spend so much time on this.



1           MR. JAMES M. JIMMERSON: No, your Honor, I  
2 can assure you that both parties are well served with  
3 you spending as much time as you are.

4           THE COURT: Goodness.

5           MR. JAMES M. JIMMERSON: The issue for the  
6 Court isn't that either party wants to bring in  
7 previous negotiations or these other things, okay? The  
8 key issue really is what do the terms mean.

9           THE COURT: Yeah.

10          MR. JAMES M. JIMMERSON: And in their  
11 citation to the Galardi case that was recently decided  
12 is precisely --

13          THE COURT: On point.

14          MR. JAMES M. JIMMERSON: Exactly. They have  
15 brought in an expert to say this is what this means in  
16 traditional usage in this --

17          THE COURT: Because I wrote down here parol  
18 evidence, meaning --

19          MR. JAMES M. JIMMERSON: Exactly.

20          THE COURT: And the big term is "reasonably  
21 informed."

22          MR. JAMES M. JIMMERSON: And the reason we're  
23 here is because there is a difference as to what the  
24 meaning of that term is, okay?

25          THE COURT: Right.

1           MR. JAMES M. JIMMERSON: So to the extent  
2 they're asking that we exclude evidence --

3           THE COURT: Of prior discussion, anything  
4 before, do you have problem with that?

5           MR. JAMES M. JIMMERSON: We've never had an  
6 issue. In fact, we haven't proposed as trial exhibits  
7 any of those prior negotiations, so we have no issue as  
8 to we want to say this means that, because we talked  
9 about this back here.

10          THE COURT: Or you have any correspondence or  
11 anything prior, like anything that might have happened  
12 with coming up with the terms of the commission  
13 agreement, because I'm sure there were discussions and  
14 stuff. Since Mr. Jimmerson was involved, I'm sure  
15 there were some discussions, and I'm sure that was a  
16 matter of quite a bit of negotiations.

17          MR. JAMES J. JIMMERSON: We are -- no, there  
18 are. There are. There are.

19          THE COURT: And you don't want to bring any  
20 of that.

21          MR. JAMES M. JIMMERSON: We didn't propose  
22 them as trial exhibits for this exact reason. We know  
23 what the agreement is.

24          THE COURT: Okay. I didn't know there were  
25 that many trial exhibits, but I agree with her on that.

1                   MR. JAMES J. JIMMERSON: Yes. And we've not  
2 suggested that that is admissible.

3                   THE COURT: Okay.

4                   MR. JAMES M. JIMMERSON: Whether or not  
5 you're going to allow us to have someone take the stand  
6 and say this is what this means.

7                   THE COURT: Okay.

8                   MR. JAMES M. JIMMERSON: And to the extent  
9 the goal is to eliminate that particular testimony, we  
10 are fighting for that, but we are absolutely not  
11 presenting to this Court old agreements or old  
12 negotiations.

13                  THE COURT: I'm focused right where you want  
14 me to be.

15                  MR. JAMES M. JIMMERSON: Right. The  
16 reasonably informed, there's clearly disagreement as to  
17 what means. We can argue that it's unambiguous,  
18 because its real meaning is our meaning or the real  
19 meaning is their meaning.

20                  THE COURT: Their meaning.

21                  MR. JAMES M. JIMMERSON: Okay. But  
22 ultimately, we are not asking the Court to say that it  
23 is admissible for Mr. Wolfram to take the stand and  
24 say, John Lash told me in May of 2004 before we had  
25 this agreement. We're not.

1 THE COURT: Good.

2 MR. JAMES J. JIMMERSON: The only issue, of  
3 course, is what is the meaning of the agreement, and  
4 the Supreme Court has consistently held that to the  
5 extent they're able to tell us what the meaning of that  
6 agreement is, you're able to --

7 THE COURT: All right.

8 MS. LUNDVALL: Mr. Jimmerson just  
9 acknowledged that, in fact, our motion should be  
10 granted. He said --

11 THE COURT: On the terms of what, any parol  
12 evidence, not the meaning. Not, parol evidence does  
13 not exclude any testimony to determine the meaning of  
14 the term "reasonably informed," as I read it, which I  
15 looked at, but anything under parol evidence, any  
16 discussion, any telephone calls, any prior drafts, what  
17 the commission agreement is, anything like that, which  
18 is how I'm evaluating the parol evidence in this case,  
19 you're in agreement as long as we all understand what  
20 parol evidence means?

21 MS. LUNDVALL: That's correct, your Honor.  
22 So from the standpoint of our motion never suggested  
23 anything to the contrary, our motion never said, Hey,  
24 you've got to adopt our meaning as far as this  
25 contractual language. We understand that the parties

1 have a dispute over the meaning, but the question  
2 becomes what evidence can they offer? Can we go back  
3 and try to offer all the other drafts and the  
4 conversations and the negotiations? No. They've  
5 acknowledged then that our motion should be granted.

6 THE COURT: This is much easier than I  
7 thought it would be, because that's, honestly,  
8 Ms. Lundvall, how I looked at it.

9 As long as we're all clear on what we mean  
10 and what we're saying by granting this motion in limine  
11 is any discussions, any discussions, any documents,  
12 any, any evidence related to prior terms, anything, the  
13 terms and the contract would in any way be affected by  
14 what was done prior, that is not under the parol  
15 evidence, and I'm granting -- that would not be  
16 granted, would not be admitted because of the parol  
17 evidence.

18 It's not to be interpreted in any way that  
19 the parol evidence or this ruling would in any way  
20 limit testimony to determine the meaning of the  
21 contractual terms. One specifically we talked about is  
22 the term "reasonably informed," and I don't know if  
23 there's others, but obviously that's one I keyed on.

24 MR. JAMES J. JIMMERSON: That's a big one.

25 THE COURT: Because it came from the summary

1 judgment, so we're in agreement on that.

2 Oh, my goodness, that's nice. That's very  
3 nice.

4 Okay, have I gone through everything?

5 MS. LUNDVALL: I believe so.

6 THE COURT: Do you want me to -- I'm in my  
7 last pile, so hopefully we're done. I'm out of piles  
8 here.

9 MR. JAMES M. JIMMERSON: Your Honor, just to  
10 confirm, the pretrial documents that you requested in  
11 advance of today, we'll be amending our list consistent  
12 with --

13 THE COURT: We also, we have the list from  
14 Kelly, but I have a list I put together for bench  
15 trials I was gonna give to you today also, because I,  
16 since I've been doing so many, I've come up with a  
17 better way to handle it, so I am not -- so I actually  
18 have a list of that too, because you and I know that  
19 pretrial isn't as helpful as some of this -- oh, not  
20 that, it isn't -- I put a lot together. I understand  
21 the significance of pretrial. Please don't read it  
22 that I don't, but do we have that list?

23 THE CLERK: Yes, I do.

24 THE COURT: I want to take the opportunity to  
25 give it to both of you.

1                   MR. JAMES J. JIMMERSON: We appreciate it,  
2 your Honor.

3                   THE COURT: And there's exhibit guidelines as  
4 well.

5                   MR. JAMES M. JIMMERSON: Your Honor, I do  
6 have one question, and this is an issue that's actually  
7 come up since we've received the documents.

8                   To the extent that we would like to get  
9 additional certified copies of the large versions of  
10 the maps from the recorder's office --

11                  THE COURT: Yes.

12                  MR. JAMES M. JIMMERSON: -- they have stopped  
13 producing those, so we have --

14                  THE COURT: The County has?

15                  MR. JAMES M. JIMMERSON: Yes.

16                  THE COURT: Or the recorder's.

17                  MR. JAMES M. JIMMERSON: As a cost saving  
18 measure.

19                  THE COURT: I was gonna say it costs --

20                  MR. JAMES M. JIMMERSON: I would imagine so.  
21 To the extent they're still capable of doing it, can we  
22 get a Court order to the extent you would like  
23 additional copies or they would like additional copies?  
24 I know you have a certified copy.

25                  MS. LUNDVALL: I have no idea what counsel is

1 asking for, but if he would like to enter into a  
2 stipulation with us and present it to you for an order,  
3 we would be happy to do that.

4 THE COURT: You're just concerned that the  
5 clerks's office, the recorder's office, I misspoke, the  
6 recorder's office.

7 MR. JAMES J. JIMMERSON: Would be compelled  
8 to make a production of what we have so there's two or  
9 three copies and not just one.

10 THE COURT: I see, certified copies.

11 MR. JAMES M. JIMMERSON: Exactly, your Honor.

12 THE COURT: Can we get a stipulation that one  
13 certified copy is enough or --

14 MS. LUNDVALL: Absolutely.

15 THE COURT: That way you would not have the  
16 requirement much more than one certified.

17 MR. JAMES M. JIMMERSON: That's perfectly  
18 acceptable too, as long as we can make copies.

19 THE COURT: We got a stipulation on that.

20 MR. JAMES M. JIMMERSON: Wonderful.

21 Thank you, your Honor.

22 THE COURT: I need two of these.

23 THE CLERK: I had, I have two. I want to  
24 make sure that's what --

25 MS. LUNDVALL: And your Honor, the one



1 question that we had, when does your clerk wish for us  
2 to bring over our exhibits to be --

3 THE CLERK: If you have them ready a week  
4 before, that would be great. I was gonna call guys  
5 like a week and a half prior to the trial.

6 MS. LUNDVALL: Brian or someone at our office  
7 will be responsible to bring them over.

8 THE COURT: Do you have another set?

9 THE CLERK: Yes.

10 THE COURT: This is what I have come up with  
11 for civil bench trials, and this is Kristin's.

12 MR. JAMES M. JIMMERSON: Your Honor, can we  
13 approach the bench?

14 THE COURT: Sure. It helps you. It's kind  
15 of in addition to the regular stuff.

16 MR. JAMES M. JIMMERSON: Thank you very much.

17 THE COURT: You're very welcome.

18 Thank you, counsel. I appreciate it.

19 Please get me the supplemental briefing.

20 MR. JAMES J. JIMMERSON: We will.

21 MR. JAMES M. JIMMERSON: We'll prepare the  
22 orders on the discovery motions and the dispositive  
23 motions.

24 THE COURT: You're gonna do it?

25 MS. LUNDVALL: The dispositive motion hasn't

1 been ruled upon jet.

2 MR. SHIPLEY: The stipulation, prepare the  
3 stipulation.

4 MR. JAMES M. JIMMERSON: Yeah, we will.

5 THE COURT: Work it out.

6 MR. SHIPLEY: And the order on the compel.

7 MS. LUNDVALL: Thank you, Judge.

8 THE COURT: You're welcome.

9 It's nice to see you this morning, counsel.

10 \* \* \* \* \*

11

12 ATTEST:

13 Full, true, and accurate transcript of proceedings.

14

15

16

17 /S/Loree Murray  
18 Loree Murray, CCR #426

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# WOLFRAM V. PARDEE

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<hr/> <p style="text-align: center;"><b>*</b></p> <hr/>	<p><b>5</b> <sup>[1]</sup> 56:17</p>	<p>24 23:2,3,8,17,18,24 24:3,6, 9,19,25 25:17,23,23 27:6,8 29:8,24 30:4 31:22 34:9 35: 8,16,23,25 36:3,7,15 37:7 38:6,22 39:5 44:14 45:11 46:14,17,21 47:1,11,18 48: 10 52:4,10,14 64:15</p>	<p><b>advanced</b> <sup>[1]</sup> 48:16</p>
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<hr/> <p style="text-align: center;"><b>/</b></p> <hr/>	<p><b>50</b> <sup>[4]</sup> 23:6,16 24:4 65:3</p>	<p>24 23:2,3,8,17,18,24 24:3,6, 9,19,25 25:17,23,23 27:6,8 29:8,24 30:4 31:22 34:9 35: 8,16,23,25 36:3,7,15 37:7 38:6,22 39:5 44:14 45:11 46:14,17,21 47:1,11,18 48: 10 52:4,10,14 64:15</p>	<p><b>adventure</b> <sup>[1]</sup> 22:20</p>
<hr/> <p><b>/s/lore</b> <sup>[1]</sup> 96:17</p> <hr/>	<p><b>50.125</b> <sup>[7]</sup> 5:16 6:14 8:6 9: 22 13:5 14:10 17:2</p>	<p>24 23:2,3,8,17,18,24 24:3,6, 9,19,25 25:17,23,23 27:6,8 29:8,24 30:4 31:22 34:9 35: 8,16,23,25 36:3,7,15 37:7 38:6,22 39:5 44:14 45:11 46:14,17,21 47:1,11,18 48: 10 52:4,10,14 64:15</p>	<p><b>affected</b> <sup>[2]</sup> 47:5 91:13</p>
<hr/> <p style="text-align: center;"><b>1</b></p> <hr/>	<p><b>53</b> <sup>[1]</sup> 24:24</p>	<p>24 23:2,3,8,17,18,24 24:3,6, 9,19,25 25:17,23,23 27:6,8 29:8,24 30:4 31:22 34:9 35: 8,16,23,25 36:3,7,15 37:7 38:6,22 39:5 44:14 45:11 46:14,17,21 47:1,11,18 48: 10 52:4,10,14 64:15</p>	<p><b>affidavit</b> <sup>[1]</sup> 57:21</p>
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<p><b>13</b> <sup>[8]</sup> 55:12,21 56:4,22 60: 7 64:6 65:1 67:3</p>	<p><b>6</b> <sup>[8]</sup> 55:21 56:4,22 57:10 60: 7 64:5 65:1 67:3</p>	<p>24 23:2,3,8,17,18,24 24:3,6, 9,19,25 25:17,23,23 27:6,8 29:8,24 30:4 31:22 34:9 35: 8,16,23,25 36:3,7,15 37:7 38:6,22 39:5 44:14 45:11 46:14,17,21 47:1,11,18 48: 10 52:4,10,14 64:15</p>	<p><b>after</b> <sup>[2]</sup> 14:1 68:7</p>
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<p><b>141</b> <sup>[1]</sup> 38:15</p>	<hr/> <p style="text-align: center;"><b>9</b></p> <hr/>	<p>24 23:2,3,8,17,18,24 24:3,6, 9,19,25 25:17,23,23 27:6,8 29:8,24 30:4 31:22 34:9 35: 8,16,23,25 36:3,7,15 37:7 38:6,22 39:5 44:14 45:11 46:14,17,21 47:1,11,18 48: 10 52:4,10,14 64:15</p>	<p><b>again</b> <sup>[15]</sup> 20:17 38:9 50:6 53:8,15 55:22 56:3 70:25 71:4,24 77:9,17 78:3 80:3 83:9</p>
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