

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

**Case No.: 72371**

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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 47 OF 88**

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McDONALD CARANO LLP  
Pat Lundvall (NSBN 3761)  
[lundvall@mcdonaldcarano.com](mailto:lundvall@mcdonaldcarano.com)  
Rory T. Kay (NSBN 12416)  
[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)  
2300 W. Sahara Avenue, Suite 1200  
Las Vegas, Nevada 89102  
Telephone: (702) 873-4100  
Facsimile: (702) 873-9966

Attorneys for Appellant

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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

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Labeled</b>
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
10/23/2013	Trial Exhibit P	27	JA004084
10/23/2013	Trial Exhibit Q	27	JA004085
10/23/2013	Trial Exhibit R	27	JA004086- JA004089
10/23/2013	Trial Exhibit S	27	JA004090

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10/23/2013	Trial Exhibit T	27	JA004091- JA004092
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
10/28/2013	Trial Exhibit 23	34	JA005255- JA005260
10/30/2013	Trial Exhibit 23a	39	JA005816- JA005817
10/28/2013	Trial Exhibit 24	34	JA005261- JA005263
10/23/2013	Trial Exhibit 25	28	JA004455- JA004462
10/24/2013	Trial Exhibit 26	31	JA004792- JA004804
10/30/2013	Trial Exhibit 27	39	JA005818- JA005820
10/29/2013	Trial Exhibit 28	36	JA005494- JA005497
10/29/2013	Trial Exhibit 29	36	JA005498- JA005511
10/24/2013	Trial Exhibit 30	31	JA004805- JA004811
12/13/2013	Trial Exhibit 31a	48	JA007385- JA007410
12/12/2013	Trial Exhibit 39	46	JA006936- JA006948

<b>Date</b>	<b>Document Description</b>	<b>Volume</b>	<b>Labeled</b>
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
10/23/2013	Trial Exhibit FF	27	JA004114- JA004118
10/23/2013	Trial Exhibit GG	27	JA004119- JA004122
10/23/2013	Trial Exhibit HH	27	JA004123

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

Date	Document Description	Volume	Labeled
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.

McDONALD CARANO LLP

By: /s/ Rory T. Kay  
 Pat Lundvall (NSBN 3761)  
 Rory T. Kay (NSBN 12416)  
 2300 W. Sahara Ave., 12th Floor  
 Las Vegas, Nevada 89102  
 Telephone: (702) 873-4100  
 Facsimile: (702) 873-9966  
[lundvall@mcdonaldcarano.com](mailto:lundvall@mcdonaldcarano.com)  
[rkay@mcdonaldcarano.com](mailto:rkay@mcdonaldcarano.com)

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

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ORIGINAL

1 FRIDAY, DECEMBER 13, 2013, 1:00 P.M.

2 LAS VEGAS, NEVADA

3 -oOo-

4 THE COURT: Good afternoon.

5 MS. LUNDVALL: Good afternoon, Your Honor.

6 MR. J.J. JIMMERSON: Good afternoon Are you  
7 ready, Your Honor?

8 THE COURT: I am ready. I have my notepad.  
9 I'm ready.

10 MR. J.J. JIMMERSON: First of all, I would like  
11 to thank the Court and its staff for its patience and  
12 time it's given to all parties and to all counsel. And  
13 I thank opposing counsel, Ms. Lundvall and Mr. Shipley,  
14 for their opportunity to work opposite them in a  
15 professional manner, and it's been an experience I've  
16 enjoyed, my son has enjoyed and, perhaps, not so much  
17 for the clients.

18 But on behalf of Mr. Wolfram and Mr. Wilkes,  
19 who is not able to be here this afternoon, we thank you  
20 and all concerned for your time and attention.

21 THE COURT: You're very welcome.

22 MR. J.J. JIMMERSON: I would now like to take  
23 this opportunity to speak about what we believe to be a  
24 summation of the facts in evidence and the law that you  
25 have been provided that will allow you to make an

1 informed decision. And we certainly believe that, based  
2 upon all the evidence, that the plaintiffs are entitled  
3 to a judgment in its favor in the manner that I will  
4 describe towards the end of our argument.

5 I will be speaking to some exhibits with you,  
6 and through this time process we've all memorized a good  
7 deal of them or portions of them, but I will be making  
8 references to exhibits and to documents so that the  
9 Court has a good understanding and can follow along. So  
10 thank you very much.

11 I would like to begin then with what we believe  
12 to be a clear demonstration of the evidence, certainly  
13 by a preponderance of the evidence with regard to the  
14 facts of this case.

15 Mr. Wolfram and Mr. Wilkes, working for their  
16 then companies Award and General Realty companies, and  
17 thereafter having acquired their own interest in this  
18 commission entitlement, had worked with Mr. Jon Lash in  
19 particular of Pardee Homes prior to spring of 2004.  
20 They had discussions, according to the testimony of  
21 Mr. Wolfram and Mr. Wilkes.

22 And they had shown Mr. Lash the White Hills  
23 property across the Hoover Dam bridge. In fact, he  
24 testified, Mr. Wolfram, that it was actually in escrow  
25 for a period of time. They showed him the Sandy Valley

1 property and then they showed him the Coyote Springs  
2 property amongst others.

3 Even in years following, they showed them other  
4 properties that did not result in anything being placed  
5 into escrow, but that evidenced Mr. Wolfram and  
6 Mr. Wilkes' desire to, of course, earn a commission for  
7 themselves and their families, but also to provide a  
8 service to Mr. Lash and to Pardee as they had done in  
9 the past.

10 I will note that Mr. Andrews didn't recall that  
11 the White Hills property went so far as to be into  
12 escrow, kind of dismissing that. And I think it's a  
13 fair statement that Mr. Andrews, who had probably more  
14 hands-on information about this project than even that  
15 of Mr. Lash, although Mr. Lash was certainly very  
16 knowledgeable, as was Mr. Whittemore and our client,  
17 that Mr. Andrews didn't have a lot of -- had a bit of  
18 disdain for Realtors and didn't have the same  
19 relationship with Mr. Wolfram and Mr. Wilkes as Mr. Lash  
20 did.

21 After the all hands meeting in which  
22 Mr. Wolfram and Mr. Wilkes participated, mostly staying  
23 quiet -- although we heard this morning that Mr. Wilkes  
24 was interjecting himself -- there was no further  
25 involvement, at least in terms of meetings or

1 conversations, between them, between Mr. Wolfram and  
2 Mr. Wilkes as the parties, Pardee and CSI,  
3 Coyote Springs, which I'll refer to occasionally as CSI,  
4 began the negotiations for the acquisition of this  
5 property through and including the execution of the  
6 Option Agreement for the Purchase of Real Property and  
7 Joint Escrow Instructions, dated the blank day of May  
8 2004, that we generally refer to as June 1, 2004, the  
9 signature date by Pardee accepting the offer as being  
10 prepared and negotiated between the two sides through  
11 competent counsel and competent principals.

12           The Court has read ad nauseam the terms of the  
13 Option Agreement. There are points, though,  
14 notwithstanding the fact that I am counting and know  
15 that the Court has memorized these terms, that I want to  
16 hit upon, and there is, indeed, a recognition within the  
17 four corners of this document that this was a 40-year  
18 contract.

19           It was a contract that, of course, could  
20 terminate sooner than 40 years, but there are so many  
21 provisions within the four corners of the document that  
22 evidence an ongoing relationship between Pardee, as  
23 purchaser of single-family production real estate  
24 property, and CSI, as seller of that real estate, that  
25 you could see from the parties that there was

1 contemplated, through the terms, the express terms of  
2 the Option Agreement, Exhibit 2, a 40-year relationship  
3 potentially between the two parties.

4           What is also important is at the time, and  
5 through all the evidence we've heard, the only  
6 contemplation, the exclusive contemplation as of June 1,  
7 2004, was that Pardee was only going to be permitted to  
8 buy single-family production real estate as so  
9 designated between the two parties and would not be  
10 permitted to buy any other type or category of real  
11 estate, whether it be multi-family, whether it be golf  
12 course, whether it be backup commercial, whether it be  
13 custom lots or the like. And, indeed, all of those  
14 rights within this contract are expressly reserved to  
15 CSI.

16           So when the parties inked this agreement, CSI  
17 and Pardee knew that Pardee was being granted, as  
18 Mr. Andrews confirmed today in his testimony, the  
19 exclusive right to be the provider of production  
20 single-family residential lots and homes for this huge  
21 project.

22           As Mr. Andrews pointed out, he was quite  
23 excited about the project, as was Mr. Lash, because in  
24 terms of the development of Southern Nevada and Clark  
25 County, this may be the single largest piece of property

1 that has been attempted to be developed over the years.  
2 I don't know and we didn't have testimony whether it's  
3 bigger than Del Webb's Sun City or whether it would be  
4 bigger than Green Valley by the Greenspun family. But  
5 it is a huge project, a city, to use the words of  
6 Mr. Andrews, that's being contemplated here.

7 The terms within the Option Agreement,  
8 Exhibit 2, are defined and static. That is to say they  
9 are clearly understood. There's not a dispute between  
10 the parties. And through testimony that we've garnered  
11 over the last nine days, we have a clear understanding  
12 of what these definitions mean.

13 First, Purchase Property is defined  
14 specifically as 3,600 acres bounded by Parcel 1 of the  
15 map recorded as 98-57, Document No. 01332, shown on  
16 page 1, paragraph B, of the Option Agreement, Exhibit 2.

17 And I know the Court knows this, but when I  
18 refer to Option Agreement, I'm referring to this  
19 document, June 1. And if I refer to the March 28th  
20 agreement, I'll refer to it as the Amended and Restated  
21 agreement.

22 THE COURT: We've used those terms consistent.

23 MR. J.J. JIMMERSON: Thank you.

24 The Entire Site is 30,000 acres, capital E,  
25 capital S, also a defined term. And the Purchase

1 Property, as we've shown, is defined here. It is  
2 further defined as a map of Parcel 1, which is attached  
3 as part of Exhibit 4, the second amendment, where all of  
4 the exhibits to the Option Agreement, Exhibit 2, were  
5 finalized and attached and incorporated by reference  
6 expressly by the words of the second amendment to relate  
7 back to the earlier June 1, 2004 document that had  
8 noticeably a number of absent exhibits, except for the  
9 key one from Mr. Whittemore's perspective, Exhibit E.  
10 He had his price escalating from \$40,000 per acre with  
11 the cost of living increases to a greater amount as the  
12 years go forward.

13 Again, just that schedule alone evidences the  
14 multi-year nature of the project where Mr. Whittemore,  
15 on behalf of his company, would be allowed to charge  
16 greater than \$40,000 per acre after the first five years  
17 going forward on an escalating basis.

18 The second definition, as we've now heard  
19 through Mr. Lash, Mr. Whittemore, from these two  
20 witnesses as well as from Mr. Wolfram, is that there is,  
21 in addition to Purchase Property of which 1,950 acres  
22 were contemplated to be built, was the definition of  
23 Option Property.

24 Option Property was all other property designed  
25 for single-family production residential use that wasn't

1 Purchase Property, by definition on page 1, paragraph B,  
2 and page 2, paragraph B of Exhibit 2.

3 The parties, you can tell, also contemplated  
4 that there would be future designations by the parties  
5 of single-family residential property beyond the initial  
6 takedown of 1,950 acres. How do we know that? Let's  
7 look to page 1, paragraph B, and this is very important  
8 language for the Court to consider because it speaks to  
9 this latest issue that we uncovered after October 28th,  
10 after October 29th, after Mr. Whittemore's testimony as  
11 to designation of intended use.

12 Here's the language, beginning with paragraph  
13 B, The parties desire to enter into this agreement --  
14 reading from Bates stamp Plaintiff 1, page 1 of  
15 Exhibit 2, the Option Agreement of June 1, 2004 -- The  
16 parties desire to enter into this agreement to provide  
17 for, (i), buyer's purchase of the portion of the entire  
18 site consisting of Parcel 1, as shown on Parcel  
19 Map 98-57, recorded July 21, 2000, in Book Number  
20 so-and-so, official records, Clark County, Nevada,  
21 containing approximately 3,605.22 acres as shown on the  
22 map attached hereto as Exhibit B and made a part hereof,  
23 the so-called Purchase Property, and (ii), buyer's  
24 option to purchase the remaining portion of the entire  
25 site which is or becomes designated for single-family

1 detached production residential use as described below,  
2 parentheses, the Option Property, in a number of  
3 separate phases referred to herein collectively as the,  
4 quote, option parcels, end of quote, parcels being  
5 plural, and individually as a, quote, option parcel,  
6 upon the terms and conditions hereinafter set forth,  
7 period.

8           If the Court focuses upon this language, it is  
9 clear that they are not just speaking to Pardee's right  
10 to acquire Option Property defined as everything outside  
11 of Parcel 1. But, secondly, that they have the right to  
12 purchase property that is, as of June 1, 2004, or  
13 becomes designated for single-family detached production  
14 residential use in the future.

15           This is important because this parcel we have  
16 discovered that we call Residential 5, shown on  
17 Exhibit B-6 in Exhibit E, Exhibits 12 and 13,  
18 respectively, and why it's proper for you to consider an  
19 award of appropriate money damages to the plaintiff is,  
20 Your Honor, this was single-family designated -- this  
21 was single-family detached production residential use  
22 from the outset, from June 1, 2004 going forward.

23           This was single-family production residential  
24 property designated in 2004, not designated in 2011 when  
25 the county planning and zoning department approved the

1 tentative map, Exhibit 43, but in 2004 it was so  
2 designated for single-family detached production  
3 residential use outside of the \$84 million of property  
4 acquired by Pardee as outlined in Mr. Lash's letter, for  
5 example, of November 24, 2009, or all the maps that  
6 we've shown you in all the exhibits.

7 In addition, of course, we have unqualifiedly  
8 the intended designation of that same property as the  
9 epicenter of the construction of new single-family  
10 detached production residential homes on one of two  
11 sites, there, which was the exchange parcel and the  
12 attached property, Residential 5, which was acquired by  
13 the multi-family agreement, and across the street to the  
14 west of the Coyote Springs Parkway, just south of the  
15 exchange parcel that then became the property of CSI.

16 I would anticipate from opposing counsel, and  
17 she tried to elicit some of that from Mr. Andrews this  
18 morning, that, Well, listen, it's a tentative map and,  
19 therefore, it can be changed. It's not a final map.  
20 And even final maps can be changed. And, therefore,  
21 plaintiffs are not entitled to a commission because  
22 maybe until it's built, we won't know if the intended  
23 use will carry forth.

24 We do know from the testimony of Mr. Lash  
25 unqualifiedly that the next purchase of land beyond the

1 \$84 million clearly was Option Property and clearly  
2 entitled our clients to a commission if used to develop  
3 single-family production residential housing.

4 But what's even more compelling is within this  
5 agreement, Exhibit 2, there is the definition of Option  
6 Agreement that is, quote, Buyer's option to purchase the  
7 remaining portion of the entire site which is or becomes  
8 designated for single-family detached production  
9 residential use.

10 Under the facts of this case, the parcel in  
11 question, Residential 5, which was acquired separately  
12 through the multi-family agreement, was even then, in  
13 2004, designated for single-family production  
14 residential use and confirmed by the same seven years  
15 later as part of the February 16, 2011 process, in  
16 which, unbeknownst to the plaintiffs, Pardee had applied  
17 for and received tentative map approval for the intended  
18 use.

19 One of the things I think you come away from is  
20 there is a conflict in testimony between the parties. I  
21 think it's reasonable to say that as to what can you  
22 glean from the information that was delivered by Pardee  
23 to Mr. Wolfram and Mr. Wilkes or what could Mr. Wolfram  
24 and Mr. Wilkes have acquired if they went to, for  
25 example, the Clark County recorder's office, and there's

1 some dispute over that, and I will speak to that a  
2 little bit more in a few minutes.

3 But for now I would like for you to accept what  
4 I believe to be unrebutted fact, and that is no  
5 information could be found from recorded documents or  
6 from the documents provided by the defendants to the  
7 plaintiffs of intended use.

8 Even today Mr. Andrews stated, No, no maps are  
9 going to show intended use. Mr. Lash said the same  
10 thing. Mr. Andrews said, No, unless you go to the  
11 county to see whatever's been filed, you won't know  
12 designated use. And in addition, he was very specific  
13 to state -- and this is very important for an overall  
14 understanding -- Pardee's internal decision-making of  
15 prospective designated use is not known by anyone except  
16 Pardee and possibly CSI.

17 But as you've indicated, we've developed  
18 several maps, he said, as to intended use and we do not  
19 share that information with outside parties. We keep  
20 that internally and it is not recorded. It is not  
21 submitted to the county or the like.

22 Here you have a designation by Pardee of 53  
23 acres of land. Mr. Andrews did the math yesterday. 83  
24 or 82 acres or 80 acres, 80-point-something acres minus  
25 26.96 equals 53.25 acres, approximately -- was applied

1 for and received, upgrading the schedule from either R-U  
2 or MPL to single-family production residential property.

3 Now, what's also clear here is that the initial  
4 development of 1,950 acres was within Parcel 1. We have  
5 that testified to by Mr. Lash. We have that testified  
6 to by Mr. Whittemore, and we have that testified to by  
7 Mr. Wolfram. And that was -- it took some days to  
8 develop, but the Court clearly has that in her notes.  
9 So when you couple that to all land, the 1,950 acres for  
10 production residential property within Parcel 1, that is  
11 Purchase Property.

12 On June 1, 2004 -- this is important and the  
13 Court, I know, will do this -- but it's important to  
14 understand what is it the parties knew or reasonably  
15 could have known on June 1, 2004? And on that date what  
16 they knew or reasonably could have known was that there  
17 was only one way to buy land after Purchase Property has  
18 been purchased, and that is to exercise the right to buy  
19 Option Property pursuant to paragraph 2 of Exhibit 2.

20 And, indeed, the structure of the agreement is,  
21 paragraph 1, purchase and sale of Purchase Property, and  
22 the witnesses testified, both Whittemore and -- both  
23 Lash and Andrews, the ability to purchase is virtually  
24 the same steps. You open up an escrow. You pay money.  
25 You receive clear title. You close escrow. That's how

1 you do it for the purchase and sale of Purchase  
2 Property.

3 With Option Property there's one additional  
4 ingredient that's specified starting at page 3, you  
5 submit a notice of Option Property exercise rights, and  
6 you pay money according to the terms of the agreement,  
7 and you complete the purchase. There's deeds to be  
8 signed. But it's very similar to the five takedowns  
9 that were part of the \$84 million.

10 Now, there was no other contemplated way for  
11 Pardee to buy single-family residential property after  
12 the \$84 million, the approximate 1,950 acres, except by  
13 use of paragraph 2, Option Property purchase mechanism.  
14 There was no provision here for a side agreement. There  
15 was provision here for some later agreement.

16 There was a statement that if you are going to  
17 buy additional property after the Purchase Property was  
18 completed to add further single-family production  
19 residential property, you would be necessarily obliged  
20 to comply with paragraph 2 of Exhibit 2 for the  
21 acquisition of Option Property.

22 And that's important because at the time the  
23 contemplation of the parties that they knew or  
24 reasonably could have known was that all -- I'm not  
25 saying all -- because it was a big thing -- that Pardee

1 was buying was the exclusive right -- we heard it from  
2 Mr. Andrews -- to be the developer of single-family  
3 homes for the entirety of Coyote Springs 30,000-plus  
4 acres of this project in exchange for which they would  
5 pay initially \$84 million to buy approximately 1,950  
6 acres, which developed by virtue of the exchanges and  
7 the necessity to subtract golf lots or subtract roads,  
8 would give them a use of 1,950 acres, which turned out  
9 to be a gross of 2,112 acres, per the letter of Mr. Lash  
10 to Mr. Wolfram of November 24, 2009.

11           So that is what the structure of this agreement  
12 was. And what is clear is that that is what was agreed  
13 to between these parties. Now, we know two years later,  
14 in 2006, approximately, the beginning of four additional  
15 agreements occurred, including right up to 2009 in the  
16 eighth amendment, where in the eighth amendment there is  
17 the acquisition of the golf course and the backup rights  
18 to the commercial property that attaches to the exchange  
19 parcel and attaches to Residential 5, which we saw  
20 through Tentative Map 2 of Exhibit 43.

21           And you had to start it with the multi-family  
22 agreement of 2006 and the seven amendments. It followed  
23 with the custom lot agreement. It followed with the  
24 golf course property, and then it followed with the  
25 backup rights under the commercial property. The

1 commercial property backup rights were actually attached  
2 to the eighth amendment, but the other three are by  
3 separate agreement, we have been advised by all parties.

4           So that is the method here. That the parties  
5 later change their mind and enter into separate  
6 agreements is their right to do so as between  
7 themselves. They do not, however, have the right to  
8 adversely affect the rights of Mr. Wolfram and  
9 Mr. Wilkes by changing the agreement between  
10 Mr. Whittemore, on behalf of CSI, and Mr. Lash, on  
11 behalf of Pardee Homes. And that is where the defendant  
12 is most vulnerable to a finding by this Court.

13           This is not an issue of mens rea. This is not  
14 an issue of proving an intent to defraud. This is a  
15 breach of contract for three reasons. One, the need for  
16 accounting, Count I, because of the elements that are  
17 required for an accounting, the superior knowledge,  
18 possession of superior knowledge over the matters that  
19 are subject to account. That's the decisions we cited  
20 in our pretrial brief.

21           It is the equity that the Court is allowed to  
22 impose when there's been a failure to act appropriately  
23 and fairly to the parties and when there's damage caused  
24 thereby.

25           The second claim is the breach of the implied

1 covenant of good faith and fair dealing. Here you have  
2 the parties having entered into a Commission Agreement,  
3 which I'll speak to in just a minute, and there is  
4 within that contract, and, in fact, within every  
5 contract under Nevada law, the implied covenant to deal  
6 with each party fairly and reasonably in the performance  
7 of their contract, the breach of which would constitute  
8 a breach of the implied covenant of good faith and fair  
9 dealing, entitling the plaintiff to money damages as the  
10 court would deem proper.

11 And third is the breach of contract claim, and  
12 the breach of contract claim, Your Honor, is the failure  
13 to keep the plaintiffs reasonably informed as to all  
14 matters relating to their entitlements to receive  
15 commissions for the sale of production real estate or  
16 single-family residential property.

17 So when you look at the Option Agreement, what  
18 was known on June 1, that's what these parties defined.  
19 We heard a huge amount of testimony by Mr. Whittemore  
20 and Mr. Lash that their defense to this was, We don't  
21 care what the words of the Option Agreement said, we  
22 always knew, because this was a development over many  
23 years, that we would run into circumstances where there  
24 would be a need to alter our earlier plans to  
25 accommodate later plans. An example of that was the

1 cost of utilities. I heard that on several occasions.  
2 So did the Court.

3 And, therefore, there was a decision made, just  
4 prior to March 28, 2005, to build more horizontally  
5 along Highway 168, then vertically along Highway 93.  
6 And, of course, there was a substantial refinement of  
7 the term Purchase Property from 3,605 acres, of which  
8 the initial developed parcel would be 1,950 to 511  
9 acres, and Option Property being defined as everything  
10 else.

11 And I resisted that. When I first heard it, I  
12 resisted that. But after I've listened to the testimony  
13 for many days, I think there's probably truth in what  
14 we've heard. And that is that there has to be some  
15 flexibility between the parties to allow the development  
16 of Pardee's dreams or visions for what its single-family  
17 residential homes would look like and Mr. Whittemore's  
18 desire to build a city.

19 MS. LUNDVALL: Your Honor, now that Counsel has  
20 finished this particular thought, I need to place an  
21 objection in the --

22 MR. J.J. JIMMERSON: Your Honor, what is  
23 this --

24 MS. LUNDVALL: Hold on. The objection is under  
25 the Lioce decision. I don't know if I'm pronouncing it

1 right, but it's L-i-o-c-e. It is the ethical  
2 prohibition for an attorney to express a personal belief  
3 into the truthfulness of the testimony of a witness.

4 MR. J.J. JIMMERSON: Fine.

5 MS. LUNDVALL: That's where -- I'm trying as  
6 far as not to be technical, but I'm not going to waive  
7 my right, because the subsequent decisions obligate  
8 opposing counsel, to preserve your right, to object to  
9 that, and that's what I'm doing, Your Honor.

10 MR. J.J. JIMMERSON: Thank you.

11 THE COURT: All right. I honestly took it that  
12 based upon the evidence, the plaintiffs' position has  
13 changed.

14 MR. J.J. JIMMERSON: That's right.

15 THE COURT: That's how I took it. I didn't  
16 take it as his personal opinion on what was truthful or  
17 not. That's how I was looking.

18 Is that how it was intended?

19 MR. J.J. JIMMERSON: It is. And I will be very  
20 careful to reach the Lioce decision. I'm quite familiar  
21 with it. It was quite a heated case and it came at a  
22 good teaching moment for the lawyers who take the time  
23 to read it. But that's exactly right.

24 It is not an unreasonable position, although my  
25 clients thought it was, to suggest that it would not

1 change. But it is an unreasonable position and a breach  
2 of contract to think that you can adversely affect my  
3 clients' rights to a commission by making a later deal  
4 between the parties that would change defined terms and  
5 entitlement to money and sequence of construction which  
6 would lead to different calculations of commission  
7 because of the fact that Option Property is paid on a  
8 different formula than Purchase Property was paid.

9 Purchase Property was a percentage of the  
10 \$84 million, four percent up to \$50 million and one and  
11 a half percent above \$50 million to \$84 million, whereas  
12 Purchase Property was property that was being acquired  
13 and developed, that it would be one and a half percent  
14 times \$40,000 per acre times the number of acres. So  
15 the math is very different depending upon your finding  
16 as what was purchased by these parties.

17 So while we say within Exhibit A that there has  
18 been, and through the testimony of our clients,  
19 Mr. Wolfram and Mr. Wilkes, there has been a payment of  
20 the appropriate percentage of the \$84 million to the  
21 plaintiffs if all \$84 million of property is found by  
22 the Court to be Purchase Property, it is not the right  
23 calculation if the Court finds that some or a portion of  
24 the 2,100 acres was, indeed, Option Property for which  
25 they would be paid a different formula and a different

1 sum.

2 What I'm suggesting to the Court, though, is  
3 the legal principle that I think the Court would find  
4 acceptable is that by signing the Amended and Restated  
5 Option Agreement, Exhibit 5, and canceling, superseding,  
6 replacing -- the verbs used by these witnesses before  
7 you starting with Mr. Lash and thereafter -- the  
8 original Option Agreement, Exhibit 2, by Exhibit 5, they  
9 cannot adversely affect the rights of our clients to a  
10 commission.

11 That is where -- that is the folly of Pardee  
12 Homes of Nevada, Inc.'s position throughout the nine  
13 days of trial that we've been working together in this  
14 matter. Because they believe, as they've testified, We  
15 knew that boundaries would change, that the direction of  
16 which building might change -- they didn't say they knew  
17 it would change, but they were going to be flexible  
18 enough to change, and that was the testimony.

19 Mr. Whittemore was humorous enough to note,  
20 Listen, I'm here to entice them to buy more property, as  
21 much as I can get them to buy. Mr. Andrews confirmed  
22 that this morning saying that Mr. Whittemore would sell  
23 them anything that they would be interested in that  
24 Mr. Whittemore's company had an interest in, from water  
25 rights to all types of other aspects, golf course, the

1 rest.

2 But there was on June 1 -- that's where this  
3 begins, June 1, 2004 -- very defined terms and an  
4 expectation that not only would Pardee be buying  
5 single-family production residential property from the  
6 get-go, up to 1,950 acres, although within the confines  
7 within a larger 3,600 acre parcel, Parcel 1, but in  
8 addition they reserved themselves the right to buy,  
9 buyer's option to purchase the remaining portion of the  
10 entire site, which is everything other than the 3,600  
11 acres which is or becomes designated for single-family  
12 detached production residential use.

13 This is also important because, as counsel,  
14 both sides, it's slip and parry, you know. It's a sword  
15 out. It's a shield back. It's the nature of the  
16 advocacy rules that we both possess, all parties  
17 possess, as attorneys where the crucible of  
18 cross-examination and the presentation of evidence gives  
19 this court an opportunity to measure credibility,  
20 demeanor of the witnesses, and to sort of size up the  
21 situation.

22 Before this became a litigable point, nine  
23 years ago -- this case started in September of 2010. So  
24 I would say to you six years before this became a  
25 litigable issue, these parties, without the benefit of

1 litigation counsel, predicted, expected, contemplated  
2 when they signed this contract that there not only would  
3 be the designation at the outset of 1,950 acres to be  
4 paid for \$84 million -- it was 66 million, as you recall  
5 and grew to 84 million -- but that there would be the  
6 potential for becoming, the property being later  
7 designated for single-family detached production  
8 residential use for which there would be the right of  
9 Pardee to acquire the same.

10 And then there was a fair amount of negotiation  
11 and agreement as to the definition of production  
12 residential property, which I'm not going to read  
13 throughout, but it's found at page 2, again the same  
14 paragraph B, and it says that the Purchase Property,  
15 capital P, capital P, and the Option Property, capital  
16 O, capital P, are sometimes referred to herein  
17 collectively as the production residential property.

18 And this is what I acquired through Mr. Lash's  
19 cross-examination, and Mr. Whittemore, but particularly  
20 Mr. Lash, that production residential property runs  
21 through both. Production residential property can exist  
22 within with the Purchase Property, Parcel 1, and it can  
23 exist within the Option Property.

24 And that's why the contract says Purchase  
25 Property, a defined term, 3,600 acres of which they were

1 going to develop 1,950 on this day, and the production  
2 residential property -- excuse me, and the Option  
3 Property are sometimes referred to herein collectively  
4 as the production residential property. So the two  
5 types of property, purchase and option, are collectively  
6 referred to as production residential property if the  
7 property is being used for the seven reasons that are  
8 set forth in the definition that immediately follows.

9           So we can see that Pardee is not looking to  
10 limit itself on June 1 of 2004. It is investing  
11 \$66 million at that point, and for about 1,500 acres,  
12 and then it raised it up to 1,950 acres for \$84 million.  
13 And how did we get the price? Just take 2,000 acres  
14 times 40,000 an acre, \$80 million. So we know that  
15 that's how they got to the price.

16           And when you look at it, it was actually  
17 44,000, if the Court remembers, \$44,800 per acre, and  
18 then we did the math and had a little bit of humor,  
19 where he said, I guess Mr. Lash got the best of me,  
20 because when you take 2,112 acres and divide it into  
21 \$84 million, you get 43,700-some-odd dollars. I guess  
22 he got the best of me. The Court remembers that.

23           So production residential property, as used in  
24 this agreement, the term production residential property  
25 means the portion of the net usable acreage as defined

1 here, and that encompasses all of the Purchase Property  
2 and the Option Property, which includes, without  
3 limitation, all single-family detached production  
4 residential lots.

5 Let's stop there. Again, you can see that the  
6 concept of production residential property crosses the  
7 boundary between Purchase Property and Option Property,  
8 not only by definition, which I've just read to you, but  
9 here it's repeated again where it states, As used in  
10 this agreement, the term production residential property  
11 means that portion of the net usable acreage, as defined  
12 below, that encompasses all of the Purchase Property and  
13 the Option Property.

14 And so not only does is include the 3,600  
15 acres, which is defined as Purchase Property at this  
16 point in this agreement, and the balance of, what, the  
17 27,000 acres of Option Property, totaling 30,000 acres,  
18 which includes, without limitation, all single-family  
19 detached production residential lots. Keep in mind,  
20 we're not talking about houses. We're not talking about  
21 something that's being constructed. We're talking about  
22 lots.

23 And, of course, that translates to what a  
24 broker is entitled to. A broker is entitled, for  
25 putting a seller and a buyer together, to a commission

1 for being the procuring cause. Here it's limited to  
2 lots, not construction. But when they paid commission  
3 based upon the acquisition of the property, they weren't  
4 requiring the property to be developed. They weren't  
5 requiring the property to reach final map stage or even  
6 tentative map stage. They were entitled to a commission  
7 from the beginning.

8           And then the seven areas I've mentioned to you  
9 are the ones that are used for production residential  
10 lots, number one; which includes lots on which custom  
11 homes are constructed by buyer, that's two. Three, all  
12 land for roadways, utilities, government facilities,  
13 including schools and parks, and park sites are subject  
14 to the provisions of paragraph 7(c), which gave the  
15 reduced cost, half cost.

16           Open space was a fifth area, required or  
17 designated for the benefit of residential development  
18 pursuant to the master plan. Six was a habitat  
19 conservation plan or a development agreement. Seven was  
20 the drainage ways or other use associated with or  
21 resulting from the development of the Purchase Property  
22 and each option parcel of the Option Property, period.

23           And for purposes of this agreement, the term  
24 net usable acreage that I just referenced here shall  
25 mean the 30,000 plus or minus acres of the entire site

1 remaining after the final reserve designation made  
2 pursuant to the Coyote Springs Multi-species Habitat  
3 Conservation Plan as now drafted or as hereafter  
4 approved.

5           So that is the beginning portion of this  
6 contract which frames the expectations of the parties,  
7 CSI and Pardee, when they made their agreement on  
8 June 1, 2004.

9           The second amendment -- the first amendment,  
10 Exhibit 3 has no role in this. It just allows for the  
11 release of \$125,000 out of escrow in favor of CSI.

12           Then Exhibit 4, which is the second amendment,  
13 this is important because it fleshes out the exhibits  
14 referenced in Exhibit 2, and, therefore, by  
15 approximately September 6, approximately -- it's dated  
16 August 31 or September 1 -- by September 1, 2004, 60  
17 days later, there are all of the agreed-to exhibits that  
18 are to be attached to the Option Agreement.

19           Those exhibits you have reviewed extensively.  
20 However, they are quite important because when you look  
21 at the exhibits, you will see that there is, in the  
22 first exhibit, the map of the entire site with the donut  
23 hole in the middle, the donut hole being that property  
24 leased or otherwise in the possession of the Bureau of  
25 Land Management, which was contemplated to be sought to

1 have an exchange sometime thereafter.

2 And, therefore, you have the provision of what  
3 the land looks like before reconfiguration and what they  
4 believe it will look like after reconfiguration if they  
5 can get their desires on. And they had an expectation  
6 that they would be able to do that, but not a guarantee.  
7 So that's why they took the care to show what the site  
8 would look like.

9 They are very clear, as you know, in the bottom  
10 left-hand corner, south of the Lincoln County line down  
11 to 168 highway going east and 93 highway going north and  
12 south, to designate the 3,600 acres which  
13 Mr. Whittemore, through his companies, had fee simple  
14 title to, which was then becoming defined as the parcel  
15 property. That's Exhibit A-1.

16 Exhibit A-2 to Exhibit 4 is after  
17 reconfiguration, where it shows the donut hole has been  
18 moved substantially to the east, and you have two types  
19 of property. You still have Parcel 1, still defined  
20 here as of September 1, 2004, and then you have the  
21 Option Property, which is immediately to the east, of  
22 about equal size, equal size there, and then everything  
23 north of the Lincoln County line as also Option  
24 Property. So there's clear definitions of what it looks  
25 like.

1           The third exhibit, Exhibit B, is just the  
2 Parcel 1 map, and it shows by crosshatch. We had a map  
3 of it here that shows you what that looked like.

4           And then you have Exhibit C-1, which shows you  
5 what is the property -- the map of the Option Property  
6 before BLM reconfiguration and C-2, the property after  
7 BLM reconfiguration. What's important here at C-2, as  
8 we look at this, because when you look at it, even after  
9 reconfiguration the boundary lines of Parcel 1 remain  
10 intact. C-2, Bates stamp 1566 makes it clear that  
11 Parcel 1 still has an eastern boundary in precisely the  
12 location reflected on the deed in 2000, which was the  
13 Purchase Property 1, defined in the Option Agreement, 60  
14 days later, through September 1, 2004.

15           Now, they could have erased the line. They  
16 could have said, You know, we're going to go east here  
17 and so we're not going to bound our Purchase Property to  
18 just within the 3,600 acres as they had set forth in the  
19 agreement, and as conceded to by Mr. Lash and  
20 Mr. Whittemore. They could have erased the line and  
21 said they could go any direction, but they didn't.

22           And as it's particularly noted in this  
23 amendment, Amendment 2, Exhibit 4, all of the defined  
24 terms are maintained, retained, and confirmed and remain  
25 the same from that of 60 days earlier defined within the

1 larger agreement, Option Agreement 2.

2           Therefore, the defense by Pardee that, We had  
3 the right, it was contemplated we could build east as  
4 well as north, that may or may not be true. It is  
5 certainly not evidenced by the four corners of the  
6 agreement. We hear from opposing counsel so many  
7 objections in this trial, it's four corners, it's a  
8 fully integrated agreement. We accept that. That's an  
9 agreement that goes both ways.

10           That is because they cannot, through their oral  
11 recitation about what their intent is to later make  
12 changes, change, modify, or defeat the plain meaning of  
13 the words of Exhibit 2, the Option Agreement.

14           And that's the major defense here, but it must  
15 fail as a matter of law as well as fact because we know  
16 what was contemplated factually by the parties, as I  
17 discussed with you, and we know under the law that it's  
18 an entire agreement and there's not going to be parole  
19 evidence permitted to modify or amend or change its  
20 meaning, that within the plain words of now four  
21 documents, or now three documents -- June 1 document,  
22 Exhibit 2; the Amendment 1, which doesn't play a role,  
23 but confirmed what was going on; and Amendment 2,  
24 Exhibit 4, restating the same provisions -- are now  
25 three documents that confirm the accuracy and relevancy

1 and definitions that are set forth in the agreement as  
2 being true.

3 And the exhibits by themselves evidence the  
4 parties' intent now, of September 1, 60 days later, as  
5 it relates to Exhibit 2. And clearly the intent was  
6 Option Property was everything other than Purchase  
7 Property 1, Parcel 1, with or without redesignation or  
8 reconfiguration as shown in Exhibit C-1 and C-2, and the  
9 boundaries are firm.

10 That they say between themselves, Listen, we  
11 understood the boundaries may not stay the same is  
12 irrelevant if they don't involve Mr. Wolfram and  
13 Mr. Wilkes in those conversations.

14 And if we listen to Mr. Andrews today, they  
15 were anything but welcome to be part of the development  
16 process and the negotiation process between CSI and  
17 Pardee in the period of February 2004 through signing  
18 the document on June 1, 2004 from the all hands meeting.  
19 And, indeed, Mr. Andrews had no involvement with them  
20 thereafter. Other than the one meeting, he had no  
21 communication. He didn't care for Mr. Wilkes and didn't  
22 have any use for them. They added nothing, in his  
23 testimony.

24 Mr. Lash negotiated with Mr. Wolfram and  
25 Mr. Wilkes the Commission Agreement between June 1 of

1 2004 and September 1 of 2004 alone, and nowhere does he  
2 testify that he shared with them the terms and agreement  
3 of the Option Agreement as it relates to our intent to  
4 later modify the terms of the agreement.

5 In the Commission Agreement there is no  
6 suggestion, no wording, no nothing -- and Ms. Lundvall  
7 says it's an integrated agreement. The language at the  
8 bottom of page 2 says this is the parties' entire  
9 understanding. Again, that works to benefit both  
10 parties. We concur.

11 There is no language, therefore, within that  
12 simple three-page agreement that identifies that the  
13 terms Purchase Property, that the terms Purchase  
14 Property Price, that the terms Option Agreement, are  
15 ever subject to change in the future. There's no  
16 communications orally between the parties that the terms  
17 are ever subject to change in the future.

18 So whether or not it is true or not true that  
19 parties knew that the development plans may change in  
20 the future, what is clear, unrefuted is there's not a  
21 single piece of testimony or written evidence to suggest  
22 that Wolfram and Wilkes knew that the direction of  
23 construction was going to change from being virtually  
24 vertical along 93 highway to then virtually horizontal  
25 along the little sliver of property retained by

1 Coyote Springs that Mr. Whittemore called the boot and  
2 the reconfigured property going from west to east in  
3 that direction beyond the Parcel Property 1 line to the  
4 east.

5 In the maps, when you look at them, they are  
6 all most supportive of the plaintiffs' position in the  
7 form of grant, bargain and sale deeds for the Purchase  
8 Property, for the Option Property, Exhibits G-1 and G-2  
9 follow all of this, as did the rest of the exhibits.

10 Can we turn to the most important document in  
11 this case which is Exhibit 1, the Commission Agreement?

12 THE COURT: Exhibit?

13 MR. J.J. JIMMERSON: Exhibit 1. I believe that  
14 Ms. Lundvall also called it Exhibit L.

15 THE COURT: The Commission Agreement. I know  
16 what it is.

17 MR. J.J. JIMMERSON: I would just say as an  
18 aside, if we try this case again, Judge, let's don't  
19 have a duplication of exhibits.

20 THE COURT: I would have suggested that in the  
21 first place.

22 MR. J.J. JIMMERSON: I'm just saying both  
23 parties are kind of culpable for that, but I did find  
24 myself saying, What was the Exhibit L, and memorizing  
25 two sets of exhibits.

1           THE COURT: Usually that's why you do joint  
2 exhibits.

3           MR. J.J. JIMMERSON: We just didn't get it  
4 together. So I assume responsibility for that as well.

5           THE COURT: We worked it out. I have notes on  
6 both. So it's okay.

7           MR. J.J. JIMMERSON: Look at Exhibit 1 or  
8 Exhibit L, being the identical document, it's Option  
9 Agreement for the Purchase of Real Property and Joint  
10 Escrow Instructions dated June 1, 2004, as amended, the  
11 Option Agreement between Coyote Springs Investment, LLC,  
12 Coyote, and Pardee Homes of Nevada, Pardee.

13           Now, while this is a simple agreement, and it  
14 does contemplate the parties' entire understanding, it's  
15 a powerful agreement for what it says. First, just the  
16 RE tells you what is being referred to. It is expressly  
17 referencing the June 1, 2004 Option Agreement and the  
18 terms of that Option Agreement.

19           It was in the possession of Mr. Wilkes and  
20 Mr. Wolfram through their respective companies. They  
21 understood, as they negotiated this Commission Agreement  
22 in July and August of 2004, what the terms Purchase  
23 Property Price means, what the term Option Property  
24 means, what all the capitalized terms here meant, as  
25 defined by the Option Agreement for the Purchase of Real

1 Property and Joint Escrow Instructions dated June 1,  
2 2004, Exhibit 2, herein.

3 It's important that you understand this point,  
4 which I do -- I want to say it. I know you do, but I  
5 want to say it out loud. Purchase Property Price, by  
6 definition, does not mean \$84 million. The definition  
7 of Purchase Property Price under Exhibit 2, the Option  
8 Agreement, is the price for Purchase Property.

9 And that's because Mr. Whittemore was hoping  
10 they would buy more. It was a fluid situation. You  
11 have the express provision that they could buy more  
12 property. So the Purchase Property Price is the price  
13 to buy Purchase Property. It's not defined and it's not  
14 equal to \$84 million.

15 I want you to understand these points as being  
16 particularly central to today's presentation. At the  
17 time of June 1, 2004, Pardee had the right to buy  
18 Purchase Property. They estimated a purchase about  
19 1,500 acres for \$66 million, which by Amendment 2,  
20 September 1, grew to \$84 million and 1,950 acres.

21 To buy more property would require the exercise  
22 of an option, sending notice and complying with the many  
23 steps that Ms. Lundvall made a big thing to do about  
24 what had to be done.

25 And she is saying as her defense for Pardee is

1 the failure to send a notice, the failure to open an  
2 escrow, the failure to have a deed, the failure to have  
3 escrow instructions, the failure to close an escrow, the  
4 failure to record a deed for Option Property, therefore,  
5 means they never bought Option Property. That's not  
6 true.

7 THE COURT: Can I just clarify what you are  
8 saying? When you say Option Property, you mean --

9 MR. J.J. JIMMERSON: Everything else.

10 THE COURT: -- single -- you mean everything  
11 else?

12 MR. J.J. JIMMERSON: No. I mean --

13 THE COURT: It's limited to -- I want to make  
14 sure because --

15 MR. J.J. JIMMERSON: I have been guilty of that  
16 for nine days, and my son told me at lunch I've been  
17 guilty for nine days. I'm referring to Pardee's  
18 acquisition of --

19 THE COURT: Single-family.

20 MR. J.J. JIMMERSON: -- single-family  
21 production residential lots in either -- because I just  
22 made a big point about it -- Purchase Property or either  
23 within Option Property -- and they have the right to do  
24 either -- requires one single method to do so under this  
25 contract, Option Agreement.

1           THE COURT: I understand. I just wanted to  
2 make sure. I knew that's what you were saying, but just  
3 for the record I wanted to make sure I'm not missing  
4 something.

5           MR. J.J. JIMMERSON: You are not at all.

6           The only way they can buy single-family  
7 production residential property outside of the Purchase  
8 Property is through the mechanism shown to buy Option  
9 Property, paragraph 2.

10           Compare that to the Commission Agreement. The  
11 Commission Agreement entitles Mr. Wolfram and  
12 Mr. Wilkes, if you'll allow me to speak on behalf of  
13 Award and General in 2004, and now for themselves, to  
14 receive a commission irrespective of the method in which  
15 the defendants choose to acquire single-family  
16 production residential property. How do we know that?  
17 Because of the anti-circumvention or avoidance provision  
18 within the four paragraph of page 2.

19           And I believe if you listen to the testimony of  
20 Mr. Lash and Mr. Andrews, particularly Mr. Andrews  
21 yesterday afternoon through my examination and this  
22 morning, the nature of a Commission Agreement needs to  
23 be and has been testified to, that's different than this  
24 development agreement, Option Agreement, Exhibit 2.

25           A Commission Agreement for a real estate

1 commission involves the concept of procuring cause. And  
2 it generally refers that whoever is hiring the broker,  
3 in this case Pardee -- retaining, it wasn't employed, so  
4 retaining them -- agrees to pay a percentage of the  
5 purchase price for having located the property, brought  
6 the property to the buyer or seller, for having  
7 facilitated the sale of real estate, in this case, from  
8 Pardee's perspective, facilitating the purchase of real  
9 estate. That's the nature of the agreement.

10 That's why, as Mr. Andrews testified and  
11 Mr. Lash the same, but Mr. Andrews quite in detail, his  
12 familiarity with many, many brokers, and perhaps his  
13 disdain for them, because he doesn't appreciate how much  
14 they are paid or doesn't appreciate the quality of their  
15 services, but nonetheless, was very clear that they are  
16 typically paid as a percentage of the purchase price or  
17 sale price. This is no different than here.

18 The important point here is the Commission  
19 Agreement, Exhibit 1, captures our clients' rights to  
20 receive a commission irrespective of the method in which  
21 the buyer, Pardee, acquires it.

22 There is no limitation within this contract  
23 that says only if Pardee exercises its right to buy  
24 Option Property under paragraph 2 of Exhibit 2, Option  
25 Agreement of June 1, and only if it sends a notice of

1 exercise of Option Property and only if it opens up an  
2 escrow and only if it deposits money and only if it  
3 closes escrow and only if it records a deed and only if  
4 it uses a settlement statement and a title company will  
5 you be entitled to a commission if we, Pardee, construct  
6 or -- excuse me -- designate for use single-family  
7 production residential property, residential lots, the  
8 word being "lots."

9 That is, I believe, the folly of the last  
10 minute gasp by Mr. Lash in changing his testimony here  
11 on Tuesday -- I'm sorry -- on Monday and Mr. Andrews'  
12 testimony here yesterday afternoon and this morning.

13 Because when you look at the agreement, as  
14 Mr. Lash testified to and as Mr. Lash testified on  
15 cross-examination to opposing counsel's questions, this  
16 document had several iterations, developed over a 60-day  
17 time period, July and August, it's signed about  
18 September 1. It might have been a couple days later.

19 And in the agreement it talks in terms of the  
20 structure of the agreement is mimicking the Option  
21 Agreement to the extent that it models the percentage of  
22 Purchase Property Price, which is what, the price of  
23 Purchase Property, which at that time was \$66 million,  
24 for which four percent of the first \$50 million would be  
25 granted and one and a half percent of the next

1 \$16 million would be paid to them if they acquire that  
2 property.

3 And then the (iii) is in respect to any portion  
4 of the Option Property purchased by Pardee pursuant to  
5 paragraph 2 of the Option Agreement, Pardee shall pay  
6 one and one and a half percent of the amount derived by  
7 multiplying the number of acres purchased by Pardee by  
8 \$40,000 times one and a half percent.

9 Now, understand, we heard Mr. Andrews say, you  
10 know, that -- Ms. Lundvall said, Did you think you were  
11 being fair?

12 And the answer was, We were generous to them.

13 Yet, if you recall the complexity of the whole  
14 comprehensive nature of the testimony, Mr. Lash says  
15 they typically paid four percent of their purchase price  
16 to their brokers. Here Mr. Lash negotiated a better  
17 price for himself, four percent to a limit of  
18 \$50 million, and then reduced substantially to one and a  
19 half percent of the balance of \$16 million.

20 And, indeed, when they added another  
21 \$18 million purchases to \$84 million, it was the same  
22 four percent to \$50 million and one and a half percent  
23 for the balance of \$34 million, as shown in Amendment 2,  
24 Exhibit 4. So the compensation was fair considering the  
25 unusual nature and size of this project.

1           As Mr. Andrews says, it's the biggest project  
2 Pardee has ever been involved in. And that's saying  
3 something because Pardee has enjoyed a good reputation  
4 over the years, certainly here in Nevada, for its  
5 development of single-family production residential  
6 homes.

7           In the course of the negotiations, as brought  
8 out by Ms. Lundvall in her examination of Mr. Lash,  
9 Mr. Lash concedes that Mr. Wolfram and Mr. Wilkes,  
10 through our law office, requested new language from one  
11 draft to another that prevented circumvention or  
12 avoidance of this obligation.

13           Keeping in mind that when the parties are  
14 negotiating Exhibit 1, the Commission Agreement, the  
15 only way that the parties understood by the plain words  
16 of the Option Agreement for them to acquire land was  
17 Purchase Property or Option Property. How do you  
18 acquire Option Property? Through the processes in  
19 paragraph 2, which are defined within that agreement.

20           So then when you look at the structure of this  
21 Commission Agreement, you have -- some of the mechanics  
22 are spoken about in the first paragraph, which is to say  
23 that they will be paid as Pardee makes payments to  
24 Coyote Springs monthly. And then as it relates to  
25 Option Property, they will wait, and they will wait

1 until they actually close escrow. To show some bona  
2 fides, Pardee will deposit that money, that commission  
3 into an escrow and, therefore, demonstrate the money is  
4 available to be paid over, but there's the need for  
5 Option Property to the wait until the parcel has been  
6 acquired, close escrow has occurred and deed recorded in  
7 Pardee's name.

8 The second paragraph is, of course, an  
9 important paragraph for this issue, Pardee shall provide  
10 to each of you a copy of each written option exercise  
11 notice given pursuant to paragraph 2 of the Option  
12 Agreement together with information as to the number of  
13 acres involved and the scheduled closing date. In  
14 addition, Pardee shall keep each of you reasonably  
15 informed as to all matters relating to the amount and  
16 due dates of your commission payments.

17 Mr. Lash conceded on Monday that commission  
18 payments, being the plural, applied equally to both  
19 commission payments received as a result of the  
20 \$84 million Purchase Property purchased as well as any  
21 monies received as a result of acquisition of Option  
22 Property for single-family production residential use.

23 You'll recall the testimony of Mr. Lash on  
24 October 28, 2013. I would like to just say to you that  
25 we did not understand and did not know of the RES 5

1 development, the tentative map, Exhibit 43, the 332 lots  
2 that encompass all of the Residential 5 and a portion of  
3 the multi-family purchase agreement as well as the  
4 exchange parcel.

5 And when I was asking the questions, because we  
6 didn't know where the trial went, I'm asking for  
7 posterity. I'm asking these questions for Mr. Wilkes'  
8 and Mr. Wolfram's heirs and assigns, spouses and  
9 children.

10 So I asked a series of questions about, Well,  
11 what happens -- because I knew the language in the first  
12 page of the Option Agreement which is designated or  
13 later designated for production residential property --  
14 what would happen in 2024, an arbitrary year? What  
15 would happen in 2024, Mr. Lash, if you had acquired  
16 property that you changed and designated later for  
17 single-family production residential use?

18 Answer, Well, I haven't given it much thought,  
19 but I think you would be entitled to a commission. That  
20 was one answer.

21 The next answer was, as we read to the Court, a  
22 much more specific determination, and that was that if  
23 we went to the point of going to the county and getting  
24 zoning -- the question was, In any event, because you do  
25 retain the right to change the use -- that certainly is

1 undisputed here -- and if you need to, to obtain the  
2 governmental approvals and zoning, that then would cause  
3 my clients to be entitled to dollars associated with  
4 that if you built residential; correct?

5 Answer: Correct.

6 That wasn't something I haven't given much  
7 thought. That was ten questions later, the same  
8 examination, the same consistent position. What is the  
9 need to change the testimony?

10 This Court has been -- and I appreciate the  
11 opportunity to practice in front of you -- this Court,  
12 and this record should reflect this, goes out of its way  
13 to benefit the parties as to credibility. It's your  
14 other personal style. You don't like a lot of  
15 theatrics, of which I'm guilty. You don't like a lot of  
16 game playing, and you are not crazy with the word "lie"  
17 or "cheat." Those are words that run hard on you, and  
18 you are very careful and judicious before you use words  
19 like that.

20 So you are willing to accept the credibility of  
21 Jim Wolfram and Walt Wilkes and assume or Accept  
22 credibility of Jon Lash, Harvey Whittemore, or Klif  
23 Andrews.

24 MS. LUNDVALL: Your Honor, now I need to also  
25 place another caution. There is additional case law

1 that speaks to the fact that you are not to personalize  
2 is the argument to the finder of fact. And, therefore,  
3 I don't think it appropriate for this counsel to be  
4 suggesting that, This is how I know the Court deals with  
5 certain circumstances.

6 MR. J.J. JIMMERSON: I am speaking to my  
7 observations of how this Court has conducted this trial.  
8 And responsively to opposing counsel's comments, I would  
9 have the obligation, I believe, if I felt the judge was  
10 acting in a way that needed to have a record made that  
11 it was inappropriate or improper or likewise giving each  
12 side the benefit of the doubt.

13 Because if we are successful in this case, I  
14 want a record that the Nevada Supreme Court can read  
15 that Judge Earley was fair to both parties. So there's  
16 no suggestion by opposing counsel in her brief later on  
17 two years from now that somehow Jimmerson got something  
18 over on the Court or that there was anything other than  
19 a fair rendition of verdict by the Court. So that's  
20 appropriate, in my judgment, to make a record. It's not  
21 something I'm belaboring.

22 I'm getting these objections in the middle of  
23 my closing argument. That's why.

24 THE COURT: I hope -- I will say I hope that if  
25 I did anything that you felt showed prejudice -- it's

1 difficult because I'm up here for a long time. If I did  
2 do something that in any way made you think I did  
3 something inappropriate or as favoring one side, I'll do  
4 like the jury instruction in front of the jury, I did  
5 not intend to convey any of that. And, likewise, if I  
6 have an observation, I tried very hard on credibility.

7 So either way, I hope that you all know I did  
8 not do anything by my facial the wrong way, because I  
9 have not felt that way.

10 MS. LUNDVALL: And, Your Honor --

11 THE COURT: And I do try to judge everybody's  
12 credibility. Yes, I do. Your point is I don't like  
13 calling people liars, just because I think I want to  
14 judge the facts of the case based on the facts and the  
15 law.

16 MR. J.J. JIMMERSON: I will say that my  
17 comments will work both ways. If you find in favor of  
18 the defendants, these comments can be used by opposing  
19 counsel to suggest to the Nevada Supreme Court we got a  
20 fair shake and lost.

21 THE COURT: I understand where you are going,  
22 but I don't --

23 MS. LUNDVALL: Your Honor, from my perspective,  
24 I'll make a record for you. We have not suggested that  
25 there's been some type of influence outside the four

1 corners of this courtroom that Mr. Jimmerson has  
2 exerted.

3 What my objection was, and he cannot twist my  
4 objection, was the very standard objection that when an  
5 attorney, during closing argument, tries to personalize  
6 the remarks to the finder of fact, that is  
7 inappropriate.

8 MR. J.J. JIMMERSON: I was not doing that. I  
9 appreciate the caution.

10 THE COURT: I see why you would think he was  
11 doing it that way, and I think he was trying to be more  
12 objective, but I understand your objection. And I did  
13 not take it that way, but I think, for the record, that  
14 was appropriate.

15 Let's go back to credibility, because I want to  
16 talk about credibility. I think that's why you were.

17 MR. J.J. JIMMERSON: I absolutely was.

18 The only major change of testimony in this case  
19 in nine days, plaintiffs to defendants, defendant's  
20 witnesses, plaintiffs' witnesses, was that of Mr. Lash.

21 What occurred between October 28, 2013 when he  
22 testified without our having discovered this issue  
23 involving Residential 5 was his best estimate of what he  
24 was to try to demonstrate the theme that you heard  
25 announced in the opening statement by the defense that

1 Pardee always does the right thing, those words, was to  
2 fairly, when faced with the terms of this Commission  
3 Agreement, which is what the subject was when it was  
4 being asked, was what did the circumvention mean? What  
5 does the word "circumvention" mean? What does "avoid"  
6 mean?

7 But on October 28th, it was in 2024, because we  
8 know you can change use -- and I went through this. He  
9 didn't change the testimony about use. We have the  
10 right to change use, he conceded. He didn't change that  
11 in his testimony. We have the right to change methods.

12 And then if you decide to change property  
13 that's later acquired -- excuse me, that's acquired by  
14 you and use it and designate it, affirmatively designate  
15 it, like an affirmative act, not a mistake and not some  
16 sort of inadvertent act, but when you go out of your way  
17 to make a designation so it's unqualified for  
18 single-family residential use, would they be entitled to  
19 commission, the answer is yes.

20 And that's the fair reading of the Commission  
21 Agreement. Because Pardee not only would send you a  
22 copy of the written option notice if they chose to  
23 acquire land, which was the only contemplated way on  
24 June 1 and on September 1, when the Commission Agreement  
25 was they were to do it this way, but as a fallback, as a

1 catchall, as a broker seeking to protect the mischief of  
2 a party, whether it be intentional, whether it be  
3 inadvertent, whether it be mistake, whether it be in  
4 2024 and you forgot about the Commission Agreement --  
5 could happen. People will die. My clients will not be  
6 here in 2024, let alone 2044 -- that you are obliged,  
7 Pardee, to keep each of you reasonably informed as to  
8 all matters relating to the amount and due dates of your  
9 commission payments.

10 I want to make it very clear that there's been  
11 a default, a clear default by Pardee in keeping Walt  
12 Wilkes informed. Other than one letter, two letters at  
13 the max, there's no effort on the part of Pardee to keep  
14 each of you reasonably informed.

15 The November 24, 2009 letter of Mr. Lash is  
16 written to Mr. Wolfram. Of course, Ms. Lundvall asked  
17 Mr. Lash, Why did you send it only to Mr. Wolfram?

18 The answer was, Well, I thought they were  
19 partners. I thought that, you know, one would  
20 communicate with the other.

21 This is a breach contract because there is no  
22 effort to send the November 24th letter, nor, what, 13  
23 out of the first 16 key exhibits that are exchanged  
24 between Mr. Lash and the plaintiffs, between  
25 Mr. Jimmerson and the defendants, between the defendants

1 writing back to Mr. Jimmerson. There's no effort to  
2 communicate directly with each of the parties. So there  
3 is clearly a breach on that point alone.

4 But just as, perhaps, more importantly, but  
5 just as importantly, is the obligation to keep each of  
6 you reasonably informed as to all matters relating to  
7 the amount and due dates of your commission payments.

8 It is an incorrect interpretation on the part  
9 of Pardee to think that they can send commission  
10 payments, Exhibit A in evidence, and discharge fully its  
11 obligation under this paragraph.

12 It is also false for the defendants to say you  
13 can go look for deeds, but as we know, intended use is  
14 never found in any of these documents by anything  
15 delivered by them. And you certainly had the error made  
16 by Mr. Lash in his November 24, 2009 letter that he  
17 didn't designate that within the multi-family purchase  
18 agreement, there was already planned, already set forth  
19 a designated use of Residentials 1, 2, 3, 4 and 5, and  
20 particularly 5, of the maps that show single-family  
21 homes. That's how this came to be.

22 I want to go back to those maps in a few  
23 minutes, but I want to stay on what's before you. What  
24 does "reasonably informed" mean, keeping each of you  
25 reasonably informed as to all matters, Mr. Lash?

1           Answer: Sufficient information being provided  
2 by Pardee to your clients, Mr. Jimmerson, so that they  
3 could on their own, independent of Pardee, confirm the  
4 intended use and what Pardee is doing. That was his  
5 answer. He confirmed it again on Monday. That was the  
6 exact testimony he gave at page 211 of his --

7           THE COURT: Of Monday or of before?

8           MR. J.J. JIMMERSON: The 28th of October, and  
9 he confirmed it again on Monday. I asked him the same  
10 question and he gave the same answer as to reasonably  
11 informed meaning independent verification.

12           And you recall I went so much further to say,  
13 In other words, there's not an obligation on the part of  
14 Wolfram and Wilkes to take your word for it?

15           Answer: That is right.

16           That is what was wrong with the November 24,  
17 2009 letter, Exhibit 15. First, contrary to Mr. Lash  
18 saying, I don't know how many maps we gave them, a very  
19 kind of reckless comment on Monday, there was only one  
20 map that Pardee ever gave the plaintiffs as contained as  
21 an attachment to Exhibit 15, the November 24, 2009  
22 letter.

23           And that map is inaccurate on its face because  
24 it fails to contain the single-family production  
25 residential use already designated by November 2009 of

1 RES 5 within the portion of the multi-family agreement  
2 adjoining the exchange parcel that we saw in Exhibit E  
3 of Exhibit 13. And that was the -- you recall, that was  
4 the map that turned --

5 THE COURT: I have it.

6 MR. J.J. JIMMERSON: -- this light on. Because  
7 when you look at Exhibit E, you saw the exchange parcel,  
8 the dark gray patch, and to the left was the sign  
9 Pardee. But in looking at the amendments, I couldn't  
10 see where Pardee acquired that land in the seven  
11 amendments.

12 And so when you look at the seventh amendment,  
13 Exhibit 12, you'll see it's by a separate agreement, the  
14 multi-family agreement referenced, not part of the  
15 \$84 million as shown on the Schedule 5 at Exhibit 12.  
16 And, therefore -- and you see that the lots are already  
17 drawn. They are already depicted as of June of 2009.  
18 The seventh amendment is April 24, 2009. The eighth  
19 amendment is June 2009, 60 days later, a little bit  
20 less.

21 The seventh amendment shows Exhibit B-6 and  
22 B-1, which I'll show you in a minute. And eighth  
23 amendment shows you Exhibit E, the exchange parcel, but  
24 right next to it is the already designated single-family  
25 home lots.

1           So Mr. Lash's change in testimony is a  
2 recognition that between October 29th, 2013, when  
3 Mr. Whittemore testified, and December 9, 2013, with the  
4 delivery on November 27th, 2013 of Exhibits 33 through  
5 43, of which 39, 40, 41 and 43 are admitted into  
6 evidence, that there was a need to change the testimony  
7 because his testimony would be the designation of the  
8 single-family land would entitle our clients to an  
9 approximate \$31,000. If you use 50 acres, it's 30,000.  
10 If you use 53 acres, it's about \$32,000, what  
11 Mr. Andrews calls chump change.

12           Now, but notwithstanding the intended use and  
13 the designation, which still stands today -- it's the  
14 last map, it's the action of Pardee for this property --  
15 what I want you to understand is it was intended for  
16 single-family residence in 2009, in 2008.

17           One of the maps that we have not spent a lot of  
18 time on, but I did want you to turn to, please, if you  
19 would, is Exhibit 12 --

20           THE COURT: 12 or 13?

21           MR. J.J. JIMMERSON: 12, B-1. It's just before  
22 B-6.

23           THE COURT: Okay.

24           MR. J.J. JIMMERSON: I'm referring now  
25 specifically to the map at 1156, CSI-Wolfram 1156,

1 Exhibit B-1. If the Court, please, plainly for the  
2 Court's edification, is Residential 5 shown just to the  
3 right and at Denali Summit Parkway or Avenue.

4 May I approach the bench?

5 THE COURT: Yes.

6 MR. J.J. JIMMERSON: This is Tentative Map 2  
7 right here. That is the -- you can see it is already  
8 zoned, 2009, for single-family residential lots.

9 THE COURT: Did you say zoned for it?

10 MR. J.J. JIMMERSON: I misspoke. It is already  
11 designated. Forget the zoning. It's already  
12 designated, as defined by the Option Agreement,  
13 Exhibit 2, for single-family production residential  
14 lots. It's plain as day right there.

15 So what is crucial here is to understand why --  
16 not only do we explain and you can see it -- why there  
17 would be a motivation, whether it be true or not, a  
18 motivation for Pardee to change this one answer out of  
19 two long days of testimony by Mr. Lash, because he  
20 recognized that this property from the outset, at least  
21 April 24, 2009, if not earlier, had found this  
22 property -- already designated this property for  
23 single-family use, but didn't include it in the  
24 November 24, 2009 letter.

25 And when you look at the November 24, 2009

1 letter, it is carefully written, perhaps with aid of  
2 counsel, certainly by Mr. Lash, because nowhere in that  
3 letter does it say this map represents all of the  
4 property Pardee has designated for single-family  
5 production use. Nowhere will you find in a sentence in  
6 that letter.

7           What you find in that letter, when you look at  
8 Exhibit 15, is this is how -- this is the property we  
9 acquired with the \$84 million that we expended and gave  
10 to CSI. And, indeed, that is exactly what the letter  
11 says. This is the property we acquired. And it says  
12 the adjustment in price per acre for these  
13 nonresidential uses has increased the 1,950 acres  
14 originally described to the purchase and sale agreement,  
15 but has now changed the original price. Your commission  
16 is based on a percentage of the total price and not the  
17 number of acres, period, end quote.

18           That is an incorrect statement. If you find,  
19 as I believe it's now undisputed, that Option Property  
20 east of the Parcel 1 location was acquired by Pardee for  
21 single-family production residential property, then a  
22 different computation for which an accounting is  
23 warranted, under Count I of the Complaint, by Pardee to  
24 Mr. Wolfram and Mr. Wilkes to ascertain the number of  
25 acres, what the computation price would be, times

1 \$40,000 an acre, times one and a half percent, and then  
2 compare it to what was actually paid by them.

3 THE COURT: You are talking about the RES 5?

4 MR. J.J. JIMMERSON: No, I'm not. I'm talking  
5 about property outside of that parcel generally.

6 THE COURT: Do it again then. I'm sorry. You  
7 are saying --

8 MR. J.J. JIMMERSON: Let me stay on RES 5. You  
9 are right.

10 THE COURT: We've now switched.

11 MR. J.J. JIMMERSON: I did. Shame on me.

12 So what I'm saying to you is that the letter,  
13 either inadvertently or intentionally, does not disclose  
14 that on November 24, 2009, as evidenced by their  
15 acquisition in the seventh amendment, April 24, 2009,  
16 six months later, seven months later, that they had  
17 acquired property under the side agreement, multi-family  
18 agreement, that had already been designated for  
19 single-family use as shown by B-1 of Exhibit 7,  
20 Exhibit 12 -- the seventh amendment is Exhibit 12 -- and  
21 did not disclose it.

22 And it was that property, along with two  
23 others, that caused Mr. Wilkes to write his letter --  
24 Mr. Wolfram to write his letter to Jon Lash on April 21,  
25 2010, Exhibit 23, where he attaches his map, and he

1 references the other four parcels that he found under  
2 the name of Pardee for which there's no designated use.

3           And he says: Dear Jon, as we discussed on the  
4 phone, please find enclosed a map of purchases on  
5 Coyote Springs. As you can see, my map does not agree  
6 with your map on acreage purchased by Pardee. My  
7 information came from county records. Please study the  
8 map, as I have your map. Then we can discuss the  
9 situation. Once we get the acreage settled, it is  
10 imperative we establish a format for future transactions  
11 on Coyote Springs. My attorney sent your attorneys a  
12 simple format that would take any title company only a  
13 few minutes to complete, but we never received a reply.  
14 Walt's family, my family, and Pardee could understand  
15 this document in the event something happened to any of  
16 us. I will contact you in a few days after you've had  
17 time to study the maps, Jim Wolfram.

18           And Mr. Wolfram then testified, After I sent  
19 him this letter, I did call Jon Lash, and Jon Lash was  
20 adamant that this was not subject to a commission, and  
21 he would not be providing the information.

22           In the letters between Stringer and Jimmerson,  
23 you see demands repeatedly by Mr. Jimmerson for the  
24 documents, and refusals by Mr. Stringer initially,  
25 despite a promise that he will provide it, and

1 Mr. Curtis, where they never provide information, just  
2 saying it doesn't apply, it's not part of the  
3 84 million, you are not entitled to commission, and  
4 we're not providing the documents.

5 That, by itself, Your Honor, is a breach of  
6 contract, Exhibit 2, of the implied covenant of good  
7 faith and fair dealing, and a breach of the contract to  
8 keep them reasonably informed as to all matters  
9 regarding their commission statements.

10 Again, how would our clients know what is in  
11 these agreements without the ability to confirm the  
12 same? That was Mr. Lash's words to objectively or  
13 objectify what a reasonable man's test, a reasonable  
14 woman's test would be to understand what does it mean to  
15 keep each of you reasonably informed as to all matters  
16 that relate to payment of commission payments to you.

17 And this can be obtained by a signing  
18 confidentiality agreement, which our clients would  
19 freely sign. There was a lack of care about  
20 confidentiality when they submitted the Amended and  
21 Restated Agreement, Exhibit 5, because it was deemed  
22 confidential, but sent by the title company.

23 And so the concept they are hiding behind,  
24 well, the documents were confidential, does not excuse a  
25 contractual obligation to keep them reasonably informed.

1 How would we know that all the property under the  
2 multi-family agreement is multi-family designated use  
3 property?

4 And according to Mr. Lash's letters and  
5 Mr. Curtis' letter and Mr. Stringer's letter, the answer  
6 is, You have to take our word for it. You have to trust  
7 us. We affirmatively and intentionally decline to  
8 provide you the documents.

9 It was only after a lawsuit is brought do you  
10 now have the right to obtain some documents, like the  
11 Amendments 1 through 8, and as Mr. Wolfram testified,  
12 particularly as it relates to Amendment 7, Amendment 7  
13 and 8 being the guts of it, he could know what was  
14 purchased, what was designated intended use for homes or  
15 not. That was never sent.

16 And further, we know that while Mr. Stringer  
17 testified in his deposition before you that he doesn't  
18 recall or didn't give me a promise to provide the  
19 detailed information that was set forth in my  
20 correspondence to him, he didn't respond for a period of  
21 approximately three months. In his deposition he  
22 testified, so you know, I don't recall that and I don't  
23 think I promised Mr. Jimmerson the documents that he  
24 specifies.

25 THE COURT: That's the depo I still have to

1 read?

2 MR. J.J. JIMMERSON: Right. But he did not  
3 write a letter saying back, Mr. Jimmerson, I received  
4 your letter wherein you state that I promised to provide  
5 the following nine categories of documents. I don't  
6 recall that or you are a liar or I didn't say that.  
7 None of that is forthcoming from Mr. Stringer or Pardee  
8 throughout any of this correspondence.

9 And the letters from Mr. Wolfram through the  
10 Jimmerson Hansen firm are replete and consistent with  
11 information requesting maps. We saw the affirmative  
12 rejection by Mr. Lash to provide maps. Requests for  
13 plat maps, rejected by Mr. Lash in his correspondence.  
14 And the request for escrow documents -- you know that  
15 none of the actual documents were ever delivered to  
16 plaintiffs?

17 If you had the escrow documents, you would have  
18 the APN number, you have the amount of money expended,  
19 you'd have the number of acres, you'd have a legal  
20 description, and you wouldn't be relying upon a deed  
21 that doesn't necessarily have acres. We went through  
22 several deeds that didn't have any acreage on it, which  
23 we know there's no intended use, and no explanation.

24 And, indeed, as you saw in Exhibit JJ and if  
25 you look at Exhibit MM, there's two additional efforts

1 on the part of Mr. Lash to affirmatively instruct  
2 Mr. Butler and another employee not to provide the  
3 information requested by Mr. Wolfram. Indeed, there's  
4 an exhibit here that talks in terms of Mr. Wolfram being  
5 troublesome for his repeated requests for information,  
6 using that term.

7 So while you've heard the defense by Pardee  
8 that there was no exercise of notice, clearly this  
9 Commission Agreement is much broader to capture any  
10 entitlement to commission.

11 THE COURT: I just want to make sure that is  
12 what you are saying. You are saying that it doesn't  
13 matter what label or how they purchased it, whether it  
14 was multi-family, whether it was under -- they paid CSI  
15 for multi-family or they paid it for commercial. Once  
16 they acquire it, if they designate it at any time in the  
17 future for single-family residence, it's your  
18 interpretation of the Commission Agreement that  
19 Mr. Wolfram and Mr. Wilkes will get a commission?

20 MR. J.J. JIMMERSON: That is true.

21 THE COURT: I thought that was it, but I really  
22 wanted to make -- we've kind of talked -- I don't want  
23 to say talked around it, but I wanted to make sure that  
24 is what you are saying.

25 And that's why you look to the terms of

1 designation when you were looking as opposed to  
2 purchase?

3 MR. J.J. JIMMERSON: Exactly. Because the  
4 Option Agreement, Exhibit 2, talks in terms of  
5 designated, is or later designated single-family  
6 production residential property.

7 THE COURT: A little different from -- okay. I  
8 just wanted to make sure I'm on the right page because I  
9 want very clear what your positions are, and I apologize  
10 to stop you.

11 MR. J.J. JIMMERSON: That's fine.

12 THE COURT: If I don't understand, I really  
13 want to make sure I'm crystal clear on the issues.

14 MR. J.J. JIMMERSON: There's at least --  
15 there's then three -- many obligations of Pardee to  
16 Wolfram and Wilkes under the Commission Agreement.  
17 Obviously, to pay the commission is one of them.

18 But secondly, you have an obligation to keep  
19 them, as an additional point --

20 THE COURT: Reasonably informed.

21 MR. J.J. JIMMERSON: -- reasonably informed.

22 And the third is the circumvention or  
23 avoidance. So those are --

24 THE COURT: Really, those are the three major  
25 issues?

1 MR. J.J. JIMMERSON: I think so. I think you  
2 are absolutely right.

3 THE COURT: I just want to make sure because  
4 there's been so much testimony. I really don't want to  
5 miss anything that you feel is --

6 MR. J.J. JIMMERSON: Those are, I believe, to  
7 be the three major points of the Commission Agreement.

8 THE COURT: So you were just talking about the  
9 reasonably informed?

10 MR. J.J. JIMMERSON: Now I'll speak to  
11 circumvention and avoidance. What's important here is  
12 under reasonably informed is you have a clear and mutual  
13 understanding by Pardee, through Lash, and plaintiffs,  
14 by Wolfram and Wilkes, of what it means.  
15 Pre-litigation, pre-pressure to exaggerate, pre-pressure  
16 to fit your answers into some legally developed defense  
17 without the purview or the onset or complication of  
18 litigation. The pure intent of the parties is what I  
19 would say.

20 Then the fourth paragraph, For purposes of this  
21 agreement, the term Pardee shall include any successor  
22 or assign of Pardee's rights under the Option Agreement  
23 and Pardee's obligation to pay the commission to you at  
24 times and amounts described above shall be binding upon  
25 Pardee and its successors and assigns.

1           That inures to the benefit of Mr. Wolfram and  
2 Mr. Wilkes. It also explains that successors in  
3 interest of Pardee, whether it be a merged company,  
4 whether it be a company that is acquiring Pardee,  
5 whether it be Tri Pointe that's in the process  
6 potentially of buying Weyerhaeuser's interest, which then  
7 would include both of the Pardee subsidiaries we've  
8 talked about in this of California and of Nevada, would  
9 be obliged to honor the terms of this agreement.

10           And then it continues, Pardee, its successors  
11 and assigns, shall take no action to circumvent or avoid  
12 its obligation to you as set forth in this agreement.

13           THE COURT: Okay.

14           MR. J.J. JIMMERSON: That is a gold-plated  
15 sentence. Because it is not a bar against cheating.  
16 It's not a bar against fraud. It's a bar against taking  
17 action, any action -- the words "any action" -- shall  
18 take no action to circumvention or avoid its obligation  
19 to you as set forth in the agreement.

20           So the position of the defense has changed  
21 from, We have been doing the right thing -- the opening  
22 statement and the first seven or eight words out of  
23 Mr. Lash's mouth when I had cross-examination of him on  
24 the 28th of October -- to, Are you trying to cheat the  
25 plaintiffs, is now the questions being asked of both

1 Andrews and Lash in the last two days. That's a very  
2 different approach.

3 Because of the sensitivity that opposing  
4 counsel has to what was discovered of the admission made  
5 by Lash on behalf of his company to pay the chump change  
6 commission and of the recognition that there wasn't  
7 clarity and/or honesty in the November 24th letter or  
8 the words of Mr. Lash or to that extent, to some extent,  
9 Mr. Whittemore relative to having acquired property for  
10 property already designated in April of 2009 as  
11 single-family property.

12 And the language -- you know, hindsight is a  
13 wonderful thing, but the language is really broad and  
14 all encompassing. Pardee, its successors and assigns,  
15 shall take no action to circumvention or avoid its  
16 obligations to you as set forth in this agreement.

17 It doesn't require us to prove fraud. It  
18 doesn't require us to prove mens rea. It's a bar  
19 against taking any action to circumvention or avoid its  
20 obligation.

21 Buying property originally designated for  
22 single-family production residential housing under the  
23 rubric of a multi-family contract, which access was  
24 intentionally denied by Pardee, knowing it was already  
25 designated in 2009 before you completed this purchase

1 and squared up all the property as single-family  
2 designated property, then to confirm that, when you  
3 confirm and deem this to be the epicenter, one of two  
4 epicenters of beginning construction for single-family  
5 production residential homes, that coupled with the one  
6 to the west of the Coyote Springs Parkway, and to go  
7 forward and inject yourself into the county planning  
8 commission process through affirmative action with the  
9 county commission sitting as the zoning commission on  
10 February 16, 2011, Exhibit 39 and 41, and the map,  
11 Exhibit 43, is an effort, whether intentional or not, to  
12 avoid or circumvent its obligation to you to pay a  
13 reasonable commission, as defined.

14 I don't have to prove intent. Ms. Lundvall  
15 doesn't win the day by convincing you that her witnesses  
16 didn't mean to cheat the plaintiffs. That's not the  
17 standard. That's not what was agreed upon. This is a  
18 breach of contract for failure to keep them reasonably  
19 informed. It is a breach of implied covenant of good  
20 faith and fair dealing for failure to do the same.

21 And the request for an equitable finding of  
22 accounting for you to tell us, using your sophisticated  
23 means, using your civil engineers on retainer to compute  
24 the curves and the straight lines and tell us how much  
25 property was outside of the Purchase Property 1, then

1 use that property calculation and, number two, to come  
2 clean, to recognize that under the name of the  
3 multi-family agreement you purchased 50-odd acres, about  
4 53 acres, 50 to 53 acres -- we see two different  
5 documents that show different numbers. One is 50, the  
6 other is 53 -- production residential property as  
7 defined in the Option Agreement, Exhibit 2, and that  
8 should be reasonably compensated for the same.

9           That's why I say to the Court, the Commission  
10 Agreement is different than the Option Agreement because  
11 the Commission Agreement is not only speaking to the  
12 nature of commissions, which is, I brought you this  
13 buyer, buyer wants this property desperately. It is a  
14 blank canvas. It excites his planners. It is an  
15 opportunity to be the new Del Webb, to be the new  
16 Summerlin, to be the new Green Valley, and even a much  
17 bigger one at that, and to have the exclusive right to  
18 single-family projects that you can't do and exercise  
19 your rights to be the exclusive developer of  
20 single-family production residential is circumvent or  
21 avoid your obligation to the broker so that you later  
22 designate the property as such and the Option Agreement  
23 expresses that.

24           We know that all 1,950 acres or all 3,600 acres  
25 within Parcel 1 was designated single-family residential

1 property -- not all of it, but the 1,950 acres were  
2 contemplated, but also if they were to expand that, they  
3 would also be buying single-family production  
4 residential.

5 THE COURT: Can I ask what is the plaintiffs'  
6 position then -- as we know, Mr. Andrews testified, We  
7 have no intention going forward right now with  
8 single-family.

9 What is the position if they never go forward  
10 on that RES 5 property as single-family residential, but  
11 they end up developing it and having it as multi-family?  
12 What is your position then on, if they pay a brokerage  
13 fee, what happens in that circumstance?

14 Because, as we know from all the testimony,  
15 it's -- they are free -- and you've acknowledged that --  
16 to change designations.

17 MR. J.J. JIMMERSON: I have.

18 THE COURT: At what point in the process do you  
19 feel the broker's fee is due? Just when it's  
20 designated?

21 MR. J.J. JIMMERSON: The answer is yes, but for  
22 this it's an easier question. I thought about this and  
23 my clients --

24 THE COURT: It's an actual question.

25 MR. J.J. JIMMERSON: I respect the Court's --

1 THE COURT: I'm sure you are going to address  
2 it, but that's in my mind.

3 MR. J.J. JIMMERSON: Thank you. I'll address  
4 it now.

5 A tentative map is just that. It's a tentative  
6 map. It is a statement, however, an intentional  
7 statement made by applicant, in this case Pardee Homes,  
8 of its intended designation of this property for  
9 single-family production residential lots.

10 THE COURT: Okay.

11 MR. J.J. JIMMERSON: To answer your question  
12 directly, the contract, which is all we can base it  
13 upon, which is the Option Agreement, Exhibit 2, page 1,  
14 the last lines of paragraph B say if the property is or  
15 is later designated for single-family production  
16 residential use, they have a right to acquire it.

17 THE COURT: You are getting that language off  
18 Exhibit 1?

19 MR. J.J. JIMMERSON: Exhibit 2, page 1,  
20 paragraph B.

21 THE COURT: Let me write it down, Exhibit 2,  
22 page 1.

23 MR. J.J. JIMMERSON: Paragraph B.

24 THE COURT: Let me read this, which is or  
25 becomes designated -- that's how --

1 MR. J.J. JIMMERSON: That's the basis for --

2 THE COURT: That's your interpretation. Okay.

3 MR. J.J. JIMMERSON: This contract is  
4 referenced and, I mean, that's why I say the first thing  
5 on the page is RE: Option Agreement for the Purchase of  
6 Real Property and Joint Escrow Instructions. That's on  
7 page 1 of the Commission Agreement, referring to the  
8 agreement being incorporated there.

9 THE COURT: So your answer to my question is if  
10 they change it for another use, as soon as they --

11 MR. J.J. JIMMERSON: Designate it for --

12 THE COURT: Which is or becomes -- once it is  
13 designated, then the question is the -- okay. Then they  
14 have to pay the commission. If they don't end up using  
15 it for that, too bad. You paid the commission. It's  
16 gone and --

17 MR. J.J. JIMMERSON: Right.

18 THE COURT: And there's no reimbursement;  
19 right?

20 MR. J.J. JIMMERSON: Exactly. There's no  
21 reimbursement.

22 THE COURT: I just wanted to know what your  
23 position was. Okay.

24 MR. J.J. JIMMERSON: We're not here to be  
25 unfair to Pardee.

1           THE COURT: I'm not trying to infer. I'm just  
2 trying --

3           MR. J.J. JIMMERSON: I'm going to say the  
4 reason that this is easier for the Court to come to is  
5 not only did they make the designation -- by the way,  
6 they made the designation before they completed the  
7 purchase of the \$84 million of property right. You see  
8 that in April of 2009. It's Amendment 7.

9           But in addition, and here's the most helpful  
10 fact to avoid any concerns from the Court, is it was  
11 already designated single-family before that. In other  
12 words, it wasn't designated in 2011 after the fact. It  
13 was designated in April of 2009, before they even  
14 expended the full \$84 million as a separate property, by  
15 definition, would be Option Property outside of the  
16 \$84 million of property that's shown in Exhibit 15, the  
17 Lash map. It was already single-family shown right from  
18 the beginning.

19           So it's not a situation where, as you say, they  
20 change their use now next year, and then, My gosh,  
21 Mr. Jimmerson, isn't it unfair to them that they have a  
22 commission unless they actually do build it? But the  
23 single answer is the contract doesn't get that way. The  
24 contract says is or becomes designated.

25           But as it relates to the facts of the

1 particular case, you are also aided by the fact that it  
2 was already knowingly designated, before 2009, when they  
3 knew they had to pay a designation, when they were  
4 paying commissions, but they bought this property under  
5 the name of multi-family.

6 THE COURT: What happens in the situation when  
7 we know they paid a commission to the brokers because  
8 they purchase it and single-family residential and then  
9 they were converting it to another use? Doesn't that --

10 MR. J.J. JIMMERSON: That's their choice.

11 THE COURT: That's their choice. The  
12 commission stays?

13 MR. J.J. JIMMERSON: Exactly.

14 THE COURT: Okay.

15 MR. J.J. JIMMERSON: Yes. And the reason for  
16 that is very simple. There's no language in the  
17 Commission Agreement to suggest that there would be a  
18 give-back or a reimbursement due to the decision-making  
19 of Pardee. Again, the decision of designation or  
20 redesignation is exclusively and unilaterally Pardee's.  
21 It's not something they seek or ask Wolfram or Wilkes to  
22 be a part of.

23 That is, in our judgment, the greatest weakness  
24 the defense argument, is they didn't involve the  
25 plaintiffs when they went from Option Agreement,

1 Exhibit 2, to Amended and Restated agreement, Exhibit 5.

2 They intentionally excluded them and they  
3 didn't recognize -- let's take any intent out of it.  
4 They didn't recognize that in their changing of  
5 development strategy and changing of definitions of both  
6 Purchase Property and changing definition of Option  
7 Property, they didn't remember that those were defined  
8 terms under the original Commission Agreement.

9 And if they were going to do that, pick up the  
10 phone and just say, Listen, fellas, we want to change  
11 the direction which we're going to build. Is it okay  
12 with you? Can we make a deal? Maybe pay you an extra  
13 50,000 and call it square. None of that takes place.  
14 It's an attitude by Pardee, at least through their local  
15 office in Nevada, of a disdain for the brokers, and I'm  
16 not going to involve them in this. And there was a  
17 derogation of their contract. That's the mistake they  
18 made.

19 THE COURT: You think they had a duty, when  
20 they changed the underlying agreement, to get their  
21 permission or just --

22 MR. J.J. JIMMERSON: Absolutely. Get --

23 THE COURT: Get their permission to change that  
24 underlying agreement?

25 MR. J.J. JIMMERSON: No, not to -- no. They

1 can change the agreement all they want. They just can't  
2 do it and defeat our clients' entitlement to a  
3 commission. That's all.

4 THE COURT: If the interpretation is it was  
5 defeating them, circumventing the agreement of paying  
6 them. All right.

7 MR. J.J. JIMMERSON: You can't conform their  
8 understanding of the new amendments to the old  
9 agreement. You cannot, by later actions between the two  
10 of them, Pardee and CSI, somehow affect the contract  
11 that existed between Wolfram and Wilkes and Pardee from  
12 the earlier agreement.

13 They certainly didn't get our clients' consent  
14 to supersede the agreement and replace it. Now, that's  
15 something the two of them can do all day long, but they  
16 can't undo the Option Agreement for purposes of today's  
17 trial. Do you understand? They can't say the agreement  
18 has no longer force and effect and, therefore, the  
19 Commission Agreement has no longer force and effect.

20 THE COURT: I don't think they were saying  
21 that.

22 MR. J.J. JIMMERSON: They were trying to  
23 suggest that no matter where they built, inside or  
24 outside Parcel 1, that they do it and call it Purchase  
25 Property. That's their defense. Their position is we

1 never bought Option Property. We never exercised an  
2 option. We never gave a notice, therefore, we never  
3 bought Option Property. Therefore, we don't calculate  
4 the commission based upon the different formula.

5 THE COURT: Right. And you are not saying they  
6 bought Option Property. What you are saying is they  
7 bought -- well, you are calling it Option Property  
8 because it was built under the multi-family. You are  
9 using the designation part now to make it Option  
10 Property?

11 MR. J.J. JIMMERSON: Exactly right.

12 THE COURT: That's what you are doing?

13 MR. J.J. JIMMERSON: Right. Because it wasn't  
14 Purchase Property and because --

15 THE COURT: It was not Purchase Property. They  
16 know it wasn't --

17 MR. J.J. JIMMERSON: And it wasn't included in  
18 the \$84 million.

19 THE COURT: I'm only asking because I want to  
20 make sure I'm very clear, because it's very important to  
21 me that I'm clear what everybody's saying. And we all  
22 know we've gone through a long process here. So I don't  
23 mean to infer anything by my questions. I just want to  
24 make sure I understand. You understand that,  
25 Mr. Jimmerson --

1 MR. J.J. JIMMERSON: I do, Your Honor.

2 THE COURT: -- what I'm doing?

3 I can't make good decisions if I'm not really  
4 clear what you're saying. That's perfect.

5 MR. J.J. JIMMERSON: What I'm saying is under  
6 the name of multi-family, the definitely bought property  
7 that, by definition, in either agreement was Option  
8 Property. That's all I'm saying.

9 THE COURT: Because they changed it to multi,  
10 that's how -- I get it. That's how you hook up the  
11 Option Property. Okay. And that's your point of they  
12 don't have to go through the exercise option?

13 MR. J.J. JIMMERSON: Also, it was not part of  
14 the Purchase Property. No matter where they built.

15 THE COURT: Of course. It was part of the  
16 multi-family. I understand that. I'm just trying to  
17 understand your reasoning how you get there. I do  
18 understand it. I thought I did, but I wanted to make  
19 sure.

20 MR. J.J. JIMMERSON: I just wanted --

21 THE COURT: Then it hooks all together. I  
22 understand that.

23 MR. J.J. JIMMERSON: When I asked Mr. Lash, Why  
24 didn't you send the November 24, 2009 letter to  
25 Mr. Wilkes, and the answer was -- Why did you exclude

1 Mr. Wilkes? Mr. Lash said there was no reason -- Lash,  
2 page 247, lines 10, 20 and 13.

3 As I confirmed already, Mr. Wilkes and  
4 Mr. Wolfram did introduce, were the producing cause,  
5 Lash, at page 22 of his testimony, Would you agree that  
6 there has not been provided to Mr. Wolfram or Mr. Wilkes  
7 any writing that would designate all the uses of the  
8 property that's shown on the maps we've looked at?

9 Answer: I believe that's true.

10 And certainly it's not shown on the one and  
11 only map that you've seen that you provided within  
12 Exhibit 15?

13 Answer: That's correct.

14 Lash, page 275.

15 If we go forward from here on out, whatever we  
16 purchase is truly Option Property for single-family, and  
17 we're more than happy to pay a commission. Lash,  
18 page 75 and also page 83.

19 This is important because this was never  
20 recanted by Mr. Lash. So any future purchases from  
21 today going forward or any future redesignations, in our  
22 judgment, for the reasons we've articulated --

23 THE COURT: That's the distinction?

24 MR. J.J. JIMMERSON: Right.

25 -- would be, of Option Property for

1 single-family use, single-family production use, would  
2 be commission.

3 Now, you know, we've thought about it because  
4 we don't want a harsh result. One of the things we're  
5 looking for from you is orders that would require the  
6 accounting so they would provide to us the property in  
7 and out of Purchase Property and Option Property so we  
8 can see.

9 But also, as I mentioned to you, to properly  
10 interpret the Commission Agreement, that there be some  
11 affirmative duty, as set forth here, to advise the  
12 clients when or if Pardee, as a company, or its  
13 successors and assigns, develops single-family  
14 production residential lots beyond that which they have  
15 purchased now in the future.

16 THE COURT: And you used the word "develop"  
17 them? So does that mean purchase?

18 MR. J.J. JIMMERSON: Acquire.

19 THE COURT: The terms are very -- I have to be  
20 really precise.

21 MR. J.J. JIMMERSON: If they acquire, if they  
22 purchase single-family production residential property  
23 in the future at that location, that they be -- that the  
24 plaintiffs --

25 THE COURT: So you're using the word "acquire"?

1 MR. J.J. JIMMERSON: Or purchase.

2 THE COURT: I know they mean the --

3 MR. J.J. JIMMERSON: -- that they be  
4 affirmatively advised of the same.

5 THE COURT: And you are looking for something  
6 different than what they have to already do when they  
7 open escrow and all that, if it's Option Property? You  
8 are going to be arguing to me something in addition to  
9 all that's already provided under have the Amended and  
10 Restated Option Agreement? Really, it was under the  
11 first one and it got incorporated. Right?

12 MR. J.J. JIMMERSON: Yes. Because what has  
13 happened here, whether it be innocence or not, they  
14 acquired property, residential production real estate,  
15 under name of multi-family, unequivocally. There's no  
16 question.

17 THE COURT: Wait a minute. Now you are using  
18 the word "acquired" and "purchased" together, but  
19 purchased isn't the same. They purchased it under the  
20 multi-family.

21 MR. J.J. JIMMERSON: That's right.

22 THE COURT: The terms are tough for me to  
23 follow. I want to --

24 MR. J.J. JIMMERSON: They purchased 250 acres  
25 under an agreement that was called multi-family

1 agreement.

2 THE COURT: Which you haven't seen.

3 MR. J.J. JIMMERSON: 50 acres of the 250 acres  
4 was already designated single-family under  
5 the tentative -- excuse me. It was also before that.

6 If you look at Exhibit -- I just told you --  
7 B-1, that is Amendment 7 to Exhibit 5. That property,  
8 even in April of 2009, while they're performing the  
9 purchase and development of the Purchase Property, the  
10 \$84 million, in addition to that they bought  
11 approximately \$30 million worth of real estate.

12 If you take \$100,000 an acre times 300 acres,  
13 you get \$30 million. Of the 300 acres, 50 acres had  
14 already been designated, as shown by B-1 of Exhibit 12,  
15 residential property.

16 THE COURT: Okay. I see what you are referring  
17 to.

18 MR. J.J. JIMMERSON: And then if you look at  
19 Exhibit E --

20 THE COURT: Of the same exhibit?

21 MR. J.J. JIMMERSON: No. Exhibit 13.

22 THE COURT: Okay. I got it.

23 MR. J.J. JIMMERSON: The property to the left  
24 or to the west is the same property already drawn right  
25 here. This is part of the multi-family property, but

1 it's already designated in 2009.

2 THE COURT: You are saying by the squares?

3 MR. J.J. JIMMERSON: By the squares.

4 THE COURT: I remember Whittemore talked to  
5 that.

6 MR. J.J. JIMMERSON: Also, you note that  
7 Mr. Whittemore told us that this was the beginning  
8 point, that Pardee changed -- and it was confirmed by  
9 Mr. Lash and Mr. Andrews -- as to where they were going  
10 to build beginning, commence their single-family  
11 production residential building was here and one other  
12 place across the street, the Coyote Springs Parkway.

13 So when you look at this, you can see that  
14 that's why it's not unfair to charge them for this  
15 responsibility. Because not only did they designate  
16 within the meaning of the Option Agreement, paragraph B,  
17 page 1, is or becomes designated, which triggers the  
18 commission right on the spot, but it's not a situation  
19 of maybe they are going to change later on. Because  
20 this was from the beginning designed for single-family  
21 residential.

22 That they included multi-family was  
23 inappropriate. That they didn't pay an extra commission  
24 at that time was inappropriate. And their intent to  
25 treat it as single-family is confirmed by, two years

1 later, here in 2011, February 16, to get county  
2 commission approval for its single-family.

3 That's what makes it so different than the  
4 possibility of changing tentative maps later on. I  
5 appreciate the Court is asking and understand that the  
6 Court wants to be fair to both sides. Maybe it wouldn't  
7 be fair to pay a commission unless they do go forward  
8 with that.

9 But in this particular case, you have a knowing  
10 purchase of property that has already, prior to  
11 completion of the expenditure of the \$84 million, buying  
12 separate property under a multi-family agreement that is  
13 intended, already designated, for single-family  
14 production residential use, and then confirmed two years  
15 later by going forward to the county and getting their  
16 tentative map approved for 332 lots.

17 That's why the equities, as well as the facts,  
18 clearly support the plaintiffs and are not supportive of  
19 the defense. It also explains the change in testimony,  
20 in our judgment. And that's the only claim of change of  
21 testimony by Mr. Lash, and it was occasioned by the fact  
22 we discovered this after Mr. Whittemore went over  
23 Exhibit E.

24 If you remember, the exchange parcel is what we  
25 went over on the 29th of October. And when we look at

1 it, why are these properties single-family? And  
2 Mr. Whittemore testified they are not part of the  
3 \$84 million. That's what he testified to.

4 THE COURT: Thank you.

5 MR. J.J. JIMMERSON: Now, let me just finish up  
6 and I'll be done here.

7 The letters I wanted to just show you. The  
8 Complaint we filed in December of 2010, Exhibit 00 in  
9 evidence, has simply been marked by myself as matching  
10 up to the exhibits and letters. And you have been read  
11 these letters until you are blue in the face. I don't  
12 intend to do that again.

13 But I did want to show you that this whole  
14 recent theme by Pardee that this is really just an  
15 unbridled, unabashed money grab by the plaintiffs, it's  
16 all about money -- Mr. Lash's testimony, I think, was  
17 generally credible. Mr. Whittemore testimony was  
18 generally credible. Mr. Wolfram's testimony was  
19 generally credible. Mr. Wilkes' testimony was generally  
20 credible.

21 But in this -- and I do take issue with both  
22 Mr. Lash and Mr. Whittemore's testimony, because when  
23 you read the Complaint and go through it, as we will  
24 now, you'll see it wasn't a money grab. The breach of  
25 contract is very different.

1 I mean, how many times have you seen in your  
2 lawsuits a lawsuit that says the breach of contract is  
3 the failure to provide information? I mean, it's an  
4 exception. I don't say it never happens. I'm saying  
5 that most of the time it's you breached the contract for  
6 which you've caused damage in excess of \$10,000.

7 So in this Complaint we have the background is  
8 we talked about they executed a Commission Letter of  
9 September 1, 2004, Exhibit 1. If we turn the page, it  
10 talks about their having been assigned their real estate  
11 companies' interest for which summary judgment is  
12 granted.

13 Paragraph 6, pursuant to the Commission Letter,  
14 they are entitled to be paid a commission for all real  
15 property sold under the Option Agreement. Pursuant to  
16 the Commission Letter, plaintiffs were to be fully  
17 informed of all sales. And I say "fully." The words  
18 are reasonably informed, and I quote it. And it says,  
19 Pardee shall keep each of you reasonably informed as to  
20 all matters relating to amount and due dates of your  
21 commission payments, Exhibit 1.

22 Then on April 23, 2009, plaintiffs sent to  
23 defendant documents which detail the purchase and sales  
24 of certain real property for which plaintiffs believe  
25 are part of property outlined in the Option Agreement

1 and, therefore, property for which they are entitled to  
2 receive a commission. A parcel map was also requested  
3 to identify which properties have been sold, Exhibit 24.

4 Judge, this is a little bit of irony here.  
5 April 23 is when the letter is dated and sent,  
6 presumably received on the 24th or 25th. That day, the  
7 next day, April 24, 2009, is the seventh amendment date  
8 to the Amended and Restated Option Agreement that  
9 specifically referenced Residential 5 and the  
10 single-family production residential as being part of  
11 the multi-family agreement.

12 That is why, when it comes to measuring the  
13 credibility, Mr. Lash was very careful to say in his  
14 letter, This is the property we've acquired using our  
15 \$84 million dollars, intentionally avoiding, in my view,  
16 the statement or representation, This is all of the  
17 single-family residential property we've acquired,  
18 because that would have been false.

19 His map did not include RES 5 as part of the  
20 documents. Part of the property that was shown in  
21 Exhibits -- Addendum 7 and 8 within Exhibits B-6, B-1,  
22 and Exhibit E of Exhibit 13.

23 Then the defendant replied to plaintiffs'  
24 letter of April 23, 2009 with a letter dated July 10,  
25 2009. The April 23 letter, Exhibit 24, memorializes the

1 request for documents that have been assuredly provided  
2 by Mr. Stringer to Mr. Jimmerson. It's not responded  
3 to, and then the response comes April of -- July 10,  
4 2009, Exhibit 21, which fails to produce a single  
5 document or include a single document, save and except  
6 to say you are not entitled to it.

7           And that doesn't meet the objective standard  
8 that both Mr. Lash and Mr. Wolfram and Wilkes reached  
9 when they signed the agreement on June 1, or as  
10 testified to by Mr. Lash and the plaintiffs here in  
11 trial the last nine days that there would be an ability  
12 to independently confirm the propriety of Pardee's  
13 actions in purchasing single-family production real  
14 estate for which our clients would be entitled to a  
15 commission.

16           Paragraph 10, plaintiffs again requested  
17 additional documents, Exhibit 18. After conversations  
18 with the plaintiffs, he sent a two-page letter, which is  
19 Exhibit 15.

20           Paragraph 12, plaintiffs relied upon  
21 plaintiffs' representations made on November 24th as  
22 being truthful and accurate. And paragraph 13, that  
23 they learned afterwards that it wasn't accurate.

24           Now, Exhibit 20 is the letter we reference here  
25 of May 17, 2010, from plaintiffs to defendants. And

1 you'll also see Exhibit 23, which is not referenced in  
2 this Complaint, but Exhibit 23 was Mr. Wolfram's map,  
3 which today Mr. Andrews, just this morning -- I guess it  
4 was yesterday afternoon, said, Yeah, his map matches,  
5 it's generally accurate.

6 But it included four parcels that Mr. Wolfram  
7 had found for which there had been no explanation, save  
8 and except in 2007 when Mr. Wolfram had called and said,  
9 You are overpaying me. And they wrote the letter back  
10 saying you owe us \$50,000. As we move along, we'll  
11 subtract a little bit here and there so we'll capture  
12 our \$50,000.

13 In that document, the second page, middle  
14 paragraph it says, And we bought other property through  
15 side agreements or through other agreements. But it  
16 didn't tell them what they bought and certainly didn't  
17 tell them that part of the property we bought under  
18 multi-family has already been designated single-family  
19 pursuant to both the Option Agreement, Exhibit 2, as  
20 well as the designation within their own workings,  
21 within their own plans, internal to Pardee for which our  
22 clients would not know.

23 And but for the fact that they then acted upon  
24 their earlier designation of April 24, 2009, the seventh  
25 amendment, declaring RES 5 residential single-family

1 production homes, two years later they went to the  
2 county and confirmed the same. Why was that? Because  
3 with the effect of the economy and, believe it or not, a  
4 water pressure table that we learned about, they would  
5 begin their construction there and not more northerly.

6 And, therefore, they were going to use both the  
7 exchange parcel and the other, which is 26.9 or 28.96  
8 acres and the other 53 acres to make up the 83-acre  
9 parcel for the commencement of single-family residential  
10 construction.

11 In the claims, I just want you to understand --  
12 I know you've read these before. Paragraph 17, first  
13 claim for accounting, plaintiffs have requested  
14 documents promised to them by defendant in the  
15 Commission Letter and have not received them.  
16 Specifically, they have requested the name of the  
17 seller, the buyer, the parcel numbers, the amount of  
18 acres sold, the purchase price, the commission payment  
19 scheduled and amount, title company contact information  
20 and escrow numbers, copy of close of escrow documents,  
21 and comprehensive maps specifically depicting this  
22 property sold and with parcel numbers specifically  
23 identified, end of quote.

24 Had that information been provided, this  
25 lawsuit would have been resolved by agreement between

1 the parties. This would have been discovered and we  
2 wouldn't have had a nine-day trial. This is what was  
3 not provided. This is what was promised by  
4 Mr. Stringer. This is what had been discussed with  
5 Mr. Wolfram and Mr. Lash, and Mr. Wolfram asked from  
6 Mr. Lash, that Mr. Lash, in his letter of November 24th,  
7 intentionally refused to provide.

8 And the proof is in the pudding. Our case  
9 might have been different had we not discovered the  
10 tentative map, except to say that, irrespective of  
11 finding that, the strength of the plaintiffs' case, as  
12 shown to you throughout the development of our case, the  
13 discovery, the motions for summary judgment that you  
14 heard and ruled upon, was it didn't -- you were in a  
15 superior position, Pardee, to provide information that  
16 you chose intentionally not to provide.

17 And if you are going to be reasonably informed  
18 and able to independently confirm the accuracy of your  
19 representations, you need to provide that information,  
20 which they didn't do.

21 Then the icing on the cake, though, is finding  
22 that they intentionally did not disclose 50 acres of  
23 prime residential production property that was going to  
24 be the first of the acreage developed. That is what  
25 made it so compelling, previously designated long before

1 this lawsuit was filed, and rendered Mr. Lash's letter  
2 of November 24th, seven months later, inaccurate in its  
3 representations. And I could be kind in just calling it  
4 inaccurate.

5 Breach of contract is the second claim for  
6 relief, for failure to bring -- look at what it says.  
7 Defendant has a duty to honor its contractual  
8 obligations. Defendant has failed and refused to  
9 perform the obligations pursuant to the terms and  
10 outlines of the commission letter.

11 In the previous paragraph, plaintiffs have  
12 requested documents promised to them by the defendants  
13 in the Commission Letter and have not received them.  
14 That's paragraph 22. As a result of defendant's breach  
15 of contract, we suffered damages in excess of \$10,000.  
16 Under Sandy Valley you have an entitlement to reasonable  
17 dollars when you expend money to obtain information like  
18 this, both in terms of prevailing party attorneys' fees,  
19 but also as money damages, as the Court has already  
20 ruled upon.

21 But notice, I would say, the wisdom and care of  
22 Jim Wolfram and Walter Wilkes. That is to say it's not  
23 a Complaint saying, You owe us money that you haven't  
24 paid us. You cheated us out of money. All the  
25 arguments we hear now in response to the newly

1 discovered information.

2 Here you have a most conservative Complaint  
3 that says, You didn't provide us the information. We're  
4 having to start a lawsuit and pay \$274 to file a  
5 Complaint and serve you to get the information you  
6 should have provided.

7 And while we got the information because of  
8 public knowledge, because of judicial notice, because of  
9 the balancing of admission at the late date for the  
10 reasons you've articulated, a fair statement can be  
11 made, Why didn't you move to compel?

12 But in terms of the agreement, the Commission  
13 Agreement, the defense is Jimmerson has to file a  
14 lawsuit and then a motion to compel before we will  
15 intentionally not provide documents and then have to  
16 provide documents. That's why it's a losing  
17 proposition.

18 Yes, Your Honor, I could have filed a motion to  
19 compel. You could have decided on it or not as the case  
20 may be, or the Discovery Commissioner then coming up to  
21 you. But under the obligation of the contract, that's  
22 not the requirement. That's not the burden of the  
23 plaintiffs.

24 It's the burden of the defendants to keep the  
25 plaintiffs reasonably informed as to all -- I would

1 suggest the word "all" means "all" -- matters as they  
2 relate to the commission payments. Those are words that  
3 the defense, no matter how they squirm, cannot get out  
4 from underneath, the consequence of those.

5 Even though they consider this amount chump  
6 change, it means the world to my clients, not for the  
7 dollars, not for the 30-odd thousand dollars and the  
8 attorneys' fees that we should win as prevailing party  
9 and money damages, as testified to by myself and in our  
10 other briefs, but because this is a 40-year process.

11 I listened to Mr. Andrews, and he may be right,  
12 and there may never be another purchase of single-family  
13 production residential in Coyote Springs by Pardee. It  
14 could very well be. I don't know. But neither does he.  
15 It is 30-plus more years to go between now and the end  
16 of this contract, and we don't know what's going to take  
17 place.

18 When a company has invested hundreds of  
19 millions of dollars, per Mr. Andrews, they are not  
20 walking away from this project. Now, do they only build  
21 on 1,950 acres? Do they only build on 1,950 acres or  
22 2,112 acres plus the 50 we've uncovered? I don't know.

23 But I know this: Our clients are entitled to a  
24 40-year look of entitlement to commissions if they do  
25 build additional single -- or they designate, excuse me,

1 single-family residential property. They already  
2 designated 2,112 acres, and they've already designated  
3 50 additional acres that we didn't know about until the  
4 middle of this trial.

5 That's why I say, in terms of when you hear  
6 this argument or question by Mr. Lash, I read the  
7 letters as asking for money -- there is a couple letters  
8 that say, We were the procuring cause, maybe we're  
9 entitled to a commission. It's true.

10 But most of the letters, of the 16 or 18  
11 letters you have before you, it is, I want information,  
12 I want information, I want -- he wasn't certain whether  
13 he was owed any money, but he was entitled to the  
14 information. They broke their agreement by not doing  
15 so, for which they are entitled to that.

16 And then the third claim is most compelling  
17 too. It's the implied covenant of good faith and fair  
18 dealing that runs with this contract and is set forth in  
19 paragraphs 27 through 30. They continue to have a duty  
20 of good faith fair dealing. They were asked for  
21 documents. They didn't provide the documents. And as a  
22 result, they are in breach.

23 When you listen to the words of opposing  
24 counsel -- I'll conclude with this -- that, Oh, you  
25 could have done to the deed and seen -- what could you

1 have done? Let's go through it. You could have seen  
2 the deeds.

3           And I went through the examination of Mr. Lash,  
4 Mr. Whittemore. The deeds that were shown many times  
5 don't show the acreage at all. Absolutely, the deeds  
6 don't show the designated use. And it's the designated  
7 use that is the triggering language within the Option  
8 Agreement, which is the predicate to the Commission  
9 Agreement, and Commission Agreement specifies that, we  
10 think.

11           It also doesn't tell you the exact location  
12 unless you can find a map. Maps aren't always recorded.  
13 Out of these 49 payments, there were only five maps,  
14 five takedowns over several years.

15           My client, by April of 2010, Exhibit 23, wrote  
16 to Mr. Lash saying, I've received your map and it's  
17 incomplete. Here are four additional parcels that  
18 you've acquired. Are you telling me that they don't  
19 include single-family residential use? Would you please  
20 tell me what the designated uses are?

21           He picks up the phone and calls him. Would you  
22 tell me what the uses are? And Mr. Lash won't take his  
23 call or says you are not entitled to it, I'm not sending  
24 the documents. And that's confirmed by multiple letters  
25 of Stringer and Curtis in July and August of 2009 --

1 excuse me, 2010, prior to the lawsuit being brought in  
2 December.

3 So the defense of opposing counsel that we  
4 could have moved to compel doesn't meet the terms of the  
5 Commission Agreement, which is an affirmative obligation  
6 on the part of Pardee to keep their clients reasonably  
7 informed.

8 THE COURT: I understand the distinction.

9 Can I ask something real quick? When you went  
10 through the Complaint, are you saying to the Court now  
11 we aren't asking for money damages?

12 MR. J.J. JIMMERSON: We were not. We're asking  
13 for the damages associated with the --

14 THE COURT: Getting the information?

15 MR. J.J. JIMMERSON: The information.

16 THE COURT: Is that still your position now?  
17 Are you now adding more?

18 MR. J.J. JIMMERSON: I don't think we're adding  
19 anything.

20 Paragraph 25, if you look at paragraph 25, it  
21 says as a result of the breach -- defendant's breach of  
22 contract, plaintiffs have been forced to bring this  
23 matter to Court. They are entitled to an award of  
24 reasonable attorneys' fees and costs.

25 THE COURT: Thank you. I did want that

1 clarified.

2 MR. J.J. JIMMERSON: So to answer your  
3 question, with the help of my son --

4 THE COURT: The answer is yes.

5 MR. J.J. JIMMERSON: Yes. We would like to  
6 have \$135,000 as shown by Exhibits 31A.

7 THE COURT: Hold on. That's the attorneys'  
8 fees?

9 MR. J.J. JIMMERSON: Yes. We're asking for  
10 \$30,000 or one and a half percent times 50 acres times  
11 40,000 an acre, which is certainly giving the defendants  
12 the best of it, because they paid 100,000 an acre, but  
13 we understood that as part of the 100,000 an acre,  
14 Mr. Andrews was clear to make it, We were buying the  
15 rights. Rights were different than the underlying  
16 property. It's just that Jon Lash says, If we're going  
17 to pay 100,000 an acre for the rights, let's get the  
18 property to match.

19 THE COURT: So the testimony is they paid  
20 100,000 for it, but you are asking for a commission not  
21 off the 100,000?

22 MR. J.J. JIMMERSON: Off the 40,000, which is  
23 the Option Agreement.

24 THE COURT: Okay.

25 MR. J.M. JIMMERSON: And Roman numeral III to

1 the Commission Agreement.

2 MR. J.J. JIMMERSON: Roman numeral III.

3 THE COURT: Of the Commission Agreement, yeah,  
4 which is how -- if it was, if the Court determines it is  
5 Option Property, everybody agrees how it would be paid,  
6 certainly not anything to do with the 100,000.

7 MR. J.J. JIMMERSON: The last point --

8 THE COURT: What else?

9 MR. J.J. JIMMERSON: That's it. So you got the  
10 prevailing party attorneys' fees. We're asking for  
11 \$135,000, plus 30,000 commissions, plus an order --

12 THE COURT: That's what I need a little more.

13 MR. J.J. JIMMERSON: -- an order that  
14 affirmatively obliges Pardee in the future for the  
15 length of the term, the 40 years counted back from 2004  
16 to 2044, that there be an obligation to notify the  
17 estates of Wolfram and Wilkes, if they are passed away,  
18 or them now while they are alive, of any future  
19 designation of single-family production residential in  
20 either the Purchase Property, which is now exhausted, or  
21 the Option Property.

22 THE COURT: What I would like, could you give  
23 me what language? Because I certainly want that so I --  
24 I don't want to go outside what you want, and I  
25 certainly don't -- I want to be able to look at it, in

1 terms of the defendant, whether that is what I want to  
2 give.

3 MS. LUNDVALL: Your Honor, from this  
4 perspective -- I didn't mean to interrupt.

5 THE COURT: You see where I'm going? I'm not  
6 saying I'll do it. But before you start -- I apologize.

7 Before -- I just wanted to get this out anyway.  
8 I looked at the findings of fact and conclusions of law.  
9 As you know, this trial changed a little bit.

10 MR. J.J. JIMMERSON: It sure did, a lot of it.

11 MS. LUNDVALL: That's why we said revised.

12 THE COURT: I got the -- I checked and it  
13 looked like, Ms. Lundvall, your second was identical to  
14 the first one.

15 MS. LUNDVALL: Absolutely not, Your Honor.

16 THE COURT: I hope I got the right second one  
17 then, because actually had my law clerk compare it. But  
18 I'll make sure that I got the revised one from you  
19 because --

20 MS. LUNDVALL: Absolutely. We'll help you out.

21 THE COURT: I was going to ask the same,  
22 obviously to help me out -- I could do this, but I don't  
23 have four months, as you can imagine, of revised. I  
24 thought yours was, but he looked at -- I had David look  
25 at it real quick, and he didn't think -- but he's been

1 doing a double load here too, to be honest, while I'm  
2 here.

3 So if it is revised, we'll -- the defendant's,  
4 we will look at it. And if for some reason it isn't, I  
5 will -- because that is very important to me.

6 MS. LUNDVALL: Thank you, Your Honor.

7 THE COURT: I was going to ask that when you  
8 closed your case. Because I don't want to sit here  
9 and -- I want to fashion, if I did do something like  
10 that, nothing more than you want. And if I have to deal  
11 with it, I want it --

12 MS. LUNDVALL: I understand.

13 THE COURT: And I want --

14 MS. LUNDVALL: What I'm trying to do is to be  
15 responsive to --

16 THE COURT: I was just going to say, how are  
17 you going to respond to it?

18 MS. LUNDVALL: Well, to the suggestion that  
19 they are going to submit something to you later, how do  
20 I respond to something that's --

21 THE COURT: Here's what I was --

22 MS. LUNDVALL: That's what their obligation is  
23 during closing arguments, to tell the Court what it is  
24 they are asking for, so that I can have an adequate  
25 opportunity to respond to that.

1 THE COURT: Okay. Here's what we could do: I  
2 will let supplemental briefing, if I need it, on  
3 something like that, because I agree. I don't want -- I  
4 understand you're in a position now, how are -- you  
5 can -- I worried about this all through trial because I  
6 knew this was coming up, how -- how to do that in  
7 fairness to both of you.

8 MR. J.J. JIMMERSON: Here's --

9 MR. J.M. JIMMERSON: May I offer a suggestion?

10 THE COURT: I want to work with you both.

11 And you have your closing. But since they are  
12 still in theirs, I want to make sure we have an  
13 agreement here. If not, then I'll just write down what  
14 he said. I don't know.

15 MR. J.M. JIMMERSON: Most states across the  
16 country, when applying an accounting, have a separate  
17 proceeding. So to the extent that you would invite  
18 supplemental briefing or oral argument on what is  
19 necessary to produce for the accounting, you would allow  
20 that at a later date. And so your idea of supplemental  
21 briefing and whatnot, there would be that separate  
22 proceeding.

23 THE COURT: I was wondering about that. I  
24 didn't have a chance to look at the case law. And I can  
25 see by Ms. Lundvall, no, I don't want to do that.

1           Because you don't feel, for an accounting,  
2           there should be a separate --

3           MR. J.J. JIMMERSON:   Here's what we need from  
4           the accounting.

5           THE COURT:   I'll write it down as best I can.  
6           Be specific.

7           MR. J.J. JIMMERSON:   It is undisputed that some  
8           portion of the 2,100 acres is to the east of Parcel 1,  
9           purchase Property, under Exhibit 2 here.   Instead of  
10          building up here, as they indicated in both --

11          THE COURT:   I understand that.

12          MR. J.J. JIMMERSON:   Here's the point.

13          THE COURT:   Tell me what --

14          MR. J.J. JIMMERSON:   The accounting would be to  
15          use their engineers -- because Mr. Lash says you have to  
16          have an engineer to do this.   Well, Mr. Wilkes and  
17          Mr. Wolfram don't have one and his wife does not have  
18          one.   The engineers will tell us how many acres fell  
19          outside Parcel 1.   That's one part of the accounting.

20          THE COURT:   You want them to provide to you how  
21          many acres that have already been purchased?

22          MR. J.J. JIMMERSON:   Correct.

23          THE COURT:   Which would include the 84 million  
24          Purchase Price Property and the multi-family and the  
25          commercial?

1           MR. J.J. JIMMERSON: Multi-family, Judge, would  
2 just be Residential 5.

3           THE COURT: I'm not willing to go like this. I  
4 can tell you right now. I'm not going there.

5           MR. J.M. JIMMERSON: That would be contingent  
6 upon your finding that the Purchase Property is  
7 defined --

8           THE COURT: Is Parcel 1.

9           MR. J.M. JIMMERSON: Exactly. You would have  
10 to make that finding and then our request --

11          MR. J.J. JIMMERSON: That's the only finding  
12 you can make from our --

13          THE COURT: I'm not sure. Can we do something?  
14 Tell me what you need if for -- if the Option Property  
15 is bought, what documents -- I'm not going to go through  
16 what -- what documents other than what is already given,  
17 they are given under the escrow instructions, that's all  
18 detailed in, you know, the Option Agreement and then  
19 it's been incorporated into the Amended and Restated  
20 Option Agreement. It has a list of things they get, as  
21 we know -- what, in addition to that, you would want the  
22 Court to order. Do you see where I'm going?

23          MR. J.J. JIMMERSON: Affirmative notice and  
24 designation of use because --

25          THE COURT: You want affirmative -- I want

1 to --

2 MR. J.J. JIMMERSON: Affirmative notice of the  
3 acquisition of property intended for single-family  
4 production use and the use.

5 THE COURT: Affirmative notice of everything  
6 that they acquire?

7 MR. J.J. JIMMERSON: Of all acquisition of  
8 property intended for single-family use.

9 THE COURT: Affirmative notice of Option  
10 Property?

11 MR. J.J. JIMMERSON: Yes. Because everything  
12 they buy now is Option Property.

13 THE COURT: Not under your agreement.

14 MR. J.J. JIMMERSON: If it's intended for  
15 single-family production use, yes, it is.

16 THE COURT: They know that already. I don't  
17 even have to --

18 MS. LUNDVALL: I'm doing my best to sit in this  
19 chair.

20 THE COURT: He's trying. Both of us -- we all  
21 understand.

22 MR. J.M. JIMMERSON: We're going to want the  
23 following documents: We going to want all maps  
24 reflecting designation of use of all property that is  
25 purchased by Pardee.

1 THE COURT: Of all future property?

2 MR. J.M. JIMMERSON: No. All current property  
3 that has been purchased.

4 THE COURT: Do it again.

5 MR. J.M. JIMMERSON: All maps reflecting --

6 THE COURT: You want the information on what  
7 the multi-family is and what they've done on commercial?

8 MR. J.M. JIMMERSON: Just where that property  
9 is located, where it's designated. So we are not asking  
10 for, you know, the price information. We're not asking  
11 for any -- we need to confirm that all of the property,  
12 okay --

13 THE COURT: That's already owned by Pardee.

14 MR. J.M. JIMMERSON: Exactly. How much of it  
15 is single-family residential versus the other  
16 properties. So to the extent --

17 THE COURT: Because we have this real issue  
18 between designated, that would be -- because they may  
19 designate something tomorrow and change it. We have to  
20 be within the realm of reality here.

21 Mr. Andrews here said, You know what, the one  
22 we did for RES 5 is probably not going to be renewed,  
23 and we're almost at the four years and that's gone.

24 So that would be asking the Court to order, for  
25 Mr. Wilkes and Wolfram, all the details that they do

1 from -- I don't think that's --

2 MR. J.M. JIMMERSON: I'm not talking about  
3 going forward.

4 MS. LUNDVALL: Your Honor, if I may have a  
5 suggestion, if Counsel would identify what they want,  
6 then we would know what it is that they are asking you  
7 to order.

8 THE COURT: That's what we started with and  
9 they were willing to do that. But, Ms. Lundvall, you  
10 said they have to do it now for the closing.

11 MS. LUNDVALL: I do.

12 THE COURT: Isn't that what we just went  
13 through?

14 MS. LUNDVALL: That's what I'm trying to get  
15 from them.

16 THE COURT: You know what, I am just going to  
17 cut this. I do want to have a chance to see specifics,  
18 because -- and you know what, in all honesty, I may have  
19 another hearing, and I want the defense to have a chance  
20 to respond to it. You can't respond to generalities.

21 I want to get this lawsuit -- if I did do that,  
22 I'm not saying I would -- but I want things finalized  
23 for both of your positions now. I don't know if I'm  
24 going there, I'll be honest. I have no idea. But I  
25 want to know if I do go there, I don't want this to come

1 back.

2           The last thing I want either for Pardee or  
3 Mr. Wilkes or Wolfram is to not understand each other's  
4 duty. I don't feel I'm in a position right now, where  
5 we are right now, to do that. I started listing  
6 questions last night of what we were going to do, and I  
7 had more questions than I had answers.

8           MR. J.J. JIMMERSON: Well, then we maybe  
9 haven't done our best job.

10          THE COURT: I mean for the order, not for the  
11 other, but for how to be fully informed. I've heard  
12 lots of testimony of what -- how -- why you weren't  
13 reasonably informed.

14          MR. J.J. JIMMERSON: One of the reasons --

15          THE COURT: But it was hard for me to get a  
16 handle on in the future what you feel you would need.  
17 In all honesty, I read through the testimony as best I  
18 could a little bit -- not a lot of time last night --  
19 because I knew this was coming today. And I couldn't  
20 get a handle on it, in all honesty. I don't know if I'm  
21 just not --

22          MS. LUNDVALL: Can I get the list from  
23 plaintiffs as to what they claim that they believe they  
24 are entitled to?

25          MR. J.J. JIMMERSON: I would -- okay. This is

1 the answer: What's in the Option Agreement, Exhibit 2,  
2 which includes the escrow instructions, a map, a deed --

3 MS. LUNDVALL: Hold on. I'm making a list.  
4 You want escrow instructions. What kind of map?

5 MR. J.J. JIMMERSON: A map depicting the  
6 property that is being designated or acquired.

7 MS. LUNDVALL: And you want a deed?

8 MR. J.J. JIMMERSON: Our Complaint is pretty  
9 good about what it is we need, really.

10 MS. LUNDVALL: Respectfully, thank you as far  
11 as for giving me a list so I can respond to it.

12 THE COURT: And the Court would appreciate it,  
13 because she needs to respond and I need to understand so  
14 there is no ambiguity, if we did go there, of what it  
15 is, because that -- I don't want any more lawsuits  
16 between you if we can avoid it. I'm sure both clients  
17 don't want that. This needs to be put to bed.

18 And because we have this long-standing Option  
19 Agreement, that is a big concern to me. That is one  
20 thing you need to accomplish out of this lawsuit.

21 MR. J.J. JIMMERSON: No question. The result  
22 of that from both sides is some sort of a recordation or  
23 recording with the county recorder's office of the  
24 Commission Agreement and whatever the Court orders here  
25 so that both sides know what has to be provided long

1 after everybody in this room is no longer in practice.

2 THE COURT: I just know it has to be something  
3 that will have force and effect for over 40 years, since  
4 some of us may not be around.

5 MR. J.J. JIMMERSON: So what we request at  
6 paragraph 17 for the accounting is --

7 THE COURT: Why don't we do -- were you  
8 finished with your closing or did I stop you?

9 MR. J.J. JIMMERSON: No, no.

10 THE COURT: Let me -- you probably need a break  
11 too. If you want to work it out --

12 MS. LUNDVALL: No, no. From this standpoint, I  
13 think that I am entitled as far as to know what it is as  
14 far as a judgment that --

15 THE COURT: Absolutely.

16 MS. LUNDVALL: -- they are asking for from you.

17 THE COURT: I agree. I just thought you could  
18 work it out while I take a break or -- I'm not saying  
19 you're going to agree. I know where you are coming  
20 from. I'm not saying you agree, but let's, at least --

21 MR. J.M. JIMMERSON: We can't get agreement?

22 THE COURT: -- have them put specifics of what  
23 they want so you can respond to it and I can have an  
24 idea what they are asking for. And if that would help  
25 before you -- we need it before your closing. Then we

1 also need a break.

2 MS. LUNDVALL: Tell me what it is that you are  
3 asking for.

4 THE COURT: The Court is taking a break now and  
5 you let me know --

6 MR. J.J. JIMMERSON: We'll put it on the record  
7 when you return, Judge.

8 THE COURT: Everybody take a comfort break.  
9 (Whereupon, a recess was taken.)

10 THE COURT: Okay. Counsel, did we work  
11 anything out?

12 MR. J.J. JIMMERSON: I don't know that we  
13 worked anything out, but Ms. Lundvall asked that I read  
14 the language into the record. So I'll do that.

15 THE COURT: So this is what you are asking for  
16 an order?

17 MR. J.J. JIMMERSON: Yes. The vast majority of  
18 this is found at paragraph 17 of the Complaint,  
19 Exhibit OO.

20 THE COURT: Okay.

21 MR. J.J. JIMMERSON: And it is, Plaintiffs have  
22 requested documents promised to them by defendant -- and  
23 that's part of this, but I'm just reading it as the  
24 allegation -- in the Commission Letter and have not  
25 received them. Specifically requested the name of the

1 seller -- so it's the name of seller, Your Honor, the  
2 buyer, the parcel numbers, the amount of acres sold, the  
3 purchase price, the commission payments scheduled and  
4 amount, title company contact information and escrow  
5 numbers, a copy of all escrow documents including escrow  
6 instructions, comprehensive maps specifically depicting  
7 the property purchased or sold, and its designated use.

8 If there is a change in designated use,  
9 particularly a change to single-family residential  
10 production property --

11 THE COURT: If there's a change in designated  
12 use?

13 MR. J.J. JIMMERSON: A change in designated use  
14 to single-family production residential property,  
15 Pardee, its successors and assigns, shall affirmatively  
16 notify plaintiffs or the estates of plaintiffs at an  
17 address to be supplied by plaintiffs, with a copy to its  
18 counsel of record, of the change of designation, number  
19 of acres involved, and the purchase price, and the  
20 number of acres involved and its location.

21 THE COURT: And when you say plaintiffs have  
22 requested -- promised to them by defendant -- you are  
23 referencing any -- we know we don't have any more  
24 Purchase Price Property. Correct?

25 MR. J.J. JIMMERSON: Correct.

1 MS. LUNDVALL: So any Option Property, as  
2 defined by the Commission Agreement, paragraph 2.  
3 Right?

4 MR. J.J. JIMMERSON: Exactly.

5 THE COURT: Subsection 3.

6 MR. J.J. JIMMERSON: And we would just make  
7 sure that all these requests are inured to the  
8 obligation of Pardee, its successors and assigns, and to  
9 the benefit of Wolfram and Wilkes, their successors and  
10 assigns.

11 MS. LUNDVALL: And with the qualification, I  
12 meant that's for the Option Property pursuant --

13 MR. J.M. JIMMERSON: We will follow up, of  
14 course, pursuant to the Court's request with the  
15 written.

16 THE COURT: And, Ms. Lundvall, they had given  
17 me -- they thought it was your revised one, and it was  
18 the same one. It was sitting -- it's my fault.

19 MS. LUNDVALL: No problem.

20 THE COURT: So they had two copies of the same  
21 thing. So evidently -- so you did give us a revised one  
22 and it has a CD-ROM on it.

23 MS. LUNDVALL: Yes, it does, Your Honor.

24 THE COURT: Somehow I got two of the same  
25 thing.

1           Okay. So you have -- all right.

2           MS. LUNDVALL: Is plaintiffs' counsel finished?

3           THE COURT: I think so.

4           You closed; right?

5           MR. J.J. JIMMERSON: Yes, Your Honor.

6           MS. LUNDVALL: Your Honor, before I even do my  
7 to-dos or do any general statements or express my thanks  
8 to you and your gracious staff, all of your gracious  
9 staff for its accommodations, what I want to do is to  
10 directly address the issue that was raised by  
11 Mr. Jimmerson concerning the R-5 property.

12          THE COURT: Okay.

13          MS. LUNDVALL: It is his theory that in  
14 December of 2005, Pardee applied for a tentative map,  
15 and on that tentative map we made requests for  
16 designations of single-family residential property. And  
17 it is also his contention that, in fact, we have already  
18 designated that single-family residential property.

19          And he pointed you to Amendment No. 7, and he  
20 said look at the R-5 designation. That's what he said,  
21 R-5 designation. Okay? And then he went on to tell  
22 you, without any foundation whatsoever, what R-5 means.

23          R-5 can be found at Clark County Code  
24 30.40.160.

25          THE COURT: Clark County Code?

1 MR. J.J. JIMMERSON: Your Honor, I never said  
2 R-5. I said RES 5. R-5 is a zoning designation. It  
3 has nothing to do with this case, Residential 5.

4 THE COURT: Hold on.

5 MR. J.J. JIMMERSON: I never --

6 THE COURT: Do you mind if I make sure I look  
7 at my notes?

8 MS. LUNDVALL: I want this to be --

9 MR. J.J. JIMMERSON: We never discussed zoning.  
10 The Court wouldn't even allow it.

11 THE COURT: I have a note here, RES 5.

12 MR. J.J. JIMMERSON: RES 5, short for  
13 Residential 5.

14 THE COURT: Well, it's a designation I have  
15 seen with RES 1 on these maps between --

16 MS. LUNDVALL: Now hold on. Please do not  
17 interrupt me.

18 THE COURT: Let me see if there's any --

19 MR. J.J. JIMMERSON: I object to the statement.

20 THE COURT: Interesting, I have an R-5. So  
21 maybe he interchanged. I put RES 5 five times so far  
22 and one R-5. So did you mean RES 5?

23 MR. J.J. JIMMERSON: Only, yes. Only RES 5, of  
24 course.

25 MS. LUNDVALL: But that's okay, Your Honor.

1 Because you know what, he told you what RES 5, that he  
2 used interchangeably with R-5, meant.

3 MR. J.J. JIMMERSON: I did not.

4 THE COURT: Just tell me what he says RES 5  
5 was.

6 MS. LUNDVALL: Please do not interrupt me as  
7 far as during my argument.

8 THE COURT: In my notes --

9 MR. J.J. JIMMERSON: Don't misstate something.  
10 I said RES 5, referring to the one parcel that was in  
11 the multi-family use. I never referenced a zoning  
12 designation. R-5 is a zoning designation for apartment  
13 buildings. This RES 5 is residential. You sell it as  
14 residential lots. I don't know where this is coming  
15 from. I never mentioned R-5 at all. RES 5 would be any  
16 reference I have as to RES 5. It's the only RES 5 in  
17 this entire trial.

18 THE COURT: For the record, that's what I wrote  
19 down. One time I did do R-5, but -- do your closing  
20 how --

21 MS. LUNDVALL: Thank you, Your Honor. But the  
22 point I want to try to make is this, is he told you that  
23 RES and R-5 meant single-family residential, that Pardee  
24 had already designated it single-family residential.  
25 That's what he told you and that's how, in fact, that he

1 used the foundation in a preface for claiming some type  
2 of entitlement to the tentative map application that was  
3 made in December of 2010.

4 The RES 5 designation is found at the exhibits  
5 to Amendment No. 7, which is found at Tab 5. And we  
6 expressly asked Mr. Whittemore in any of those  
7 depictions on those maps, the reference is to  
8 multi-family land. Answer: Yes. You can go back and  
9 to look through his testimony.

10 Moreover, the RES 5 that is depicted on these  
11 maps matches the R-5 designation that is multi-family  
12 land that is found at 30.40.160. And so, therefore, I  
13 think that that is a very important point that  
14 plaintiffs' counsel originally made, and that is the  
15 Court is entitled to take judicial notice of the Clark  
16 County codes, statutes, case law, anything from a legal  
17 perspective. So we would ask the Court to take a look  
18 at that.

19 THE COURT: 30.40.160, Clark County Code.

20 MS. LUNDVALL: Clark County Code.

21 THE COURT: I want to make sure I have the  
22 right reference. That's R-5 designation.

23 MS. LUNDVALL: That's correct. If you take a  
24 look at, there is a standard as far as agenda maps that  
25 is used by the Clark County Commission. In the lower

1 right-hand corner what they use is also as  
2 identification as residential districts. You are going  
3 to see the R-5 reference. Where is it under?  
4 Multi-family. That's a standard form that is used then  
5 by the Clark County Commission.

6 Now, from here, Your Honor, what I'd like to do  
7 is this, is to hand a copy to the Court as well as to  
8 opposing counsel our proposed findings of fact and  
9 conclusions of law.

10 THE COURT: This is the new one?

11 MS. LUNDVALL: That is the revised.

12 THE COURT: Okay, that I did just find it.

13 MS. LUNDVALL: One of the things, Your Honor,  
14 that I found is giving the closing remarks in a bench  
15 trial differs significantly from giving closing remarks  
16 to a jury.

17 THE COURT: Usually the trier of fact doesn't  
18 ask questions. And I don't know if that's appropriate  
19 or not, but sometimes you have to. I bet jurors -- they  
20 can, but they don't like writing it down. They get  
21 intimidated.

22 MS. LUNDVALL: The other thing that I found too  
23 is in doing closing remarks then to the bench is that  
24 the courts typically are more analytical. We all kind  
25 of move in progression. We move and we analyze in

1 linear fashion, and we look at things and we're trying  
2 to find checklists. Like essential elements, have they  
3 been demonstrated? Has proof of this issue been  
4 demonstrated in this trial?

5 And, therefore, what I intend to do is to  
6 fashion my remarks, my closing remarks, around our  
7 proposed findings and conclusions of law. I'm going to  
8 pull these up on the screen in addition to having the  
9 written document in front of the Court. The screen  
10 helps me go along. So Brian is going to simply follow  
11 me.

12 THE COURT: That's fine.

13 MS. LUNDVALL: What the Court is going to  
14 learn, what your court staff regrettably will learn, is  
15 it takes a little bit longer and it's not --

16 THE COURT: I promised both of you you could  
17 have as much time as long as we do it today. They're  
18 fine.

19 MS. LUNDVALL: And it's not as exciting. So  
20 I'm hoping everybody is able to stay awake at this late  
21 hour on a Friday afternoon.

22 THE COURT: I promise you, I will.

23 MS. LUNDVALL: If we pull up the first page,  
24 I'm going to start going through some of these things  
25 because they are not -- you need to blow up for me so I

1 can see these as they come up.

2 Some of these issues and some of these  
3 foundational proposed findings of fact there's no  
4 dispute for, and I'm going to run through these fairly  
5 quickly.

6 There's no question about that both Mr. Wolfram  
7 and Mr. Wilkes were real estate agents, who they work  
8 for. Moreover, there is no question that the Court has  
9 already ruled that they have standing then to bring this  
10 case.

11 THE COURT: That's under your A. It's almost  
12 like stipulated facts, although it doesn't say  
13 stipulated facts.

14 MS. LUNDVALL: But there is no dispute  
15 concerning these particular issues.

16 There's no issue that, in fact, in the 1990s  
17 Mr. Whittemore was the one that began developing the  
18 project that was to be known as Coyote Springs. We also  
19 know, and there's no dispute, that this included over  
20 43,000 acres of unimproved real property and where its  
21 location was.

22 Now turn to the next one, please. We also know  
23 that Pardee is a home builder, and you learned through  
24 the testimony then what a production home builder is,  
25 and they do business here in Nevada. Pardee, in this

1 reference, is shorthand for Pardee Homes of Nevada.

2 They are the defendant then to this action.

3           Its parent company has been in business, as  
4 Mr. Lash testified, since 1921. And we also heard and  
5 we saw examples of Pardee's slogan of "Do the right  
6 thing." I'm going to talk about these in a little bit  
7 more detail.

8           But the two principal examples that I think the  
9 Court has seen how Pardee has done the right thing with  
10 these plaintiffs is, first and foremost, by entering  
11 into the Commission Agreement in the first place. Even  
12 though there was a dispute as to whether or not they  
13 were the procuring cause, Pardee went forward. Mr. Lash  
14 testified they went forward and entered into this  
15 Commission Agreement.

16           Second, you had another example from Mr. Lash,  
17 and that is that he gave them what he believed was more  
18 information than to which the contract, the Commission  
19 Agreement, entitled them to. When Mr. Wolfram, and  
20 Mr. Wolfram only, began asking questions, there was  
21 responses back to Mr. Wolfram, and there was additional  
22 information over and above what was set forth within the  
23 Commission Agreement that was sent to Mr. Wolfram.

24           Now, I don't think there's any dispute that  
25 Mr. Wilkes received that information. Why? Because we

1 know from both of them that they shared it back and  
2 forth with each other.

3 Next page, Brian. It was 2002 that both  
4 Mr. Wolfram and Mr. Wilkes indicated that they had  
5 become familiar with Mr. Whittemore.

6 Next page, we also know by that same time frame  
7 they had been acquainted with Mr. Lash, who was then  
8 responsible for land acquisition.

9 Page 6, please. On a previous occasion they  
10 had approached Mr. Lash with a potential development  
11 deal, and it was according, particularly, to Mr. Wilkes  
12 that he had testified that there had been other deals  
13 that they had entered into and that Pardee had paid them  
14 in full on those commissions. In other words, at the  
15 time that they began this relationship, they had no  
16 reason by which then to distrust Pardee or that Pardee  
17 was going to do them wrong in some fashion or another.

18 Number 7, the testimony, particularly, was from  
19 Mr. Wilkes is that while Mr. Wolfram was on vacation,  
20 they had learned that Mr. Whittemore had acquired his  
21 water rights. And they had contacted Mr. Lash asking  
22 him if he was interested in meeting with Mr. Whittemore  
23 concerning Coyote Springs. They also as far as then  
24 contacted Mr. Whittemore. There's no dispute concerning  
25 these particular facts.

1           If you go on to Item No. 8, is that,  
2 unbeknownst to Mr. Lash, Mr. Whittemore and Mr. Andrews  
3 had already begun a relationship. They had already  
4 developed a relationship, and they had already began  
5 discussing Pardee's involvement at Coyote Springs. You  
6 heard from Mr. Whittemore that prior to this all hands  
7 meeting, he had already developed an interest in working  
8 with Pardee. You heard from Mr. Andrews that prior to  
9 this all hands meeting, that they had already -- that  
10 Pardee had already developed an interest in working with  
11 CSI, with Mr. Whittemore.

12           Now, why is it that I'm emphasizing this  
13 particular issue? Because the plaintiffs, they continue  
14 to push this idea that they were the procuring cause and  
15 somehow that that means something and it changes or  
16 modifies or suggests a different interpretation from the  
17 contract that they negotiated and entered into with the  
18 plaintiffs. Respectfully, it does not.

19           The procuring cause doctrine that the Court, as  
20 you indicated that you had done some research into this,  
21 is a doctrine whereby it was designed to protect brokers  
22 who had no written agreement. It's designed to protect  
23 brokers that basically got left out in the cold when  
24 they had put a buyer and a seller together and the buyer  
25 and the seller refused to pay them a commission. That's

1 how the procuring cause doctrine was developed.

2 But the procuring cause doctrine has made real  
3 clear that if, in fact, the parties go forward, in this  
4 case Pardee Homes of Nevada and the plaintiffs, and they  
5 consummate their relationship into a contract, it is the  
6 terms of that contract that prevail. And it is those  
7 terms of that contract that we are going to highlight  
8 during the course of my remarks to determine what the  
9 scope of the plaintiffs' responsibilities were to  
10 Pardee, as well as Pardee's responsibilities to the  
11 plaintiffs.

12 Both Mr. Wolfram and both Mr. Wilkes indicated  
13 that the parties' contractual obligations to each other  
14 were reduced to writing in this Commission Agreement.  
15 No more and no less. And, therefore, that's why I  
16 intend to focus on it.

17 And if there's any question about the fact that  
18 you cannot use, somehow, some other doctrine to make the  
19 duties bigger than what they are within the Commission  
20 Agreement, we would cite the Court then to the decision,  
21 and we cited this decision in previous submissions to  
22 the court, but the Highway Builders case versus Nevada  
23 Rebar. Nevada Rebar is probably one of the most  
24 important contract cases that our Nevada Supreme Court  
25 has issued. It is found at 128 Nevada Advanced Opinion,

1 page 36, 284 Pacific 3rd, page 377. It's a --

2 THE COURT: 284 Pacific 4th, right, P4?

3 MS. LUNDVALL: That's a good question. I think  
4 it's Pacific 3rd. Whatever is found in 2012. I'm  
5 pretty sure we're still in Pacific 3rd.

6 The basic holding from that case, Your Honor,  
7 is this: That you cannot argue that, in fact, your  
8 agreement is more than what the parties had  
9 memorialized, particularly when they have an integrated  
10 clause in their contractual document. And there's no  
11 question about the fact that the Commission Agreement  
12 contains an integration clause.

13 Next topic, we go on and we talked about what  
14 is referred to as the all hands meeting. And one of the  
15 things I think that is important from this is the fact  
16 that what it was that Mr. Whittemore at that time was  
17 willing to sell to Pardee and what Pardee was willing to  
18 buy at that point in time.

19 And that issue then turns upon and it informs  
20 this argument that the plaintiffs made afterwards that  
21 somehow that they were entitled to additional  
22 commissions on the multi-family land, the commercial  
23 land, et cetera, because that's what their position was  
24 before the litigation began.

25 And so that's why I highlight this and that's

1 why I point it out. And that's why, based upon the  
2 undisputed facts that are before the Court, it was clear  
3 that the only thing that Pardee was interested in buying  
4 was the single-family production lots. The only thing  
5 that CSI was interested in selling was the single-family  
6 production lots.

7 At that meeting, there was no question about  
8 what happened, what lands were under negotiation.  
9 There's also no question between CSI and Pardee what was  
10 the result of their negotiations. There's no question  
11 between Pardee and CSI what the status of the lands  
12 were.

13 Both Mr. Whittemore, as well as Mr. Andrews  
14 told you there was a blank canvas out there. There was  
15 no mapping. There was no entitlements. They didn't  
16 know where the sewer provisions were. They didn't know  
17 where the roads were to be mapped. They didn't know  
18 where the golf course was going to be located, nothing.  
19 The parties were starting from ground zero. And I think  
20 that's important because there's been no contrary  
21 evidence as to what the slate looked like at that time  
22 that they began their negotiations.

23 There was also no dispute as to the obstacles  
24 that they were facing. We learned about the utility  
25 corridor and how that was going to change the

1 boundaries. We learned about the BLM configuration and  
2 how that was going to change the boundaries.

3 We learned about, bless his heart, Jack  
4 Nicklaus, and his -- everyone tried to put their best  
5 gloss on it and say how creative he was, but it also  
6 sounds like maybe he was a bit demanding. And he would  
7 say, My vision is I want my course to go up there. And  
8 guess what, the parties accommodated that and they  
9 changed and made their contours then of where the land  
10 and the mapping were going to be based upon  
11 Mr. Nicklaus.

12 You also heard about wildlife issues. You  
13 heard about utility issues. Those were all factors that  
14 were going to inform then the parties' future dealings  
15 and their future mappings and what they intended to do.

16 Number ten. There's no question about the fact  
17 that Pardee and CSI began several months of  
18 negotiations. Item No. 11 is that plaintiffs were not  
19 needed for any of those negotiations.

20 One of the things I think that's interesting  
21 is, both from Mr. Wolfram's perspective, from  
22 Mr. Wilkes' perspective, from Mr. Lash's perspective,  
23 from Mr. Whittemore's perspective, all of them testified  
24 to what is standard or custom within the industry, that  
25 if brokers are involved in putting parties together,

1 that they are not needed for any subsequent  
2 negotiations. They are not the attorneys. They are not  
3 the land use people. They are not the engineers. They  
4 are the people that make introductions.

5 Nobody disputed this from an evidentiary  
6 standpoint that, in fact, Mr. Wolfram and Mr. Wilkes  
7 were not needed for any of the negotiations that led up  
8 to the Option Agreement or anything thereafter. The  
9 only people that are contending that there's something  
10 wrong with that are plaintiffs' counsel. They've  
11 characterized it in their argument that there's  
12 something nefarious about that, but none of the evidence  
13 matches the argument.

14 Now turning to Item No. 12, the single meeting  
15 that they were in attendance at was the only meeting of  
16 the participation that the plaintiffs had in the  
17 original transaction which was memorialized into the  
18 Option Agreement. I don't think anybody fusses about  
19 that. Nobody has any dispute that, in fact, they  
20 attended the single meeting.

21 Mr. Wilkes talked about that maybe it took him  
22 about a week or so, collectively, to put all the  
23 information together, and that's what he had into the  
24 research aspect of it. Maybe that these guys had taken  
25 Pardee on as far as a couple day trips for looking at

1 other properties.

2 But as to the amount of time that they had into  
3 this transaction, when you compare and contrast to what  
4 they got out of this transaction, they did very well by  
5 themselves, and they have the opportunity in the future,  
6 particularly if our economy ever picks up, to do well in  
7 the future. And had our economy continued to go, they  
8 would have been in great shape.

9 But the facts are what they are and where we  
10 are at as far as within this circumstance and that is  
11 this: For the time invested that the plaintiffs have  
12 into this, from this standpoint, they have gotten  
13 benefit of the bargain and they have the opportunity to  
14 continue to receive the benefit of their bargain.

15 You heard from Mr. Andrews that this is by far  
16 the largest commission that Pardee has ever paid for a  
17 transaction here in Nevada.

18 Turning your attention then to Item No. 13,  
19 Finding No. 13, we talk about how that there was months  
20 of intensive negotiation. Nobody disputes that they  
21 entered into the Option Agreement. We have the Option  
22 Agreement designated as Item B. We know that the Option  
23 Agreement was amended twice. The first one you can find  
24 at Exhibit E. The second one you can find at Exhibit J.

25 Both the plaintiffs testified from the witness

1 stand that not only did they receive the Option  
2 Agreement, but they also received the two amendments.  
3 And the thing that I think is notable is who they  
4 received it from. And if I could, at this particular  
5 point, I'm going to skip ahead a little bit, but you are  
6 also going to see at Items P and you are going to see at  
7 Items Q where they also received a copy of the Amended  
8 and Restated Option Agreement.

9 Now, from where did they get those documents?  
10 They got them from the title company. So the issue  
11 becomes is what duty did the title company then have to  
12 give them that information? Title companies have  
13 independent duties to the parties that are part of their  
14 escrow.

15 Now I want to cite the Court particularly to  
16 the case, the Broussard case, which is kind of the  
17 penultimate case in Nevada that deals with and describes  
18 the fiduciary duties that an escrow officer has.  
19 Broussard, which is B-r-o-u-s-s-a-r-d, versus Hill, is  
20 found at 100 Nevada 325, 682 Pacific 2nd 1376, and it's  
21 a 1984 case. And that decision then is a decision that  
22 identifies the fiduciary duties and the obligations that  
23 an escrow officer and escrow company has.

24 Now, this is important in this context,  
25 Your Honor. As the Court saw in the different

1 iterations of the Commission Agreement -- and you will  
2 see as far as that different -- the draft of the  
3 Commission Agreement where the black lines were applied  
4 by the plaintiffs.

5           Where did they place their trust? Where did  
6 they place their reliance? Who did they count on to  
7 protect them? It was the escrow company. And that only  
8 makes sense, to be quite candid. These are individuals  
9 that work within the industry all the time. They work  
10 with escrow companies, with escrow officers all the  
11 time. They put -- and they insisted on special  
12 protections in their Commission Agreement to ensure that  
13 those escrow officers, who had a fiduciary duty to  
14 inform them of anything that may have impacted their  
15 Commission Agreement, gave them that information.

16           You heard Mr. Wolfram testify that he confirmed  
17 that his Commission Agreement, that his and Mr. Wilkes'  
18 Commission Agreement was with the escrow company. And  
19 it is demonstrative as to who gave copies of the Option  
20 Agreement, the amendments and the Amended and Restated  
21 Option Agreement to Mr. Wolfram and Mr. Wilkes.

22           And the one question that is probably going to  
23 be posed or at least a question that you may sit back  
24 and scratch your head a little bit, and you'd say, Why  
25 would the escrow company have given Mr. Wolfram and

1 Mr. Wilkes copies of the Amended and Restated Option  
2 Agreement? Why? Because the initial closing date  
3 changed and that impacted their Commission Agreement.  
4 So the single change that was going to impact them out  
5 of their Commission Agreement, they were informed of  
6 that by the escrow company.

7 And one of the things that I'm going to -- I'm  
8 now getting way ahead of myself when it comes to these  
9 findings of fact. But when you take a look at all of  
10 the relevant and all as far as the capitalized terms,  
11 you don't see any changes in the subsequent amendments.

12 And I'm going to go through that entire list  
13 with you and ask you to be able to compare the  
14 Commission Agreement with those capitalized terms  
15 against the subsequent amendments. And what you are  
16 going to learn is there have been no changes to those,  
17 and, therefore, there would have been no duty to give  
18 those to the plaintiffs. But like I said, I'm getting  
19 ahead of myself. So let me go back as far as to my  
20 general outline.

21 One of the things that I'd like to do at this  
22 point in time is to address a little bit of the legal  
23 theory or the theories that the plaintiffs have advanced  
24 as to why they are entitled to additional commissions.

25 We know from my tired blowup that, in fact,

1 that these are the three provisions that speak to the  
2 commission portions as far as of the Commission  
3 Agreement. And what I'm going to do is try to point  
4 out, and that is this, that from these three paragraphs,  
5 the theory that the plaintiffs have espoused is not  
6 found with these three paragraphs, which is the  
7 Commission Agreement.

8 And let me begin by pointing out this, is they  
9 contend that Parcel 1 under the Option Agreement was  
10 what Pardee was purchasing back in May of 2004. Now,  
11 everybody involved with Pardee says, Huh-uh, that wasn't  
12 what was going on. The representative of CSI that came  
13 in said, Huh-uh, that wasn't what was going on. And if  
14 you take a look as far as at the Option Agreement and go  
15 past the recitals in the Option Agreement, you can see  
16 that wasn't what was going on.

17 But most importantly, though, Your Honor, that  
18 is this: Under paragraph 1 and paragraph 2 that  
19 identify then the payments that were under Purchase  
20 Property, there is nothing that indicates that either  
21 the timing of the takedown of Purchase Property or the  
22 location of the Purchase Property was something that  
23 impacted their commission arrangement. Nothing within  
24 this. The location and the timing, let alone the number  
25 of acres is not even referenced in the payment

1 provisions of their Commission Agreement.

2           And so it's hard for me to understand how it is  
3 that the plaintiffs can contend that these two  
4 paragraphs that obligated Pardee to pay based upon  
5 Purchase Property Price, and then when we look at the  
6 second page as to the timing of those particular  
7 payments and how those payments were to track, the  
8 installment payments that were being made by Pardee to  
9 CSI, point by point by point, that's how they were being  
10 paid under 1 and 2, and it had nothing to do with  
11 specific takedowns, locations, amount of acreage,  
12 nothing.

13           But how would they have known, though? And let  
14 me -- I want to pose a rhetorical question. They  
15 suggest that, Well, we didn't know that Parcel 1 was not  
16 Purchase Property. We knew that in the original Option  
17 Agreement that Pardee was going to pay \$66 million, and  
18 if you look at paragraph 1, subsection D, what we know  
19 is that Pardee was going to pay \$44,800 per acre.

20           Now, if you run the math on that, it's really  
21 pretty simple. You take 3,602 acres that was identified  
22 as Parcel 1, you multiply that then by \$44,800 an acre.  
23 And what do you get, \$161 million, almost \$162 million.  
24 So just that simple calculation alone should have put  
25 them on notice that Parcel 1 was not Purchase Property.

1 And they had to dig farther then past the recitals into  
2 the Commission Agreement itself to have an understanding  
3 of what CSI and Pardee had agreed to do.

4           There are a number of places within the  
5 parties' agreement that, in fact, references the  
6 cooperative mapping and how the boundaries were going to  
7 change. I'm going to as far as give the Court a  
8 recitation of these number of different places. If you  
9 go through what is our Exhibit B, the Option Agreement,  
10 what you are going to see is that page 1, paragraph A,  
11 there is references to changing boundaries. Page 2,  
12 paragraph B, there's references to changing boundaries.  
13 Page 2, paragraph 1A, there's references to changing  
14 boundaries. Page 4, paragraph 1C, twice within that  
15 paragraph there's references to changing boundaries.  
16 Page 7, paragraph 2F, there's references to changing  
17 boundaries. Page 14 paragraph 4D, references to  
18 changing boundaries. Page 15, paragraph 4E; page 17,  
19 paragraph 4H; page 19, paragraph 6A; page 31,  
20 paragraph 12E.

21           In sum, if you read the entirety of the Option  
22 Agreement, you will see and reference what it is that  
23 Mr. Lash, Mr. Andrews, and Mr. Whittemore undisputedly  
24 testified what the parties not only expected to happen,  
25 but what they memorialized would happen.

1           And that was because they had a blank slate out  
2 there, that they knew that there was going to be  
3 cooperative mapping. They knew there needed to be  
4 certain assignments of duties to each other as part of  
5 that process, and they engaged in that process so as to  
6 be able then to identify what it was that Pardee was  
7 going to get in exchange for the \$84 million Purchase  
8 Property Price that they had agreed to and set forth  
9 within the four corners of their Option Agreement.

10           Now, if you take a look also then at the  
11 Amended and Restated Option Agreement. I'm not going to  
12 go through all of the same references, but if they had  
13 gone through that Amended and Restated Option Agreement,  
14 what you are going to see is that same thing.

15           Going to Finding No. 14, this speaks to the  
16 fact that what basically the land was at the time that  
17 they began the negotiations that consummated then in the  
18 Option Agreement. They talked about how there was no  
19 zoning, parceling, mapping, entitlements, permitting,  
20 et cetera.

21           The only thing Mr. Whittemore testified that  
22 had been done was that he had a development agreement  
23 that he had entered into with the county at that point  
24 in time. That was the only thing that had been done.  
25 As to the rest of all of this, all of that needed to be

1 done in the future.

2 Mr. Whittemore was looking for a co-developer.  
3 He got a co-developer in Pardee. And part of the Option  
4 Agreement identified the duties that Pardee was going to  
5 undertake as the co-developer. And one of those duties  
6 involved the mapping that we're talking about.

7 Also this finding makes reference for which  
8 that there has been undisputed testimony as to the  
9 different obstacles the parties faced for which that  
10 they knew the mapping and boundaries were going to  
11 change.

12 Turning your attention to Finding No. 15, in my  
13 opinion, the facts that underlie Finding No. 15 are  
14 undisputed, and I submit that they are undisputed to the  
15 Court, and I submit, Your Honor, that they are  
16 dispositive of two of the parties' claims.

17 Let me explain first how I believe that they  
18 are undisputed, and I'm going to go through these in  
19 detail. At the same time that Pardee was negotiating  
20 with Coyote Springs, Pardee was also negotiating with  
21 the plaintiffs concerning their finder's fees. Nobody  
22 disputes that.

23 Pardee and the plaintiffs extensively  
24 negotiated the Commission Agreement that bears the date  
25 of September 1 of 2004. Mr. Lash testified to that on

1 one side. Mr. Wolfram and Mr. Wilkes testified to that  
2 on the other side. They also testified that they were  
3 represented by Mr. Jimmerson throughout that process.

4 They also testified that they relied on  
5 Mr. Jimmerson to secure the best deal for them and that  
6 they were pleased with his efforts and they, themselves,  
7 elected and decided to accept the deal that he had  
8 negotiated. There is no dispute about that.

9 In addition, there's no dispute that these two  
10 individuals were knowledgeable real estate professionals  
11 and that they were well familiar with the documents that  
12 are typically involved in land development. Both of  
13 them identified that from the witness stand.

14 The obligations to each other, both sides  
15 testified, were reduced to the four corners of the  
16 Commission Agreement, and they acknowledge that it was  
17 an arm's length transaction. They placed no special  
18 reliance on Pardee akin to what you see in an insurance  
19 agreement.

20 Why is that important? It is important because  
21 without a special relationship, which is a legal term in  
22 a legal conclusion, without that special relationship  
23 between Pardee and the plaintiffs, their accounting  
24 claim fails, as well as their covenant of good faith and  
25 fair dealing claim.

1           And when we get into the legal conclusions that  
2 we're going to ask the Court to make, I will cite the  
3 Court then directly not only to the Court's previous  
4 orders where it was identified that those were essential  
5 elements of those particular claims. And, respectfully,  
6 we submit that these facts are undisputed, and without a  
7 special relationship between the plaintiffs and Pardee,  
8 then, in fact, their claim for accounting fails, as well  
9 as their claim for breach of the covenant of good faith  
10 and fair dealing.

11           Finding 16, no dispute that, in fact, Pardee  
12 went forward and negotiated the Commission Agreement,  
13 notwithstanding that Pardee had already done work then  
14 with CSI before that.

15           Finding No. 17, the Commission Agreement  
16 governs the payment of commissions and the provision of  
17 certain information related to their purchase. We know  
18 that it's a fully integrated document. We also know,  
19 from Mr. Wolfram, Mr. Wilkes, and Mr. Lash that there's  
20 no other deal between them. This is the sum total of  
21 their deal. And so the scope of their responsibilities  
22 and their obligations is found within that Commission  
23 Agreement.

24           It is also this Commission Agreement that they  
25 accuse Pardee of breaching. I asked Mr. Wolfram, This

1 case to you is principally about breach of contract?

2 Answer: Yes.

3 Mr. Wilkes, this case to you is principally  
4 about breach of contract? Answer: Yes.

5 And the contract that's at issue is your  
6 Commission Agreement? Answer yes, by both of those  
7 individuals.

8 And they also -- Mr. Wolfram in particular --  
9 went on to acknowledge that it's that breach of contract  
10 that underpinned their covenant of good faith and fair  
11 dealing as well as their accounting claim.

12 But their focus, from the plaintiffs'  
13 perspective, they looked at this case as a breach of  
14 contract case. And, therefore, I'm going to focus then  
15 pretty much the balance of my remarks on what is  
16 required then by the Commission Agreement.

17 We know from taking a look at Exhibit L, which  
18 is our Commission Agreement, Exhibit 1 for the  
19 plaintiffs, no dispute about that, that all of the  
20 capitalized terms then from the Option Agreement are  
21 what inform the construction then of the Commission  
22 Agreement. And so, in other words, if there's some  
23 question about the scope or the definition or something  
24 of that nature in the Commission Agreement, these  
25 gentlemen knew to go to the Option Agreement to look for

1 those.

2 Now, importantly, Your Honor, is if you take a  
3 look at the amendments, even the Amended and Restated  
4 Option Agreement, and if you take a look at Amendments 1  
5 through 8 to the Amended and Restated Option Agreement,  
6 the Court will see no changes to the definition of  
7 Purchase Property Price. It will see no changes to the  
8 definition of Option Property. If you compare and  
9 contrast the Option Agreement to the Amended and  
10 Restated Option Agreement, there is no difference  
11 between the procedure under paragraph 2 by which the  
12 options were going to be exercised.

13 Now, why is that important? And I know that  
14 I'm going to sound like a broken record on this  
15 particular point, Your Honor, but when you go to (iii),  
16 (iii) doesn't say if Option Property is purchased.  
17 (iii) entitles these gentlemen to commission with  
18 respect to any portion of the Option Property purchased  
19 by Pardee pursuant to paragraph 2 of the Option  
20 Agreement.

21 And so I do believe that, in fact, a proper  
22 definition of Option Property includes this. But if  
23 there's any question that that's not what the parties  
24 intended, all you have to do is look at their agreement.  
25 They made it express within their agreement.

1           It's not just some type of an everything else  
2 approach that has been advocated and that has been urged  
3 upon you by plaintiffs' counsel. It is Option Property  
4 purchased pursuant to paragraph 2 of the Option  
5 Agreement. That helps the Court and informs the Court's  
6 interpretation of this Commission Agreement as to what  
7 the parties had agreed to, when were they going to  
8 receive a commission.

9           And I would note that there's nothing within  
10 these provisions or the balance of the agreement that  
11 says once Pardee acquires property of some fashion or  
12 another, that for which it has paid Purchase Property or  
13 it is bought in any other component and somehow changes  
14 the designation of the use of that property, that then  
15 we go back and we reshuffle the deck and we give them  
16 additional commissions.

17           We have to look at what the language is of the  
18 Commission Agreement. And there's nothing that the  
19 plaintiffs can point to, nothing within the Commission  
20 Agreement that they can point to that if there are  
21 subsequent changes that Pardee and CSI made to the use  
22 designations that, in fact, those subsequent changes,  
23 after the original transaction closed, that entitles  
24 them to more commissions.

25           The simple answer to that is, number one, it's

1 not found within the four corners of the agreement. The  
2 second answer to that is, all right, when were they  
3 entitled to some type of payment?

4 We know that they have acknowledged that under  
5 (i) and (ii) that they've been paid in full. So then we  
6 have to go to (iii) and what does three say? I'm back  
7 to my broken record. It's Option Property purchased  
8 pursuant to paragraph 2 of the Option Agreement.

9 I got off on a little bit of a tangent. We  
10 were talking about how there were no changes to the  
11 definition of initial purchase closing settlement dates,  
12 deposits, parcel maps, option parcels, option closing,  
13 contingency periods. Those were all provisions found  
14 within the Commission Agreement.

15 And, moreover, if, for some reason, that there  
16 was some type of a concern because there had been a  
17 change to a definition from Option Property to the  
18 Amended and Restated Option Agreement, which we know  
19 that the parties had already started to do the process  
20 of mapping so that they were able to identify what that  
21 initial purchase was going to be, and it was 511 acres,  
22 the plaintiffs knew that.

23 They knew that there was a change from the  
24 Option Agreement that talked about this 3,600 acres that  
25 Mr. Whittemore described and the balance of the document

1 described as it was going to be security for the parties  
2 and the Amended and Restated Option Agreement that had  
3 the first parcel identify as Purchase Property as 511  
4 acres. They knew of that change because they were given  
5 those documents.

6 Did they think it was a big deal? Apparently  
7 not. They never sent a letter to Mr. Lash or anyone at  
8 Pardee saying, What does this mean? They never called  
9 Mr. Lash in March of 2005 and said, What does this mean?  
10 They never contacted the escrow company and said, What  
11 does this mean? Why? Because it was irrelevant to how  
12 they were going to be paid. They were going to be paid  
13 on the Purchase Property Price, and we know that was  
14 \$84 million, and we know that there were installments  
15 that Pardee was going to make.

16 And we know that by taking a look at, and if  
17 the Court compares the installment schedule that's found  
18 on the second amendment, it's also echoed in the Amended  
19 and Restated Option Agreement. And if you take a look  
20 at what the aggregate payments, the aggregate deposits  
21 were, they total \$10 million. They got paid. Their  
22 first commission payment was on \$10 million.

23 And then they got paid 44 additional payments  
24 based upon the \$1.5 million monthly payments that Pardee  
25 was making to CSI. And, in addition, they got paid

1 based upon the final three payments, which were  
2 \$2 million payments, installment payments that were  
3 being made from Pardee to CSI, and that's all set forth  
4 within the schedule.

5 And the thing that I think is important at this  
6 point, or at least I'll point it out at this point in  
7 time, is that we know that in 2007 that the plaintiffs  
8 were overpaid by the escrow company. We also know from  
9 Mr. Wolfram's testimony that he was able to discern from  
10 the information available to him at that time as to  
11 whether or not that he was being paid properly, and he  
12 determined that he was being overpaid.

13 And Mr. Wolfram identified that, in fact, what  
14 was available to him, the Option Agreement, the two  
15 amendments, the Amended and Restated Option Agreement,  
16 and the commissions that were being paid to him at that  
17 time, and he was able to discern and contact Pardee and  
18 say, I don't know for certain, but I think I'm being  
19 overpaid. And guess what, he was.

20 He, at that point in time, didn't know the  
21 locations of property. He didn't know the acreage. He  
22 didn't know land use designations. He didn't know  
23 anything about the takedowns. He offered you no  
24 testimony that he went down and looked for deeds or  
25 anything of that nature. What he knew is the schedule

1 for payment of the Purchase Property Price set forth in  
2 the parties' agreement, and what he knew is based upon  
3 what he had received from the escrow company to discern  
4 if he was being paid properly for the amount and the due  
5 dates of his commissions.

6 Now, one of the things, while we're at this  
7 point in time, what I want to do is to echo what I  
8 offered to the Court in my opening statement about  
9 connect the dots. Let me tell you where I was going  
10 with those connect the dots, because I do think this is  
11 important.

12 Plaintiffs acknowledge and admit that they've  
13 been pain in full under paragraph 1 and paragraph 2. So  
14 we get down here to paragraph 3. And what is that  
15 procedure, what is that process then that was set forth  
16 pursuant to paragraph 2 of the Option Agreement. I  
17 walked Mr. Whittemore through that, and what I'd like to  
18 do then is to highlight that for purposes of my argument  
19 to you right now.

20 If you take a look at page 2 of Exhibit B,  
21 which is the Option Agreement, it gives you --  
22 Exhibit 2.

23 THE COURT: Okay. I got it.

24 MS. LUNDVALL: Exhibit B.

25 THE COURT: Of Exhibit 2?

1 MS. LUNDVALL: I think Exhibit 2 and Exhibit B  
2 are the same thing, the Option Agreement.

3 THE COURT: Right. I got the Option Agreement.

4 MS. LUNDVALL: All right. At page 2, we know  
5 that it requires a designation by CSI. How many times  
6 did we hear that? And so that part was found on page 2.

7 If you go to page 5, what you are going to see  
8 at page 5, beginning at paragraph 2, is that the first  
9 thing that is required is a written notice. That's the  
10 very first stage. After you get past the designation,  
11 you gotta have a written notice. And it says to whom  
12 it's supposed to be sent. That's paragraph number 17.

13 There's miscellaneous different procedures then  
14 that are set forth at B, C, D, E, F and G. But the one  
15 I think that is probably the most important for the  
16 Court to take a look at is at page 14, and you are going  
17 to see on page 14 -- let me see if I can identify where  
18 specifically on that page so the Court takes a look at  
19 that.

20 About halfway down that first paragraph that's  
21 found at the very top of page 14, and it speaks to after  
22 the final purchase closing the buyer timely exercises  
23 its option.

24 I asked Mr. Whittemore what did that mean. He  
25 said that the Option Property was going to be taken down

1 after Pardee got property for the \$84 million it was  
2 spending with Pardee. The final purchase closing is the  
3 final closing that you'll see earlier defined in the  
4 agreement was the last parcel that Pardee would receive  
5 for its \$84 million. And then if, in fact, that they  
6 are going to purchase additional single-family land,  
7 then the Option Property and the definitions and the  
8 process and the procedure kick in.

9 So there's where you look particularly to learn  
10 that this is a linear transaction. It's not a  
11 transaction as described by the plaintiffs where it was  
12 Parcel 1 was Purchase Property and anything outside of  
13 Parcel 1 was Option Property. That's not how the  
14 parties defined it. That's not how CSI and Pardee  
15 defined it in their own agreement. They defined it in a  
16 linear fashion.

17 Pardee was going to spend \$84 million first.  
18 And if, after spending that \$84 million in Purchase  
19 Property Price and getting land, and if they needed  
20 additional single-family land after that, then they had  
21 the right, if CSI had designated single-family land, to  
22 send an exercise option.

23 The testimony unequivocally has been that that  
24 has not happened. Factually, that's what the undisputed  
25 evidence is before the Court.

1           Equally factually from a business perspective  
2 is that Pardee has no need for additional single-family  
3 lands at Coyote Springs. You heard Mr. Andrews'  
4 testimony they probably have enough for a lifetime, at  
5 minimum his lifetime.

6           In addition, you heard Mr. Lash that said at  
7 the very minimum, under the best of circumstances,  
8 they've got inventory for at least 14 to 15 years. And  
9 so to the extent that they have enough inventory of the  
10 single-family land for which their business needs may  
11 dictate, it would be only after that point in time for  
12 which that this process from a business perspective may  
13 be kicked in.

14           And so to the extent let me continue going on  
15 then and marching through then what the process would  
16 be. If you take a look also on subsection D that is  
17 found on page 14, the Court will see that there is  
18 reference to an Option Property deed. It was a form of  
19 the deed that the parties had identified.

20           The form of that deed was one of the exhibits  
21 to Amendment No. 2, and it expressly states on the form  
22 of the deed Option Property. And if Pardee had  
23 exercised its option, if CSI had accepted that, if they  
24 had gone through the entirety of the transaction, they  
25 were to record that Option Property deed, that form, to

1 take the legal description and insert it into the form  
2 on that deed and make it a matter of public record.  
3 That is all set forth in the language that is found on  
4 page 14 under subsection D.

5 And the point to be made here is this: That  
6 Option Property deed, Your Honor, would have been a  
7 public document. So that if the plaintiffs wanted to  
8 discern if Pardee had purchased any Option Property,  
9 pursuant to paragraph 2, what would they have done?  
10 Mr. Andrews' testimony and, by logic, is the first thing  
11 that you would do is you would go to the public records  
12 and look for that Option Property deed.

13 There's none there. It doesn't exist. Why?  
14 Because as Mr. Whittemore, on behalf of CSI, as Mr. Lash  
15 and Mr. Andrews testified, Pardee has never exercised  
16 any option to purchase additional single-family lands  
17 pursuant to paragraph 2, had no need to do so.  
18 Therefore, there was no Option Property deed to be found  
19 in the public record.

20 If the Court also takes a look at additional  
21 procedures, you are going to see on page 15,  
22 subsection E, that speaks to the description being  
23 inserted into the form deed. There's additional  
24 procedures that are identified at page 16.

25 Equally important at page 17, subparagraph H,

1 it makes reference to the option memo and the addition  
2 or the edits and changes that need to be made to the  
3 option memo. On page 22, there's further discussion  
4 concerning the written notice, and on page 27 there's  
5 the description about the preparation of the tentative  
6 maps for purposes of the Option Property, none of which  
7 that exists.

8 So that process and that procedure was all very  
9 document intensive, as any land transaction is. Pardee  
10 wouldn't have been the only party that had that  
11 information. CSI would have had that information. The  
12 escrow company would have had that information.

13 They sent a subpoena to CSI. Didn't get any  
14 information on Option Property being purchased by  
15 Pardee. No exercise, no notice of exercise option, no  
16 escrow instructions, none of this process I've just  
17 described.

18 They sent a subpoena duces tecum then to the  
19 title company, asked for all of this information. It  
20 doesn't exist. There was nothing to give back to them.

21 You've also heard as far as how that in the  
22 public record there is no Option Property deed. So  
23 Pardee is not the only party that would have this  
24 information that would have memorialized if, in fact,  
25 that this paragraph would have been kicked in.

1           There are other parties, CSI and, at a minimum,  
2 the escrow company, and at a minimum the public record.  
3 All of those places have been searched and scoured.  
4 None of those places unearthed any information to  
5 support the fact that Pardee had purchased Option  
6 Property.

7           In other words, when Mr. Lash told Mr. Wolfram  
8 that there had not been any Option Property that had  
9 been purchased for which that they would have been  
10 entitled to a commission, he was telling them the truth.

11           Paragraph 21, please. Is that where I'm at?  
12 Brian, take me to 18.

13           THE COURT: You just went through 20 and we  
14 went through --

15           MS. LUNDVALL: I thought so.

16           THE COURT: You were on 21. I've been  
17 following it. If you look, you have your (i), (ii),  
18 (iii), and we just went through it. So the next would  
19 be starting on the Purchase Property.

20           MS. LUNDVALL: I do believe that the Court is  
21 accurate. 21, that's where I'm at, at least in my  
22 notes.

23           THE COURT: That's where I'm at. So hopefully  
24 I'm following.

25           MS. LUNDVALL: Paragraph 21, the term Purchase

1 Property Price was defined in the second amendment, and  
2 also it was defined in the Amended and Restated Option  
3 Agreement, \$84 million.

4 The due dates then for the commission -- and I  
5 think that this is important, Your Honor. Because one  
6 of the things that helps the Court in trying to  
7 determine what do these mean, is when you look at -- and  
8 under standard contract interpretation, you are supposed  
9 to look at the entirety of the agreement in context, not  
10 supposed to pick out things here and there. You are  
11 supposed to look at it in its context.

12 So let's take a look then at when the due dates  
13 for the commissions were due under paragraphs (i) and  
14 (ii). If you go to page 2 then of the agreement, there  
15 hasn't been a lot of focus on this portion of the  
16 Commission Agreement, but it does inform the  
17 interpretation.

18 It speaks to Pardee shall make the first  
19 commission payment to you upon the initial purchase  
20 closing, and then it talks about what that is supposed  
21 to be with respect to the aggregate deposits. All  
22 right. What is all that referring to? It's all  
23 referring to that schedule that was found in the second  
24 amendment and the Amended and Restated Option Agreement  
25 as to the schedule of payments that Pardee was making to

1 CSI.

2 And then it talks about each additional  
3 commission payment pursuant to clause one and two goes  
4 concurrently with the applicable Purchase Property Price  
5 payment to Coyote. And that's where you go back right  
6 then to that same schedule I keep making reference to.

7 And that informs the Court then as to what  
8 Pardee obligated itself to under paragraphs (i) and  
9 paragraph (ii). There's nothing in the language about  
10 the due dates or the obligation to pay in the first  
11 place that makes any reference to acreage, location,  
12 where are the lands, if the lands had actually closed.

13 I think this is important as far as in respect  
14 to Mr. Wolfram. Mr. Wolfram had testified that this  
15 Commission Agreement was something that he had never  
16 dealt with before. Every other transaction in his  
17 professional life that he had dealt with, that there was  
18 some type of a deal that was cut between a buyer and a  
19 seller. Land closed. There was an exchange of deeds  
20 and he got paid. That's what his experience was. And  
21 I'm not going to discount that experience because that's  
22 what he understood.

23 But that's not the Commission Agreement his  
24 attorney negotiated for him. His attorney actually  
25 negotiated a much better deal than that for him.

1 Because at the time that the original aggregate deposits  
2 had been made, there had been \$10 million that had  
3 already been paid by Pardee to CSI and there had been no  
4 closings at all.

5 And when you take a look then at each one of  
6 those payments on a monthly basis when \$1.5 million was  
7 paid to CSI, there weren't any closings each month.  
8 There weren't any acreages identified each month.  
9 Nothing. There weren't any deeds that were exchanged.

10 As Mr. Lash has identified and as the documents  
11 and the records all reflect, there was only five  
12 closings. But how many commission payments and checks  
13 were there made? 49. The original, the 44, and the  
14 last three.

15 So what you end up with is nothing either about  
16 the language of the parties' agreement, let alone the  
17 performance of the parties under the agreement, suggests  
18 that these two clauses had anything to do with location,  
19 acreage, or the timing of the closings. And, therefore,  
20 that information was irrelevant to determining if Pardee  
21 had complied.

22 Now, turning the Court's attention then to  
23 paragraph 22, paragraph 22 speaks to paragraph 3. In  
24 paragraph 3 there's also, on page 2, additional language  
25 that informs the Court as to the interpretation of this

1 subparagraph 3. On page 2 the Court is going to see  
2 when Pardee was supposed to be making commission  
3 payments pursuant to clause 3, and that was upon the  
4 close of escrow on Pardee's purchase of the applicable  
5 portion of the Option Property.

6           Provided, however, in the event that the  
7 required parcel map creating the applicable option  
8 parcel has not been recorded, the commission shall be  
9 paid into escrow concurrently with Pardee's deposit of  
10 the Option Property Price, and the commission shall be  
11 paid directly then from escrow.

12           Break all this down and what this says is that  
13 Pardee was going to make a payment to CSI. In exchange  
14 it was going to get a piece of land. There was going to  
15 be a closing for which a deed would be recorded, and  
16 these gentlemen got paid at that point in time. It  
17 makes no reference, no reference whatsoever to if  
18 there's been some redesignation. If there's a tentative  
19 map that has been filed, there makes no reference to  
20 that whatsoever.

21           What the plaintiffs are asking you to do is  
22 something that you are prohibited from doing, and I know  
23 that no judge likes to hear something that we have  
24 limits. None of us like to know we have limits. But  
25 the case law is clear, you can't rewrite the parties'

1 agreement. This is what the parties had agreed to.  
2 This is what you are being asked to interpret. And to  
3 offer and to allow what the plaintiffs are asking for  
4 demands and requires you to rewrite their agreement.

5 Now, the thing I think that what I want to do  
6 is to identify then a couple of these theories or  
7 address a couple of the theories that the plaintiffs  
8 have offered along this particular line, and let me  
9 address these somewhat out of line.

10 The first one that Mr. Jimmerson talked about  
11 is that Parcel 1 was Purchase Property and so Option  
12 Property was everything else. If there's something  
13 outside those boundaries, they should be entitled to  
14 commissions here under (iii).

15 Number one, I want to suggest to the Court that  
16 if they genuinely believed that to be true, then  
17 Mr. Wolfram's testimony is equally to be believed. And  
18 that is this: He knows the locations. They know the  
19 locations of the land that Pardee actually took down.  
20 They know how much exists outside of Parcel 1. They  
21 apparently may not have the skill set to calculate what  
22 that acreage is, but they had all of the information or  
23 the tools available to allow someone who is qualified to  
24 do that.

25 Pardee doesn't employ all the engineers in the

1 world. They could have gone to an engineer. The  
2 assessor's office and recorder's office, they have  
3 people that make those calculations all the time. You  
4 go through the phone book and you can see all kinds of  
5 engineers that offer those services. They could have  
6 made that determination, but they did not.

7           So what does that mean? What it means -- well,  
8 let me back up. They had the tools available to them.  
9 They knew where the locations of the land were. They  
10 knew the locations of the parcel. They knew how much  
11 was outside. They knew the price that Pardee was  
12 supposed to pay for that under the schedule. They also  
13 knew the date by which that Pardee had acquired the  
14 lands, because that was found within the deeds. And,  
15 therefore, they could have calculated, not only the  
16 amount of commission they were due, but also how much  
17 interest on those commissions.

18           Did they bring those calculations to you? No.  
19 What have they done? They've failed in their burden of  
20 proof on the very first theory that they have offered to  
21 you.

22           Second, there's also a, Well, jeez, Your Honor,  
23 if you didn't like that theory, let me give you another  
24 one. And the other one that they wish to offer is this  
25 theory about somehow if Pardee changes the use

1 designation, then, in fact, we should be able to be  
2 entitled to a commission when there's been some type of  
3 a use designation change.

4 First and foremost, found nowhere within the  
5 four corners of the agreement. That's point number one.

6 Point number two is that we know from the  
7 testimony of Mr. Andrews that, in fact, those use  
8 designations have changed repeatedly across time and are  
9 likely to change again across time. So what that  
10 suggests to me is that this process is going to be  
11 constantly, Okay, we're going to give some money to the  
12 plaintiffs. But if we change the use designation, isn't  
13 the flip side of that then equally applicable, that they  
14 have to give some money back? Isn't that the flip side  
15 of their argument?

16 Every argument has both a positive side and it  
17 has a side that cuts back against you. And the argument  
18 that they advance would mean that if, in fact, Pardee  
19 changes some type of a use designation at a point in the  
20 future for which that they've already been paid  
21 commission, why wouldn't Pardee be entitled to that  
22 commission back if that theory was appropriate under the  
23 Commission Agreement?

24 We've already seen examples, Your Honor, that  
25 that's been done. Mr. Andrews gave you two examples.

1 He identified, remember, as far as on the boundary, that  
2 on Exhibit No. 15, that multi-family designations have  
3 been put up in that upper left-hand corner.

4 Brian, can you pull up 15 for me quickly? I'll  
5 show the Court what I'm talking about.

6 Your Honor, on 15, Mr. Andrews identified this  
7 parcel here that is in yellow has already been changed.  
8 They have moved multi-family designation up to this  
9 area. So in other words, the plaintiffs have already  
10 been paid a commission, we know, on these lands, and  
11 there's already been a change. So why, under their  
12 theory then, is the plaintiff not entitled to have to  
13 give something back?

14 Equally what we know is this: That he drew on  
15 the map, Exhibit 15, and labeled A and B, which were the  
16 exchange parcels that were the subject then of the  
17 beginning of the town center. And he identified how the  
18 buyer's exchange parcel, which is what Pardee had owned,  
19 was lands that were down here for which Pardee had  
20 already paid them a commission. What happened to those  
21 lands? They got moved to another area.

22 And so to the extent that they got moved then  
23 to the multi-family area, and so that designation is  
24 also another change for which the plaintiffs have  
25 already received payment and we moved use designations

1 off there. And so why is it that they wouldn't have to  
2 give it back?

3 And the logical answer to that, Your Honor, is  
4 this, is because if, in fact, this is going to be a  
5 moving target for the next 40 years, based upon any  
6 redesignations of use, and not -- not based upon what  
7 the language of the parties' agreement was, it's a  
8 theory that does not hold water. And we respectfully  
9 submit that that theory does not entitle the plaintiffs  
10 to additional money.

11 It's the same component then of the earlier  
12 argument they made that they contended that multi-family  
13 property that we purchased and that Mr. Whittemore made  
14 it abundantly clear that the lands that were the subject  
15 then of this exchange were multi-family lands that  
16 Pardee had already purchased. And we know from the  
17 testimony of Mr. Wolfram and everyone else that they  
18 weren't entitled to monies on the multi-family property.

19 So there's a swap then as far as those  
20 designations as part of what was happening then at the  
21 tentative map application process in December of 2010.  
22 So to the extent, Your Honor, that based upon the theory  
23 that they have espoused that somehow these  
24 redesignations or the parties going through their  
25 standard and their normal business development and

1 having genuine and realistic and needed business needs  
2 for these changes, that somehow that entitles them to  
3 additional commissions.

4 And what their argument is is that, based upon  
5 the language that says that Pardee can't circumvent or  
6 avoid its duties, is that somehow by taking legitimate  
7 business needs, for which that is the only evidence that  
8 this Court has -- the only evidence is that the reason  
9 the parties entered into the eighth amended agreement  
10 was to deal with the downturn in the economy, and that  
11 the only reason that they had for doing that were  
12 legitimate business reasons. It had nothing to do with  
13 trying to circumvent or avoid its obligation.

14 And I do think that it is important to take a  
15 look at what the definition of "circumvent" is because  
16 it also informs the definition of "avoid." And as the  
17 Court elicited from Mr. Lash, it was his understanding  
18 what that meant is that we couldn't do something bad.  
19 We couldn't try to do a bad act. We couldn't try to  
20 cheat them out of their commissions, and nor did we try  
21 to cheat them out of their commissions.

22 The lands that were at issue through the  
23 tentative map application were lands for which they had  
24 already been paid a commission, number one, and lands  
25 that were purchased pursuant to the multi-family

1 agreement for which they concede that they weren't  
2 entitled to any commissions upon.

3 Now, one of the things we've heard repeatedly  
4 throughout the course of this case is that between  
5 Pardee and CSI, we made a change to the definition of  
6 Option Property.

7 Brian, can you move on to 23 for me, please.

8 23 gives you the definition of Option Property.  
9 You can see all the stuff that's in between. Where it's  
10 found is in Exhibit B. That definition is the exact  
11 same definition that is found -- go to 24 for me, Brian.  
12 It is the exact same definition that is found in  
13 Amendment No. 1 to the Option Agreement, Amendment No. 2  
14 to the Option Agreement, to the Amended and Restated  
15 Option Agreement, and all of the amendments thereafter.  
16 There has been no change to the definition of Option  
17 Property.

18 In addition, there has been no change to the  
19 process and procedure from Option Agreement to Amended  
20 and Restated Option Agreement pursuant to paragraph 2 as  
21 to how those lands would be acquired then by Pardee.

22 Finding No. 25, your Honor, we already talked  
23 about.

24 Number 26, I want to talk then about our  
25 performance under the Commission Agreement. If you go

1 to 26 for me, Brian.

2 We know that the plaintiffs were paid in full  
3 and on time on the \$84 million Purchase Property Price.  
4 That's a very simple process to take a look at  
5 Exhibit A. They were informed of the amount and the due  
6 dates of those commission payments, first through  
7 Stewart and then through Chicago Title. How do we know  
8 that? By looking at Exhibit A.

9 We also know, Your Honor, that the plaintiffs  
10 were able to discern when they had been overpaid and how  
11 they were going to fix that. Those additional exhibits  
12 then identify that.

13 We know from Mr. Wolfram's testimony that at  
14 one point in time his commission payments started to be  
15 electronically deposited into his account. So he didn't  
16 see this description detail. But we also know from his  
17 testimony that when he started asking questions, he was  
18 able to get all of the orders to pay commission. So he  
19 got all of those orders to pay commission that could be  
20 found at Exhibit A.

21 If you take a look, I think that we go  
22 through -- Brian, move forward a little bit for me.  
23 I'll get to it. Go back to the exhibit. I'll point it  
24 out to the Court what I'm talking about.

25 We know that Mr. Wolfram went to the escrow

1 company. He asked Frances Butler for a number of pieces  
2 of information. And when he asked for pieces of  
3 information, he asked Frances to send him copies of all  
4 the previous orders to pay commission. She did. She  
5 memorialized that. Mr. Wolfram testified, I received  
6 those.

7 So he has all of those orders to pay  
8 commission. Each and every one of those orders to pay  
9 commission memorialized the amount and the due date then  
10 under paragraphs one and two of the arrangement of their  
11 Commission Agreement.

12 Turning your attention then, and I'm going to  
13 go through this quickly because I don't think that it is  
14 excessively relevant, but I do think it does inform the  
15 Court as to what the mind-set was of Pardee going into  
16 this dispute.

17 And that was this: It started when Jon Lash  
18 sent the letter to the plaintiffs, both of them,  
19 Mr. Wolfram and Mr. Wilkes, that said this: You guys  
20 have been overpaid. This is how we're going to fix it.  
21 And, oh, by the way, we're taking down additional  
22 properties, and you guys aren't entitled to commissions  
23 on these other takedowns. We saw that letter and I  
24 think that letter, if my recollection serves me, is at  
25 Exhibit W.

1           And what did Mr. Lash get back from both  
2 Mr. Wolfram and Mr. Wilkes, they got back a letter that  
3 says, I don't know how you came to the conclusion that  
4 we're not entitled to commissions on these other  
5 properties. We believe we are. That's what they told  
6 him. And that letter is found at Exhibit Z.

7           And then what do you see? You see letters that  
8 are found at Exhibit 18, 19, 20 and 24. And what do  
9 those letters ask for? They ask for all of the  
10 documents that memorialized all of the transactions  
11 between Pardee and CSI.

12           Mr. Lash understood all of those to be  
13 referencing the other transactions for which that he had  
14 already told them that they weren't entitled to payment  
15 upon. That's what his testimony was. That's how he  
16 understood those, when they were asking for all, that's  
17 what they wanted.

18           He authorized the title company to give them  
19 all the single-family stuff, but not the other  
20 transactional documents. And, therefore, I believe that  
21 gives an explanation as to the mind-set that Pardee had  
22 into the dispute that arose between the parties.

23           And, Your Honor, one of the things that I would  
24 like to do, if you don't mind, because it is 5:15, I  
25 know that I've been going for about an hour and 15

1 minutes.

2 THE COURT: Do you need a break?

3 MS. LUNDVALL: I would like to take a very  
4 short comfort break, not only for the Court, but for  
5 your staff as well, if that's okay.

6 THE COURT: That's fine. A quick 15 minutes.

7 (Whereupon, a recess was taken.)

8 MS. LUNDVALL: Thank you, Your Honor.

9 THE COURT: You're welcome.

10 MS. LUNDVALL: We're on Finding No. 27, and  
11 what we had started to do was to go through Pardee's  
12 performance under the Commission Agreement. And I'm  
13 going to cover this portion because, to be honest with  
14 you, I'm a little bit confused throughout the course of  
15 this trial.

16 I don't know if there's money being sought. On  
17 one hand I'm being told that it's not. On the other  
18 hand now I'm hearing through closing argument that it  
19 is. So, therefore, I'm going to walk through then  
20 whether or not the facts, the evidence before the Court,  
21 to determine whether or not that there are additional  
22 monies owed to Mr. Wolfram and Mr. Wilkes. Because like  
23 I said, I'm getting mixed messages, and I'm not going to  
24 turn any stone unturned concerning this.

25 First and foremost, we know that the

1 provisions 1 and 2 were based upon the Purchase Property  
2 Price. And I pulled this quote out of the opening  
3 statement that the plaintiffs had given to the Court.  
4 And I can tell the Court specifically it's on page 14,  
5 if the transcripts are available to the Court, and if  
6 anyone wants to verify the accuracy of this.

7 THE COURT: I didn't read opening statements.  
8 I just read testimony.

9 MS. LUNDVALL: But you know, as far as the  
10 statements on behalf of an agent --

11 THE COURT: I understand.

12 MS. LUNDVALL: And I think that they also  
13 inform the Court.

14 In their opening statement what they  
15 acknowledged is that under the Purchase Property  
16 formula, they were entitled to a percentage of the  
17 Purchase Property Price. No quarrel about that  
18 whatsoever. Absolutely none.

19 Then they went on to say there is no benefit or  
20 additional commission for additional acreage being  
21 purchased if there's no corresponding increase in price.  
22 And we agree with that as well.

23 The Purchase Property Price under 1 and 2, as  
24 we've well seen how many times now, was \$84 million.  
25 That price didn't change across any of the amendments.

1 Once it had been amended pursuant to the second  
2 amendment to the Option Agreement and was restated then  
3 in the Amended and Restated Option Agreement, there was  
4 no changes to that \$84 million, no corresponding  
5 increase in price.

6 So under the acknowledgment from the plaintiffs  
7 themselves, that's what was determinative of if they  
8 were entitled to commissions under 1 and 2.

9 Moreover, we have the testimony of Mr. Wolfram  
10 and Mr. Wilkes themselves that they received all of  
11 their commissions timely under paragraph 1 and  
12 paragraph 2 of the Commission Agreement.

13 Let's go to the next finding then, Brian.

14 We know, if you take a look at Exhibit A and  
15 you total up all of those orders to pay commission,  
16 that's the amount you get. \$2,632,000. That, to me, is  
17 a lot of money, but that's what they received. It was  
18 split equally between Mr. Wolfram and Mr. Wilkes, and  
19 that's what Exhibit A reveals.

20 Go on, Brian.

21 The plaintiffs acknowledge that their  
22 commissions that were due under paragraphs (i) and (ii)  
23 were based on that price, not acreage or location. Both  
24 Mr. Wilkes, before he left the witness stand, and  
25 Mr. Wolfram in the very first day, acknowledged that the

1 acreage and the location of the property that Pardee  
2 acquired was not determinative of what their commissions  
3 were under (i) and (ii). They also admitted that  
4 they've been paid in full under (i) and (ii) of the  
5 Commission Agreement.

6 Brian, go to the next one, please.

7 We know from Pardee's perspective Mr. Lash had  
8 testified they did not pay more than \$84 million. We  
9 know that the lands were used for Purchase Property  
10 takedowns.

11 Turning your attention then to 31, please.  
12 CSI, from Harvey Whittemore's perspective, CSI, he  
13 confirmed, never received more than \$84 million as  
14 payment for those lands. And Mr. Whittemore also  
15 memorialized, as well as Mr. Lash, that all of the  
16 transactions had been memorialized in publicly recorded  
17 deeds.

18 Next, no commissions were due to the plaintiffs  
19 under (iii) unless the property purchase fell within the  
20 definition of Option Property purchase pursuant to  
21 paragraph two of the Option Agreement. I've already  
22 argued that to the Court, and I'm not going to repeat  
23 myself even though it's probably one of the most  
24 critical issues.

25 We believe that there are multiple documents

1 that would have memorialized such a transaction and that  
2 none of those documents exist. All of the tools were  
3 available by which to try to capture those documents.  
4 None of those documents were found. The plaintiffs were  
5 able to confirm that Pardee was telling them the truth  
6 that it had not purchased any Option Property.  
7 Mr. Whittemore confirmed they had not purchased any  
8 Option Property.

9 33, Brian.

10 They also concede that the Commission Agreement  
11 describes the only commissions to which they were  
12 entitled. How do we know that? We have a fully  
13 integrated agreement.

14 Next provision, Brian.

15 We know that we've never exercised any options.  
16 If we had, there would be multiple public records that  
17 would memorialize the transaction. This is the argument  
18 I just made to the Court. Both the representatives of  
19 CSI and Pardee deny that any Option Property was  
20 purchased pursuant to paragraph 2 and, therefore, we  
21 don't owe any commissions to the plaintiffs under  
22 paragraph (iii) of the Commission Agreement.

23 Next one, Brian.

24 All right. This is where we get into, I don't  
25 want to say the meat of this dispute, but I think this

1 is where the plaintiffs have been a bit ambivalent. And  
2 what they've tried to suggest is that we owe them more  
3 information than what we contracted to provide to them.  
4 So I'm going to walk through in detail to the Court the  
5 interpretation that is found within the plain meaning of  
6 the Commission Agreement.

7 That paragraph has two sentences to it. We can  
8 all probably recite them from memory at this point in  
9 time. And I'm not going to repeat them, but we know the  
10 paragraph that's at issue. There's no other paragraph,  
11 there's no other provision, there's no other place  
12 within the Commission Agreement where Pardee promises to  
13 give information to the plaintiffs. This is it. It's  
14 the sum total. And this is really the meat of what the  
15 Court is being asked to interpret then as to whether or  
16 not that we had discharged our duty in this regard.

17 Go to the next one, Brian.

18 The first one, in my opinion, is easy. That  
19 first sentence, Pardee shall give you a copy of each  
20 written option exercise notice given pursuant to  
21 paragraph 2 together with the information about the  
22 number of acres involved and the scheduled closing date.

23 If there was no written option exercise notice,  
24 then there's nothing to give to the plaintiffs. If  
25 Pardee is not purchasing Option Property, there's

1 nothing to give them regarding acreage. If Pardee is  
2 not purchasing Option Property pursuant to paragraph 2,  
3 there is no scheduled closing date information by which  
4 to give them.

5 This, to me, is one of the hardest arguments I  
6 think to make as a defendant when you are trying to  
7 prove a negative, and I respectfully submit that we have  
8 discharged that proof. Even though it's not our burden,  
9 we have affirmatively stepped to the plate to  
10 demonstrate that, in fact, none of this exists because  
11 it did not happen. We didn't purchase any Option  
12 Property pursuant to paragraph 2, so there's no notice,  
13 no acreage, no closing dates to give them.

14 Turning your attention to the second. So now  
15 let's talk about to keep them reasonably informed under  
16 the sentence two. Go to the next one, Brian, for me. I  
17 think I start to lay out in detail then. All right.

18 So let's begin to identify the detail so that  
19 the Court can interpret then what does the language that  
20 says reasonably informed as to all matters relating to  
21 the amount and the due dates of your commission payment,  
22 because if you want to boil this case down to even its  
23 greater definition, that sentence is what it is. That's  
24 the sum total of what the parties are fussing about.

25 Respectfully, I would submit this: First and

1 foremost, related to the amount and the due dates of  
2 your commission payment, doesn't that assume that  
3 there's a commission payment that's due? If there's no  
4 commission payment due, then you don't have any  
5 information about the amount or the timing of that due  
6 date.

7           And so I think the common sense interpretation  
8 of that is that, first and foremost, the Court needs to  
9 determine, Was there a commission payment due? I don't  
10 think it hinges upon that, but I do think that that  
11 helps inform the Court as to its interpretation. What  
12 did the parties mean by the scope of that?

13           So let's look at what Pardee gave to the  
14 plaintiffs for the commissions that they were due. It  
15 gave them Exhibit A. We've talked about that ad  
16 nauseam. And so each and every time that Pardee made a  
17 payment of the Purchase Property Price to CSI, they got  
18 a commission. There was an order to pay commission.  
19 That order to pay commission then identified how it was  
20 being paid, why it was being paid, to whom it was being  
21 paid, the escrow number on there. All of that  
22 information is on the order to pay commission,  
23 Your Honor, for each and every one of those payments.  
24 That's why Exhibit A is so thick. That's why Exhibit A  
25 is so fat.

1           When we changed escrow companies from Stewart  
2 to Chicago, we advised them of that change, both  
3 Mr. Wolfram, both Mr. Wilkes. And that's found at  
4 Exhibit E. And thereafter Chicago Title continued to  
5 inform the plaintiffs then of the amount and the due  
6 dates of the commission. Chicago Title's orders to pay  
7 commission are also found at Exhibit A.

8           Can you go to the next one, Brian?

9           Now, if you take a look at when Pardee was  
10 supposed to make the first commission payment, it is  
11 informed by the Commission Agreement. It was supposed  
12 to be done at the initial purchase closing, and then  
13 each payment thereafter was concurrent with the payment  
14 being made pursuant to Amendment 2. That's what this  
15 language is, the very first portion of this.

16           And so if you take a look then at each  
17 commission payment first by Stewart and by Chicago,  
18 match it up then to the schedule, what you'll see then  
19 is that they were informed as to the amount and the due  
20 date of their commissions.

21           The commission checks themselves that the  
22 plaintiffs received, if they received a check -- now,  
23 the thing that I find interesting about this, a little  
24 bit, is that they did receive checks at the very  
25 beginning, and Mr. Wilkes continued to receive checks

1 all the way through. And you'll see that in Exhibit A.

2           There came a point when there was an electronic  
3 deposit for Mr. Wolfram, but that was for his  
4 preference, for his choice. And so he may not have  
5 seen, in essence, what the check stub was and this  
6 particular information, but he had the opportunity to  
7 see that information at the time it was being made. And  
8 at the very minimum, we know that all of those were  
9 given by Frances Butler directly to Mr. Wolfram so that  
10 he could confirm that he had been fully informed as to  
11 the amount and due dates of his payments.

12           We also know the evidence about when they were  
13 overpaid. We sent the letter explaining the  
14 overpayment. That's found at Exhibit W.

15           At that point in time there was an amended  
16 order to pay commission that fixed that. It articulated  
17 how that was going to be fixed. You go into the guts of  
18 Exhibit A at 95B, you'll see those amended orders. If  
19 you also take a look at Exhibit K, it's also  
20 memorialized in there.

21           In addition, we sent them a letter that  
22 informed them we had made our last payment. That's  
23 found at Exhibit GG. At that point in time -- and all  
24 of this information is being sent to both Mr. Wolfram  
25 and Mr. Wilkes.

1           It's Mr. Wolfram then that begins asking  
2 questions and he gets additional information. What  
3 additional information does he get? He gets a number of  
4 explanations in the form of letters from Mr. Stringer  
5 and Mr. Curtis that explain our interpretation, our  
6 understanding of how the Commission Agreement worked.

7           In addition, we went one step further, and we  
8 articulated to him at Exhibit 15 and said these are the  
9 lands we bought with that \$84 million, and we identify  
10 the specific locations of those.

11           And in addition, when Mr. Wolfram continued to  
12 ask questions, we authorized the title company to give  
13 him all the information dealing with the single-family  
14 land transactions. If you look at Exhibit II, you are  
15 going to see that instruction.

16           Now, at Exhibit JJ what you are going to see,  
17 also, is the inquiry that was made, Do we give him on  
18 the other transactions? Answer, No, only the  
19 single-family lands.

20           And then we go on and we talk about the deeds  
21 that underlie Pardee's acquisition of all the Purchase  
22 Property from CSI. You can see those at KK, at LL and  
23 at MM. And the most interesting thing I think about  
24 this particular exchange is this: What did the  
25 plaintiffs ask for? What did they ask for in

1 Exhibit 18, 19, 20 and 24? Those were the letters that  
2 were sent by Mr. Jimmerson asking for documentation.

3 And this is what he asked for, and the Court  
4 probably thought I was crazy as to a number of different  
5 witnesses that I asked this question, but I asked, On a  
6 deed can you find the seller, can you find the buyer,  
7 can you identify what the location of the lands are, can  
8 you identify the parcel maps, can you identify the  
9 parcel numbers, can you discern the price that is paid?  
10 Look at the stamp in the upper right-hand corner. Can  
11 you discern the escrow company? Can you discern the  
12 document numbers? You look at the letters that were  
13 sent that were requested of us, that's what they got  
14 back.

15 Equally important, Your Honor, Mr. Jimmerson  
16 stood here and told you that those letters asked for  
17 land use designations. That's what he told you. You  
18 scour those letters and you look for a request for land  
19 use designations and you don't find it anywhere.

20 Brian, can I get you to move forward? I'm  
21 hoping people are happy I'm turning a lot of these pages  
22 forward. Okay?

23 One of the things, too, is on this particular  
24 point, Your Honor, I wanted to interject here, it's a  
25 little bit outside these findings, but it responds to an

1 allegation that Mr. Jimmerson made in his closing  
2 remarks. He said that Mr. Lash testified at page 211 of  
3 his testimony that -- he said that Mr. Lash's testimony  
4 was that Wolfram and Wilkes were entitled to  
5 verification by having all of those land documents and  
6 land use designations and to be able to verify then  
7 these transactions.

8 I would direct the Court's attention then very  
9 specifically to that testimony. The question --

10 THE COURT: Which day was that? It was --

11 MS. LUNDVALL: The first day.

12 THE COURT: The first two weeks?

13 MS. LUNDVALL: That's right. The original  
14 first two weeks.

15 It is found on page 210, question by  
16 Mr. Jimmerson: Yes or no, was the provision of the  
17 second paragraph of the Commission Agreement, Exhibit 1,  
18 from Pardee's perspective, that Pardee would provide  
19 enough information so that Wilkes and Wolfram could --  
20 independent of taking your word for it -- confirm the  
21 accuracy of your representations?

22 Answer: Yes. We thought we did that.

23 Now, that's what his testimony was. When I  
24 asked him, What did you mean by you thought you did  
25 that? He said, Well, we gave them all of the orders to

1 pay commission. He identified all of the information  
2 that Pardee had given to them so that they could verify  
3 that Pardee was telling the truth. That's what Mr. Lash  
4 testified to, not something else.

5 And so if the Court has any questions  
6 concerning that, the Court does have the record that  
7 somebody has asked the court reporter then to  
8 transcribe.

9 THE COURT: The court reporters -- everything  
10 that everybody asked to have transcribed, I have it all.

11 MS. LUNDVALL: Thank you, Your Honor. And so  
12 the Court can be able to verify then the accuracy of the  
13 parties' --

14 THE COURT: I have it on my table.

15 MS. LUNDVALL: -- representations on this.

16 Turning your attention then to Finding No. 40,  
17 Finding No. 40 deals with the other land transactions.  
18 We described and the Court has heard testimony on that  
19 as we co-developed the Coyote Springs project, we began  
20 separate negotiations. Those separate negotiations had  
21 nothing to do with the plaintiffs' activities.

22 Pardee informed the plaintiffs, even before  
23 they asked, we told them we're engaging in these other  
24 transactions. We told them that there's multi-family  
25 transactions, commercial transactions, custom lot

1 transactions. We told them that. And the plaintiffs  
2 now acknowledge that they are not entitled to  
3 commissions on those other transactions.

4 Those other land designations include the golf  
5 course, commercial activity, custom lots, multi-family,  
6 and industrial. And Mr. Wolfram, in particular,  
7 acknowledged that he was not entitled to commissions on  
8 those.

9 So I want to think about that in this context.  
10 Before this case began, we told the plaintiffs we were  
11 doing these other deals. We told them that they weren't  
12 entitled to commissions on those other deals. And they  
13 didn't believe us.

14 Now, as a result of this litigation, they've  
15 admitted from the witness stand they are not entitled to  
16 commissions on these other deals. So why would they be  
17 entitled to damages in any form to verify that Pardee  
18 was telling the truth? If you want to boil their case  
19 down to its bare essence, what they claim is that  
20 somehow they are entitled to damages for verifying that  
21 Pardee told the truth.

22 Equally, Your Honor, Pardee told the  
23 plaintiffs, We did not take down any Option Property.  
24 We did not engage in all the process and the procedures  
25 pursuant to paragraph 2. We, respectfully, submit we

1 have demonstrated we have not purchased any Option  
2 Property pursuant to paragraph 2 of the Option  
3 Agreement. And, therefore, we have proven that we were  
4 telling the plaintiffs the truth.

5 So, once again, my question is rhetorical, and  
6 rhetorical in this regard, how is it that the plaintiffs  
7 can claim an entitlement to damages for Pardee proving  
8 that it told them the truth before this litigation ever  
9 began?

10 What I want to do then is I'm going to try to  
11 very quickly go through these conclusions of law, and  
12 I'm going to do the level best I can to move as quickly  
13 as I can. The first conclusion of law deals with the  
14 essential elements for proving up a breach of contract.  
15 Now, I start with the breach of contract because that's  
16 what Mr. Wolfram and Mr. Wilkes said was the principal  
17 reason that they were bringing this case.

18 These are the four essential elements. I don't  
19 think there's any quarrel between the attorneys that  
20 these are the essential elements. Move forward.

21 Number one, we believe -- number two, we  
22 believe that the evidence proved that we did not commit  
23 a material breach of the Commission Agreement. We also  
24 believe that we have demonstrated, number three, that  
25 they did not suffer any damages.

1           Number four, now, the obligations between  
2 Pardee and the of plaintiffs are governed by the four  
3 corners of the Commission Agreement, which both sides  
4 have acknowledged. It's clear and unambiguous.

5           Number five, contracts are supposed to be  
6 construed in the written language and enforced as  
7 written. Number six, when a contract is clear,  
8 unambiguous and complete, the terms must be given their  
9 plain meaning and the contract must be enforced as  
10 written.

11           And concomitant to this, we didn't give the  
12 specific case citation, but I'm nearly positive the  
13 Court is familiar with this case law, the Court is not  
14 entitled to rewrite the parties' agreement. And,  
15 respectfully, given the demand that has been made by the  
16 plaintiffs, they are asking you to rewrite the parties'  
17 agreement. They are asking you to do something more  
18 than what the parties are contracted to each other.

19           Seven, we agree to pay commissions and provide  
20 information. Eight -- and if you keep going with me,  
21 Brian -- speaks to the plain language about payments  
22 under one and two. I've already given the Court our  
23 argument on that. Nine, only entitled to commissions on  
24 Option Property. We have not exercised any options to  
25 purchase Option Property. Finding No. 10, same argument

1 that I just made.

2 Finding No. 11, we paid in full and timely on  
3 the commissions on the \$84 million Purchase Property  
4 Price.

5 Finding 12, the plaintiffs acknowledge that  
6 their commissions were based upon the Purchase Property  
7 and not on the acreage. We've already argued that to  
8 the Court.

9 Finding 13, we argued that the Purchase  
10 Property price was \$84 million. 14, that that's what  
11 Pardee paid to CSI.

12 15 is that from the very beginning CSI and  
13 Pardee acknowledged that the specific boundaries of the  
14 Purchase Property and the Option Property may change for  
15 a variety of reasons. I went through all of those  
16 provisions, gave you the citations to the Option  
17 Agreement as to where the parties had included that.

18 And by provision then of those agreements to  
19 the plaintiffs, they too knew that those boundaries  
20 could change. We also heard unrefuted testimony as to  
21 what factors may impact those changing boundaries.

22 Finding 16, it is clear that those factors were  
23 out of CSI and Pardee's control concerning the changing  
24 of the boundaries. And as a result of those boundaries  
25 changing, so too did the potential boundaries for the

1 Option Property change. There's no dispute, I don't  
2 think, about that.

3 But the definitions of Option Property and the  
4 process by which that that Option Property was supposed  
5 to be taken down, that did not change. It is unrefuted  
6 that that did not change.

7 They've offered no evidence that CSI designated  
8 specific lands or that, in fact, we exercised any  
9 options for those lands.

10 17, Brian. This is starting to get a little  
11 redundant, but in drafting Court's proposed findings, I  
12 think sometimes they are a little bit redundant. We  
13 talk about paragraphs one and two. We've already argued  
14 that to the Court.

15 18, we talked about Option Property being  
16 pursuant to paragraph number 2. We've identified and  
17 we've articulated to the Court where you can find that  
18 multi-step process. That multi-step process would have  
19 resulted in a myriad of different written documents.  
20 Each and every one of those written documents would have  
21 been found in other third-party files. None of those  
22 documents were presented to this Court.

23 We brought the subpoenas. If you take a look  
24 at our exhibits, you'll see the subpoenas to the title  
25 companies, both to Chicago as well as Stewart. You are

1 going to see the subpoenas that went to CSI. We know  
2 that they subpoenaed these documents. We know that they  
3 had the opportunity to find them if they existed. They  
4 do not exist. They brought nothing to the Court's  
5 attention that memorializes the process and the  
6 procedure by which then if we would have purchased  
7 Option Property.

8 19, we also talked about the failure to provide  
9 information, and I'm going to try to go through this  
10 quickly because this is now, like I said, it's getting  
11 redundant.

12 20, Brian. This is simply a repeat then of the  
13 provision of the Commission Agreement. Respectfully, we  
14 believe that we have fulfilled all of our obligations  
15 under this particular provision.

16 22 speaks to paragraph two of the Option  
17 Agreement. Specifically it covers Pardee's right to  
18 purchase the Option Property.

19 Finding 23, Pardee has not purchased any Option  
20 Property. Pardee agrees with that. CSI agrees with  
21 that. There's no document that suggests otherwise. In  
22 essence, it is undisputed that Pardee has not purchased  
23 any Option Property to which that they would be entitled  
24 then to a commission.

25 Number 24, it was Pardee and the escrow

1 companies that kept the plaintiffs reasonably informed  
2 of the amount and due dates of their payments.

3           Number 25, they complain that they did not  
4 receive Amendments 1 through 8, but those amendments did  
5 not change or impact their commissions under (i) and  
6 (ii) of the Commission Agreement and nor did they  
7 contain any option exercise notices. Each and every one  
8 of those amendments can be looked at and analyzed and  
9 the Court can confirm then that this is an accurate and  
10 true statement by taking a look at Exhibits 6 through  
11 13.

12           They did not change or alter the definitions  
13 contained within the Commission Agreement, and the  
14 plaintiffs did not complain -- what I'm referring to  
15 here -- I'm sorry. I lost my train of thought. It's  
16 getting late. And I'm going to be honest with you, my  
17 blood sugar starts to crash about this time of the day.  
18 So I'm going to push through this, and my apologies to  
19 everyone if I don't do as good a job as what I should.

20           They complained about not receiving the  
21 multi-family or the custom lot agreements, but they  
22 identified no entitlement to receipt of that  
23 information. That's what I meant there. We explained  
24 why it was that we did not give them that information.  
25 And, respectfully, we believe that that explanation was

1 reasonable and it was justified.

2 26, when they asked us, when they began  
3 questioning, we gave them information like maps, deeds,  
4 all of which were related to the Purchase Property  
5 acquisition.

6 The thing I think that the Court, hopefully,  
7 you might have a little fun with is learning some  
8 additional definitions. Mr. Wolfram kept saying, I  
9 needed a parcel map, I wanted a parcel map, a parcel  
10 map.

11 Well, Mr. Lash or Mr. Andrews identified what a  
12 parcel map is. And what is a parcel map? It's kept by  
13 the recorder's office and the assessor's office. How do  
14 we get our tax bill every year? If you own a home, you  
15 get a tax bill based upon information that is found in a  
16 parcel map that is recorded. Where do the APN numbers  
17 come from? From the recorder's office and the  
18 assessor's office. Why do they need this? Principally  
19 to tax us, so they get their property tax payments. All  
20 of that information is a matter of public record.

21 Turning your attention then to 27, this is the  
22 one that deals with the fact that how the plaintiffs now  
23 concede that, in fact, they are not entitled to any  
24 monies under the other transactions.

25 28, we told them how we didn't exercise any

1 options.

2 29, Mr. Stringer identified when we made the  
3 last of our payments, and we also pointed out in full  
4 that they've been paid.

5 30, we gave the Exhibit 15, which was the  
6 narrative of each Purchase Property acquisition  
7 reference to the color maps. It had a breakdown of the  
8 amounts that were paid to CSI at each closing.

9 31, Pardee's obligation to inform the  
10 plaintiffs of any purchase if there was -- I think I  
11 have a typo here. But the point I'm trying to make here  
12 is this: If there was never any exercised options,  
13 there was never any purchase of Option Property, there  
14 was nothing we could give them in that regard. And that  
15 I guess is the point I'm trying to make in 31.

16 In sum, Your Honor, 32, we believe that we have  
17 demonstrated that there has not been a material breach  
18 of the Commission Agreement. And I think it's important  
19 then to take a look at what the case law requires. The  
20 case law requires a material breach. We believe that  
21 there's no breach whatsoever, let alone a material  
22 breach.

23 There's also an additional why where we  
24 believe, in fact, we're entitled to judgment on their  
25 breach of contract claim, and that is you don't have any

1 evidence before you that they've suffered damages  
2 because of a material breach of contract.

3           And let me explain what I mean to you by this.  
4 At paragraph 34, we gave the Court the case law that  
5 identifies that it is the party seeking to demonstrate  
6 breach of contract, and you have one of the essential  
7 elements is proving damages, and that burden falls upon  
8 the plaintiffs.

9           If you assume the truth of their theory, they  
10 had all of the information and the tools available to  
11 them to calculate under their own theory about Parcel 1  
12 was Purchase Property and Option Property exists outside  
13 of that. All of those tools were available and they  
14 could have done that calculation. They have not done  
15 that calculation and brought that evidence to the Court.

16           By their failure to do that, having all of the  
17 tools available to them, they have failed to demonstrate  
18 an essential element of their claim. They have failed  
19 to demonstrate damages and, therefore, respectfully,  
20 that's an additional reason as to why their breach of  
21 contract claim fails.

22           Now let me try to go quickly through some of  
23 these because I don't think we need to spend undue time  
24 on them. Let me take a very quick peek at 41. Brian,  
25 take me to 41, please.

1           We brought the Court's attention to the Highway  
2 Builders case and the Nevada Rebar case. So you do have  
3 the citation about -- and also at finding 42 we brought  
4 the Court the citation about how you cannot rewrite the  
5 parties' agreement. And the Court then has case law  
6 then to support that particular finding.

7           And, therefore, we submit that at 43, is that  
8 if you try to seek some type of a theory of recovery  
9 that goes beyond the four corners of the Commission  
10 Agreement, that they are not entitled to do so.

11           Let me try to highlight a couple of quick  
12 points under the breach of covenant of good faith and  
13 fair dealing claim, because I do believe it is important  
14 to understand the argument that I made to the Court  
15 before. It is based upon the case law. And that case  
16 law, under breach of the covenant of good faith and fair  
17 dealing or under the accounting, and the accounting  
18 order by the Court itself had identified that a special  
19 relationship, which was the argument that was advanced  
20 to the Court by the plaintiffs -- let me back up just a  
21 little bit.

22           We had moved for --

23           THE COURT: That was because they had  
24 information. Your client solely had the information to  
25 give them. Am I on the right page?

1 MS. LUNDVALL: Their argument was this, that  
2 there was a special relationship that existed between  
3 Pardee and the plaintiffs. And that special  
4 relationship then is what -- it's special term within  
5 the law.

6 THE COURT: It is. I'm aware of that.

7 MS. LUNDVALL: And it requires, in essence,  
8 then a finding by the Court. And if that special  
9 relationship, which is one of the essential elements of  
10 their claim for accounting --

11 THE COURT: And for --

12 MS. LUNDVALL: -- and for the breach of the  
13 covenant of good faith and fair dealing. And what we  
14 tried to do is to bring to the Court all of the legal  
15 foundation for this argument that I've just now tried to  
16 integrate into one.

17 Because this is an issue that arose all the way  
18 back when we were bringing to the Court's attention the  
19 Aluevich case. Aluevich was an attorney as far as she  
20 practiced up in Reno. She was a great gal, and she had  
21 an arrangement with Harrah's concerning a gift shop, and  
22 it was her argument that there was a covenant of good  
23 faith and fair dealing claim that she had against  
24 Harrah's. And because of the special relationship she  
25 had with Harrah's, it allowed her to recover damages

1 under that. It's an old, I think it's a 1970-something  
2 case, if my recollection serves me.

3 And our Nevada Supreme Court says no. Why?  
4 Because they were two sophisticated parties that were  
5 fully negotiating an agreement, and the result was not a  
6 contract of adhesion, similar to what you see in the  
7 insurance context.

8 When all of us think about our insurance, do we  
9 negotiate anything with our insurance company?

10 Particularly for health insurance now with Obamacare,  
11 are we ever going to get to negotiate anything? No.  
12 They're contracts of adhesion because we don't get to  
13 have input into the language of those contracts.

14 Our Nevada Supreme Court has been uniform, when  
15 you have contracting parties that come to the table with  
16 equal bargaining power and each party has the  
17 opportunity for input into the contract that is at  
18 issue, that it is not a contract of adhesion and,  
19 therefore, there is no special relationship between the  
20 parties.

21 And what do we have here? You have Pardee on  
22 one side negotiating with the plaintiffs, who are  
23 represented by Mr. Jimmerson, and we have different  
24 drafts, different reiterations, different revisions  
25 to the Commission Agreement. They had the opportunity

1 for input. That input is found in the Commission  
2 Agreement.

3 Most particularly what we wanted the Court to  
4 understand is they placed their faith, not in Pardee to  
5 tell them what was going on, particularly under the  
6 option portions of this, but placed their faith in the  
7 escrow companies. And you are going to see then those  
8 exhibits where the black lines occurred where they  
9 inputted the escrow company protections into that  
10 agreement, and it is still found within their Commission  
11 Agreement, and that was input from the plaintiffs and  
12 their attorney.

13 And you heard from both of them that they were  
14 happy with their attorney. There's been no evidence to  
15 suggest that they were not fully and properly and fairly  
16 represented. Respectfully, Mr. --

17 THE COURT: I want to make sure I understand.  
18 What you are arguing is to the reasonably informed as to  
19 all matters relating to -- I should have it memorized --  
20 as to the -- the reasonably informed that we're talking  
21 about?

22 MS. LUNDVALL: It's here, Your Honor, at the  
23 very bottom.

24 THE COURT: I know it's reasonably informed,  
25 so -- as to all matters relating to commissions and

1 amounts --

2 MS. LUNDVALL: To the amount and --

3 THE COURT: Are you arguing to me that then the  
4 escrow company had the responsibility to make sure under  
5 this Commission Agreement that Mr. Wolfram and  
6 Mr. Wilkes got that information? That's where they  
7 placed their trust, not to Pardee? I'm trying to make  
8 sure I'm getting where you are going.

9 MS. LUNDVALL: I think I understand where  
10 the -- I don't want to confuse the Court, because we've  
11 got two concepts here.

12 Number one, Pardee has a duty. Pardee  
13 delegated that duty, we know, as far as with the amounts  
14 and the due dates. All right?

15 THE COURT: They delegated it to escrow?

16 MS. LUNDVALL: To the escrow company.

17 THE COURT: Because they had -- okay.

18 MS. LUNDVALL: In addition, all the other  
19 information that we gave to the plaintiffs.

20 THE COURT: Right.

21 MS. LUNDVALL: But the most important thing,  
22 though, I'm trying to make is this point, is whether or  
23 not that they placed special trust, special reliance on  
24 Pardee.

25 THE COURT: And you are saying in negotiating

1 this contract -- that's where you are going?

2 MS. LUNDVALL: Yeah. In negotiating this  
3 contract they demonstrated that they were not placing  
4 their trust in Pardee to make sure that they got all the  
5 information. They were placing their trust in the  
6 escrow companies. And let me see if I can't --  
7 because --

8 THE COURT: That's a new twist.

9 MS. LUNDVALL: To show the Court particularly  
10 their black line --

11 THE COURT: I know we went through the black  
12 line and it was explained to me in the testimony. The  
13 black line was what was being inserted by Mr. Jimmerson.  
14 I wasn't quite -- to be honest, I wasn't quite sure what  
15 the significance necessarily was at the time. Now it's  
16 being tied up. So I want to make sure -- I know it's  
17 late.

18 MS. LUNDVALL: At Exhibit K you are going to  
19 see the black line that the plaintiffs have put  
20 together. Both Mr. Wolfram and Mr. Wilkes have  
21 identified that those were their insertions.

22 THE COURT: I understood that from the  
23 testimony. Okay.

24 MS. LUNDVALL: And at K, subsection 2, you are  
25 going to see where they inserted the language as to how

1 the escrow shall be paid or the commission shall be paid  
2 into escrow. All right? They also identified that the  
3 commission shall be paid directly into escrow from the  
4 proceeds of escrow.

5 So what I'm saying is this: They are the ones  
6 that put these protections in there that the escrow  
7 company was the party that was going to protect them in  
8 the event that Pardee didn't do what it was supposed to  
9 do. In other words --

10 THE COURT: But the escrow -- okay.

11 MS. LUNDVALL: The escrow company has an  
12 independent duty to these guys.

13 THE COURT: I understand all that. But the  
14 information that the escrow company gets comes from  
15 Pardee.

16 MS. LUNDVALL: Precisely. Precisely,  
17 Your Honor. And I'm following you exactly. And the  
18 point being is that if Pardee had the escrow company do  
19 a closing for Option Property, all of that is going  
20 through escrow.

21 THE COURT: I follow you there, and we all know  
22 everything that has to go with that.

23 MS. LUNDVALL: That's correct, Your Honor.

24 THE COURT: Get back to what you are arguing on  
25 this special trust so I know where you are going with

1 that. I know it's late.

2 MS. LUNDVALL: I'm going to go through these --

3 THE COURT: How much longer?

4 MS. LUNDVALL: I'm only going to be about ten  
5 more minutes, Your Honor.

6 THE COURT: I don't want to cut you short. I'm  
7 just thinking if we have hours more, I have to be  
8 honest, I'm fading. It's very important to me that I  
9 hear your argument. But okay. I'm fine. I need a  
10 cookie. I get low blood sugar like Ms. Lundvall.

11 MS. LUNDVALL: If you turn to page 55, it is a  
12 finding in the citation.

13 THE COURT: Page 55, paragraph 55.

14 MS. LUNDVALL: All right.

15 THE COURT: Okay. I'm there.

16 MS. LUNDVALL: So at 55 we start advising the  
17 Court how there needs to be some type of a special  
18 element of reliance or fiduciary duty to be able to  
19 establish the foundation for this special relationship.  
20 If I continue to go on --

21 THE COURT: So I can read through your cases  
22 and follow it?

23 MS. LUNDVALL: There we go.

24 THE COURT: I'm more than willing to do all  
25 that.

1           THE COURT: At 55, 56, 57. And then we get to  
2 their claim for accounting.

3           THE COURT: So that was all working with the  
4 breach of good faith and fair dealing. Okay.

5           MS. LUNDVALL: That's correct. But there's a  
6 common denominator to their breach of covenant of good  
7 faith and fair dealing and their accounting claim.

8           At Finding No. 63 we brought to the Court's  
9 attention from your order how that to prevail on a claim  
10 for an accounting, the plaintiffs must establish the  
11 existence of a special relationship.

12          THE COURT: That came out of the order for  
13 the --

14          MS. LUNDVALL: That came out of the order  
15 denying our motion for partial summary judgment. That's  
16 correct. So that was their burden of proof, to try to  
17 demonstrate that there was something special, legally  
18 special, about the relationship then between Pardee and  
19 the plaintiffs.

20          And that's where, respectfully, Your Honor, you  
21 have no evidence before you whatsoever. The parties  
22 have explained each one of them was represented by  
23 counsel. Each one of them is a sophisticated  
24 contracting party. Each one of them had the opportunity  
25 and exercised the opportunity for input into the

1 Commission Agreement. The agreement itself discharges  
2 any fiduciary duty in the sense of, We're not partners,  
3 there's no joint venture between us, there's no  
4 employment relationship.

5 THE COURT: Now I understand where you are  
6 going with that testimony. Okay.

7 MS. LUNDVALL: All right. And so --

8 THE COURT: I heard it. I just didn't get the  
9 hook-up. I do now. Okay.

10 MS. LUNDVALL: And, respectfully, Your Honor,  
11 you've heard no evidence to suggest that there is  
12 something special, legally special, about the  
13 relationship.

14 THE COURT: I know what that means. Okay.

15 MS. LUNDVALL: We went through all of those  
16 findings and brought the Court all of that case law and  
17 you'll find that from 67 all the way through 77.

18 THE COURT: Okay.

19 MS. LUNDVALL: I'm not going to address as far  
20 as their issue concerning the attorneys' fees as special  
21 damages. We brought the Court our case law, what the  
22 findings have to be concerning that. And, respectfully,  
23 we submit that there's no evidence that would suggest  
24 that.

25 And I go back to my argument that I made to

1 begin with and that being this: The only way that there  
2 are damages to which that they are entitled to is if  
3 they demonstrate that Pardee did something wrong.

4 And what I submit to the Court is that they  
5 have two issues. They complained that we told them  
6 about these other transactions and that they weren't  
7 entitled to it. They now concede that they weren't  
8 entitled to any additional commissions. And, therefore,  
9 they have conceded that Pardee was telling them the  
10 truth.

11 How is it that Pardee --

12 THE COURT: So you are saying that for an  
13 accounting cause of action, that if getting the  
14 accounting, getting with the information they need, if  
15 they find out the other party is wrong, then they can  
16 get the money. But if they find out by getting all the  
17 information they didn't have before that they are right,  
18 they don't have any --

19 MS. LUNDVALL: That's right.

20 THE COURT: So they are at a huge risk. If  
21 they want the information and they don't know whether a  
22 party is right or wrong until they get the information,  
23 how else can they get it if it's not an accounting  
24 claim? I have to follow you a little bit better.

25 MS. LUNDVALL: Let's go back to what the

1 parties contracted for.

2 THE COURT: Okay. I see where you are going.  
3 Okay.

4 MS. LUNDVALL: So what I'm saying is what the  
5 parties contracted for, the information that we  
6 contracted to give them was the notice --

7 THE COURT: Okay. That goes back to the breach  
8 of contract?

9 MS. LUNDVALL: That's right.

10 THE COURT: So you have to decide that in  
11 tandem?

12 MS. LUNDVALL: Exactly. We didn't make any  
13 other promises to give them any information. We didn't  
14 make any other promises that, We will provide you with  
15 this information. Absolutely nothing, Your Honor. Our  
16 obligation to give them information is informed by the  
17 four corners --

18 THE COURT: Of the document.

19 MS. LUNDVALL: -- of the document.

20 THE COURT: Can I ask you, in your position,  
21 that we all know the sentence, In addition, Pardee shall  
22 keep each of you reasonably informed as to all matters  
23 relating to the amount and due dates of your commission  
24 payments, your position is that's unambiguous? That  
25 reasonably informed as to all matters relating, your

1 interpretation is that's not ambiguous? That just means  
2 we have to give them the amounts and the due dates,  
3 period?

4 MS. LUNDVALL: All matters relating to the  
5 amounts and the due dates.

6 THE COURT: Okay.

7 MS. LUNDVALL: So then it gets to the Court's  
8 Interpretation. What are all matters?

9 THE COURT: I understand what you are saying.

10 MS. LUNDVALL: Is it realistic to say we have  
11 to give them everything to confirm that we're telling  
12 the truth? I'm sorry, but I find that hard to imagine  
13 that a party like the plaintiffs can advocate in a case  
14 like this to say, All right, we admit we're not entitled  
15 to multi-family commissions, we are not entitled to  
16 commercial land transactions, the custom lots, we admit  
17 that, but you guys didn't give us the information about  
18 that.

19 Where is it that we promised to give them  
20 information about that? We didn't promise to give them  
21 that information. And so, therefore, how is it that  
22 when we tell them the truth, you punish a party like  
23 Pardee for telling the truth? Because that's what's  
24 going to happen. If, in fact, you find that they were  
25 entitled to this other information, even though we

1 contractually did not promise to give that to them, to  
2 confirm that we were telling the truth, you are  
3 punishing a party, a contracting party, for telling the  
4 truth.

5 I think the balance of our findings,  
6 Your Honor --

7 THE COURT: A lot is case law I'm going to have  
8 to go through.

9 MS. LUNDVALL: -- are self-explanatory.

10 And what I'd like to do is to address the  
11 question that Mr. Wolfram posed to me when he was on the  
12 witness stand and that I would have liked very much to  
13 address when he was testifying, but as the Court well  
14 knows, I get to ask questions. I don't get the  
15 opportunity to give answers.

16 THE COURT: You don't testify.

17 MS. LUNDVALL: That's correct.

18 THE COURT: I understand.

19 MS. LUNDVALL: Closing argument is that.

20 Mr. Wolfram testified about all of the  
21 information that he had received and how all of that  
22 information fell within the four corners of what his  
23 attorney had asked for. He wanted to know the seller.  
24 He wanted to know the buyer. He wanted to know the date  
25 of the land transactions. He wanted to know the parcel

1 maps. He wanted to know the legal descriptions, how  
2 much was paid. All of that information was found in the  
3 deeds. All of that information was able to be given to  
4 him.

5 And what he said to me, he said, Why did I have  
6 to play detective?

7 The answer to that question, Your Honor, is  
8 directly related to the theme that I just advanced. He  
9 played detective to confirm that Pardee was telling the  
10 truth. He disbelieved us when we told him he wasn't  
11 entitled to commissions on the other transactions. He  
12 disbelieved us when we told him we had not taken down  
13 any Option Property. He played detective to confirm  
14 that we told him the truth.

15 And, therefore, respectfully, Your Honor, a  
16 party like Pardee cannot be punished or be found liable  
17 for either breach of contract, breach of the covenant of  
18 good faith and fair dealing, or an accounting when they  
19 have told the opposite contracting party the truth, and  
20 that there has been no evidence brought before this  
21 Court's attention that, in fact, that we lied to him,  
22 that we misled him, that we did not give him the  
23 information that we contracted to give to him or to  
24 Mr. Wilkes.

25 And, therefore, we respectfully submit,

1 Your Honor, that the money damages claim that the  
2 plaintiffs are asking for has not been demonstrated.  
3 The accounting claim has not been demonstrated. And in  
4 addition, this order that they have asked the Court to  
5 do demands that the Court rewrite the parties'  
6 agreement, and the Court is prohibited from being able  
7 to rewrite the parties' agreement.

8           There are two things that I would like to be  
9 able to close with at this point in time. And that is  
10 that, first and foremost, I am going to acknowledge that  
11 I think that it is tough to be in your position,  
12 especially after being a practicing attorney. You know  
13 the effort and the energy that goes into production of a  
14 case. And, therefore, it makes it hard to say somebody  
15 wins and somebody loses.

16           THE COURT: It does, but that's the system.

17           MS. LUNDVALL: That's the system.

18           THE COURT: That's what the law is.

19           MS. LUNDVALL: And what the plaintiffs have, I  
20 want to say suggested to the Court is they've been  
21 trying to kind of give a soft way to the Court by  
22 suggesting, All we want is information. But that  
23 information verifies that what we were doing was telling  
24 them the truth in the first place.

25           And, therefore, the soft way, which appears to

1 be kind of, you know, a soft way of not saying, I want  
2 big money damages or something like, but there are  
3 consequences that flow from those decisions. And the  
4 consequences are not consequences, respectfully, that we  
5 contend that Pardee should be charged with.

6 The last thing I would like to say to the Court  
7 and that is this, thank you.

8 THE COURT: You're welcome. It's been a  
9 pleasure to have all counsel here.

10 MS. LUNDVALL: Also to be able to say thank you  
11 to your staff, to your bailiff, thank you to opposing  
12 counsel for their worthy adversaries, but most of all  
13 thank you for your time.

14 THE COURT: It has been a pleasure and I do  
15 mean that.

16 MR. J.J. JIMMERSON: Thank you, Judge. May it  
17 please the court, Judge, out of respect for our son who  
18 has worked so hard on this case, I would like him to  
19 give our reply closing argument and some compelling  
20 reasons to find in favor of the plaintiffs.

21 MR. J.M. JIMMERSON: Your Honor, I will do my  
22 best to be brief.

23 Before I begin my formal remarks, I did want to  
24 address the RES 5, R-5 matter. If the Court would look  
25 to both plaintiffs' and defendant's exhibits,

1 specifically Plaintiffs' 39 and 41 and Defendant's  
2 Exhibit XX, you'll find a litany of references to how  
3 that parcel is zoned.

4           Using their own exhibit, their own piece of  
5 paper that they blew up to you, okay, where they said,  
6 Here's R-5 under multi-family, look up here, it says  
7 R-2. The same thing for the black-and-white version,  
8 the same thing for where it says zone R-2 on the  
9 application.

10           MS. LUNDVALL: Your Honor, that was not the  
11 argument that they made. The argument that they made  
12 was that the map --

13           MR. J.M. JIMMERSON: Am I allowed --

14           MS. LUNDVALL: -- originally depicted R-5  
15 designation, and we confirmed the designation as  
16 single-family residential through the tentative maps.

17           And what I pointed out to the Court is that it  
18 had never been designated as single-family land, that  
19 R-5 is a multi-family designation, and it came from an  
20 agreement that dealt with multi-family property being  
21 acquired.

22           THE COURT: I do understand the evidence.  
23 So -- I understand.

24           MR. J.J. JIMMERSON: I understand that,  
25 Your Honor, but, respectfully, I would like to be able

1 to give the statement to you without being interrupted  
2 constantly.

3 On that issue there was no evidence about  
4 anything being zoned R-5. There isn't a piece of paper.  
5 There's isn't witness testimony. The reason you got R-5  
6 is because it's RES 5. It is the fifth residential  
7 portion of the multi-family deal. That's why we have  
8 R-5.

9 Had it been R-1 or RES 1, you would have gotten  
10 R-1. Had it been RES 2, it would have been R-2. And it  
11 was stated one time during the closing and that was it.  
12 Again, Exhibit 39 refers to it as R-2 and Exhibit 41  
13 also R-2.

14 Now on to the balance of the closing. I think  
15 it's fair to begin with how we got here, how we began  
16 with the allegations of breach for failure to give  
17 information, the contract and the covenant of good faith  
18 and fair dealing, and the need for a claim for an  
19 accounting.

20 Hindsight is always 20/20. And after months  
21 and years of discovery and argument and taking a closer  
22 look at everything, it's a lot easier to say all the  
23 information was out there.

24 First, let's just assume that the information  
25 Jim Wolfram had was the same as Walt Wilkes had, which

1 we know is not the case, at least as it pertained to  
2 Pardee providing them information. Let's look at what  
3 James Wolfram had. He had orders to pay commission. He  
4 had some communications with Mr. Lash, representatives  
5 of Pardee, and representatives of the title company, but  
6 was not provided any maps until November 24, 2009, and  
7 was not provided any of the amendments to the Amended  
8 and Restated Option Agreement.

9           There was no scheme disclosing how the land was  
10 being designated, how it was going to be used. In fact,  
11 we heard from Mr. Andrews that that information is  
12 generally held tight to the vest. We heard him disclose  
13 that they had plans. They designated certain  
14 multi-family lands just in the northern portion of the  
15 multi-family deal that are internally designated, but  
16 haven't been papered with the county yet. We've heard  
17 that only one of the multi-family deals that have been  
18 designated have been papered with the county.

19           So when you look at the information that was  
20 provided to Mr. Wolfram prior to this litigation, you  
21 have the payments, you have one map, which we'll get to  
22 in a minute, and you have promises that, You've been  
23 paid everything and everything else that we've done  
24 doesn't apply to you.

25           We've heard testimony --

1 MS. LUNDVALL: Your Honor, that would be a  
2 misrepresentation of the evidence. We know that there  
3 was additional information he got from the title  
4 companies.

5 THE COURT: I recall the evidence. Just argue  
6 this is what you think the evidence shows. I understand  
7 that.

8  
9 MR. J.M. JIMMERSON: I would appreciate if I  
10 could --

11 THE COURT: It's okay. I know the evidence,  
12 and they probably disagreed with some of your evidence  
13 or your what you say was provided. But let me follow  
14 the argument, at least. I'd appreciate it.

15 MR. J.M. JIMMERSON: Your Honor, when you look  
16 at what he had, we know that he's --

17 THE COURT: You are talking prior to the  
18 lawsuit?

19 MR. J.M. JIMMERSON: Exactly. Prior to the  
20 lawsuit.

21 THE COURT: You need to distinguish.

22 MR. J.M. JIMMERSON: Prior to the lawsuit he  
23 has his commission orders. He receives a November 24,  
24 2009 letter attaching a map. He's given closing  
25 statements which reference deals which are defined in

1 defined terms in the Amended and Restated amendments.  
2 He doesn't know what they mean.

3 He's given some deeds, which he already had  
4 access to because he went to the county recorder's  
5 office, he went to planning and zoning, he went to the  
6 assessor's office, he went to the development -- he went  
7 everywhere in the Clark County building trying to find  
8 information about this development.

9 And, yet, he didn't have one critical piece of  
10 information and that is designation. We heard it a  
11 million times. Someone says all the rest of the  
12 property is Option Property. No, no. It's all the rest  
13 of the property which is designated as production  
14 residential property is Option Property. We've always  
15 focused on the designation, time and time again.

16 So when you are informed, as Mr. Wolfram was by  
17 a colleague of his at Nevada Title by the name of Phil  
18 Zobrist, that Pardee is buying additional land and he's  
19 not being informed about it, that he doesn't know where  
20 it is, he doesn't know how it's designated, he asks  
21 questions. He's going to be curious. When he's told  
22 they are buying additional land pursuant to other  
23 agreements, a multi-family agreement and a custom lot  
24 deal, he gets a little more curious.

25 When he learns, finally, after getting a map,

1 that the location of the land is outside of Parcel 1,  
2 which has been, his understanding from day one, the  
3 definition of Purchase Property, and the definition of  
4 Option Property being the balance of the entire site  
5 which is or becomes designated for single-family homes,  
6 but he does not receive option notices, he did not  
7 receive copies of the documents he should in the event  
8 Option Property is purchased, he's again wondering what  
9 is going on.

10 So when we look at and examine the testimony of  
11 both sides -- Mr. Wolfram, Mr. Wilkes, Mr. Lash -- when  
12 asked, What does it mean to be reasonably informed as to  
13 all matters related to the amounts and due dates of the  
14 commissions, in this commission -- I'm sorry -- in this  
15 transaction it meant the ability to confirm that the  
16 commissions are being calculated accurately and paid  
17 appropriately. That's what it meant from both sides.  
18 That you didn't have to say, Trust -- you didn't have to  
19 believe, Trust me, we're paying you the right  
20 commissions. You had the ability to confirm that.  
21 That's what started this all, is that we didn't have --  
22 our clients didn't have that information.

23 Now Ms. Lundvall brings up an interesting  
24 point. Well, what happens if Pardee is telling the  
25 truth that they had given them the proper amounts of

1 commissions, that they had given them the information  
2 because it pertained to all matters related to the  
3 amounts and due dates of the commissions? Should they  
4 be punished? No, they shouldn't be punished if they  
5 complied with the contractual obligations. Absolutely  
6 not.

7 But when there is a failure to fulfill your  
8 obligations to keep them reasonably informed as to all  
9 matters related to the amounts and due dates of the  
10 commissions, even if your trust to me is right, you  
11 shouldn't have to bring a lawsuit to confirm it.  
12 Because the duty in that contract said otherwise, that  
13 Pardee -- not the title company, not Frances Butler --  
14 Pardee has this duty.

15 So that's how we got here. We have a map. We  
16 have some commission orders. We have some deeds. We  
17 don't have a complete picture of what's going on at  
18 Coyote Springs. We don't have a complete map. That was  
19 created by Mr. Wolfram himself after hours and hours and  
20 hours working to find it. And we don't have a key piece  
21 of information, which is the designation information.  
22 Because if the land isn't designated for single-family  
23 homes, they can't receive a commission on it.

24 And so when you, once again, look at the  
25 November 24, 2009 letter, ask yourself, Is there a

1 statement that says this is all of the production  
2 residential property that Pardee has purchased at  
3 Coyote Springs? You are not going to find it. The  
4 reason you are not going to find it is because that  
5 statement couldn't be made truthfully. And we'll get to  
6 that portion a little later. But that's how we got  
7 here.

8 And so when Mr. Wolfram looks at Exhibit D  
9 showing the initial developed parcel inside is the 3,600  
10 acres of Parcel 1, the Purchase Property as defined in  
11 the original agreement, when he sees C-2, that even  
12 after the BLM land transaction, where you actually have  
13 room to move east, you still see the easternmost  
14 boundary of Purchase Property. Still there, doesn't go  
15 away after the contemplated BLM transaction.

16 And then he sees that the land that they  
17 purchased is outside of the boundary, that it's being  
18 told to him that he's being paid a percentage of price,  
19 when under the Option Property formula he would be paid  
20 a percentage of acres. And he was informed that they  
21 purchased other property which was not disclosed to him,  
22 the location or the designation thereof.

23 So when he knows that he's just not looking at  
24 a company that owns \$84 million of property, they own  
25 much more. As you heard from Mr. Andrews, they've

1 invested hundreds of millions of dollars in this  
2 investment. They now have a custom lot agreement. They  
3 now have a multi-family agreement. They've now taken on  
4 responsibilities for commercial property.

5 The question is when, knowing that it is  
6 outside of Parcel 1, and knowing that other property has  
7 been purchased, that portion of the information hasn't  
8 been disclosed to you, can you be said -- can  
9 Mr. Wolfram know that he received the proper amount of  
10 commission payments? The answer to that question is no,  
11 if only because he didn't have the designation  
12 information.

13 A related point Ms. Lundvall made was observing  
14 that Mr. Wolfram thought he had been overpaid back in  
15 2007. And it's interesting because we get to the  
16 conclusion Mr. Wolfram thought he was overpaid and he  
17 only had, at that point, orders to pay commission. He  
18 was only tracking his own money.

19 The reason why he knew he was overpaid, and  
20 Mr. Wolfram told you about this, was because he had  
21 received more money beyond the \$50 million, but was  
22 being paid at the four percent rate. He didn't need to  
23 know where they were buying it. He just knew that,  
24 according to their own formula, he was being overpaid.  
25 That didn't mean he had the information to confirm that

1 he had been properly paid before or after.

2 Knowledge of a mistake and having the  
3 information to have that knowledge is not the same as  
4 having the information to confirm accuracy of the  
5 commission payments. That's the flip side of the coin.  
6 And that was what was necessary under the commission  
7 letter agreement.

8 So now fast-forward to the filing of the  
9 Complaint. There's been requests for information.  
10 They've been unsuccessful. The best we've received or  
11 the best Mr. Wolfram received was that map, but there  
12 was not any complete disclosure. There was not an  
13 explanation or a reconciliation of what's going on,  
14 what's the difference between Mr. Wolfram's map and  
15 Mr. Lash's map.

16 There was a letter that said, The parcels that  
17 are on your map but not on Mr. Lash's are outside the  
18 scope of your agreement. Again, a conclusion, no  
19 factual information to support it.

20 You didn't hear any testimony from Mr. Lash or  
21 Mr. Andrews explaining the phone calls, the details that  
22 they provided to him about how Coyote Springs was  
23 developing and why the \$84 million had been spent this  
24 way and why they'd been paid the right amount of  
25 commissions and why they weren't entitled to commissions

1 under the multi-family deal, why the information  
2 provided there wouldn't help them to confirm they had  
3 received the proper amount of commissions. You never  
4 heard that testimony. And the reason you didn't hear it  
5 was because it didn't happen.

6           You heard from Mr. Wolfram how many times, They  
7 didn't give me any information. He was like a broken  
8 record, I swear to God. But it was true. It's because  
9 there was no explanatory phone call. We wouldn't be  
10 here if there was an explanatory phone call, because  
11 there would have been disclosure of all of the  
12 production residential property that had been purchased.  
13 There would have been resolution of that matter.

14           Had the issues of changing boundaries and the  
15 evolution of the development of Coyote Springs become a  
16 real issue, Mr. Wolfram would have answered the call.  
17 He would have said, I'll sign the confidentiality  
18 agreement if you need me to. They trusted him with four  
19 confidential agreements, and they don't trust him with  
20 eight more related to the same underlying base  
21 transaction for the Purchase Property and the Option  
22 Property.

23           So when he is forced at this point to finally,  
24 after three years of requesting information, to hire an  
25 attorney, file suit, get access to the tools in

1 discovery, subpoena power, most importantly to appeal to  
2 this Court's equitable powers to give equitable relief  
3 in the form of compelling an accounting to ensure they  
4 are receiving the appropriate amount of information and  
5 to issue an order interpreting the contract consistent  
6 with the evidence, that is, you need to give them  
7 information to confirm they are receiving the right  
8 amounts, that is why we have a damage claim as it  
9 specifically relates to attorneys' fees. And I won't  
10 get into the law. You have read countless briefs on  
11 that matter.

12 But without that power, we don't have the CSI  
13 documents. We don't have the documents from Stewart  
14 Title or Chicago Title. We don't have the information  
15 that we brought forward to you today, information which  
16 was quite eye-opening when fully explained.

17 And this is how it relates to the second  
18 portion of the breach claim, which is specifically, Did  
19 they buy production residential property and not pay a  
20 commission?

21 Mr. Whittemore, I thought, was a very, very  
22 compelling witness, very knowledgeable. I thought there  
23 were a couple points, though, that gave me pause. Every  
24 single document presented in front of him, there wasn't  
25 an issue with any of the designation maps, B-1 through

1 B-5, about how the land was located and how it was  
2 designated.

3 And, yet, for the critical piece of  
4 information, the five residential parcels in the  
5 multi-family land deal, that's when it all hit the  
6 skids. That's he said it was also multi-family even  
7 though there was already a previous designation under  
8 parcels MF-1 and MF-2.

9 We learned later through it the examination of  
10 Exhibit 13, specifically Exhibit E, the land just to the  
11 left of the seller exchange parcel, that was RES 5.  
12 That was Residential 5 on B-6. We learned that that was  
13 the plans for the first development, the first  
14 subdivision for single-family home, production  
15 residential property.

16 But when faced with that question,  
17 Mr. Whittemore responded with, I didn't know what they  
18 did. I didn't know if they downgraded. He went from  
19 saying it's all multi-family to then, when faced with  
20 serious evidence that it wasn't multi-family, he  
21 suddenly became ignorant. And I'm making this point  
22 because this Court needs to make a determination is the  
23 paper right or is the testimony right?

24 And we've been told to look to paragraph B on  
25 page 14 countless times, look to the specific provisions

1 of the contract to learn what it means. And, yet, the  
2 most basic of information, looking at a map, a picture  
3 showing what's going on, that's incorrect, and in the  
4 most curious of situations where it would have most  
5 impact on the plaintiffs' ability to receive a  
6 commission, but also to confirm that they had received  
7 the appropriate amounts of commission.

8 If the Court finds that the map is more  
9 trustworthy than the testimony, saying it's not  
10 accurate, it's also going to have to find that they  
11 took -- that Pardee took down production residential  
12 property under the guise of multi-family land deal. And  
13 I speak to all five parcels and not just RES 5.

14 RES 5, the evidence is clear, that land is for  
15 single-family homes. You heard it from Klif Andrews.  
16 You saw it on the map. You've got Exhibit 43, which  
17 shows each and every one of the 332 lots, single-family  
18 homes. It's an 80-acre parcel which is split up into  
19 the 26 and change acres for the seller exchange and the  
20 balance being Residential 5.

21 We know that at least one-fifth of that  
22 multi-family deal of the residential parcels is  
23 production residential property, and we know that it  
24 wasn't just designated in-house by Pardee. We know that  
25 it was serious enough to file paperwork with the county,

1 unlike what Mr. Andrews explained that they did with the  
2 multi-family portion which is the northern portion of  
3 that site.

4           What was interesting also about Mr. Andrews'  
5 testimony when asked, How was the rest of it designated,  
6 he said, I don't know. He knew where the multi-family  
7 was, which I would expect him to. It's his business.  
8 He's the hands-on head of the Nevada team. But there  
9 wasn't any disclosure of any other possible designation  
10 of land.

11           He said that CSI still reserves much of the  
12 commercial property. You've got multi-family, which he  
13 discussed earlier. What is the other option?  
14 Single-family residential. Exactly what the map says on  
15 B-6, supported by the Exhibits 43, 39 and 41 talking  
16 about how it is zoned, what the use is supposed to be  
17 for. The question is which would you believe more? The  
18 records, the map of Coyote Springs and Pardee, their  
19 agreements, or the testimony of a couple witnesses?

20           You have the maps from the county and the  
21 agreements between the parties. At the time there was  
22 no amendment to Amendment No. 7. There was no  
23 correction of we need to change to designation. You  
24 heard these are all eight amendments. But we're now  
25 expected to believe that when it says residential, it

1 means multi-family, when we have already a multi-family  
2 designation on that map.

3           If the Court finds that that land was  
4 production residential property when it was purchased or  
5 ever redesignated, it must find that there was a breach  
6 of the contract for a number of reasons, the first of  
7 which is information.

8           Mr. Wolfram and Mr. Wilkes had every  
9 expectation that they would be paid a commission and  
10 informed, necessary as required by the Commission  
11 Agreement, for every acre of production residential  
12 property purchased by Pardee throughout the entire site.

13           Let's be clear here. In 2004, September 1,  
14 when they signed that agreement, there was one operative  
15 agreement between Pardee and CSI. That was the Option  
16 Agreement. There was two amendments thereto, but there  
17 was not some other deal. There was not some other  
18 negotiation to buy commercial land, multi-family land,  
19 other designations of land between Pardee and CSI at  
20 that time.

21           The only interest Pardee had on September 1,  
22 2004 in Coyote Springs was for single-family homes, and  
23 according to the Option Agreement, had only one  
24 mechanism of buying land once Purchase Property had been  
25 completed. That is the exercise of options.

1           So when you read the Commission Agreement,  
2 Counsel pointed you to the language purchased pursuant  
3 to paragraph 2 of the Option Agreement. That is not  
4 limiting language. Under that interpretation, under a  
5 straight interpretation of that, if they bought  
6 production residential property in any other manner, our  
7 clients would not be able to receive a commission, nor  
8 would they be entitled to information concerning it.  
9 But that's not the case.

10           When they signed that had agreement, there were  
11 only two ways Pardee was going to buy production  
12 residential property, buying Purchase Property and  
13 buying Option Property. So when the Commission  
14 Agreement says that you get a commission when they buy  
15 Option Property pursuant to paragraph 2, there's no  
16 contemplation that they are going to buy production  
17 residential property in any other way. At that time  
18 there was no other mechanism for Pardee to buy  
19 production residential property except for what was in  
20 the Option Agreement.

21           Here's where we get to the noncircumvention  
22 portion, unless they try to bypass the Option Agreement,  
23 bypass our clients in the interim. They entered into  
24 separate agreements whereby they purchased this  
25 production residential property, specifically the

1 multi-family land deal.

2           It took a second agreement for them to get  
3 access to this land. They didn't do it through the  
4 underlying Option Agreement. That's why you didn't see  
5 the written option exercise notice. That's why you  
6 didn't see the option deed. They did it through a  
7 separate agreement. So when you look at the justified  
8 expectations of our clients from the Commission  
9 Agreement, they had a justified expectation that every  
10 acre of production residential property purchased by  
11 Pardee, they would receive a commission on, because the  
12 only way for Pardee to buy production residential  
13 property was through the Option Agreement at that time.

14           So when you learn that they bought -- excuse  
15 me -- when they bought production residential property  
16 through other agreements, through separate agreements,  
17 and neither compensated our clients, nor informed them  
18 about it --

19           THE COURT: So you are equating buying and  
20 purchasing as the same thing as designating it something  
21 different, redesignating it?

22           MR. J.M. JIMMERSON: I'm going to move  
23 separately. I'm just using that example.

24           THE COURT: Because we all know they bought it,  
25 purchased it, under a multi-family agreement and they

1 purchased not -- under multi-family price. That is not  
2 in dispute.

3 MR. J.M. JIMMERSON: Yes.

4 THE COURT: We all know that. I just want to  
5 follow you.

6 MS. LUNDVALL: \$100,000 an acre.

7 THE COURT: I remember. It was 100,000.

8 Okay. So go ahead. I'm sorry.

9 MR. J.M. JIMMERSON: Our position on that  
10 issue --

11 THE COURT: Terms are so precise in this.

12 MR. J.M. JIMMERSON: You are a hundred percent  
13 right.

14 THE COURT: Terms are so precise to me that  
15 they have to be. So I want to make sure I'm in the  
16 right step of what you are arguing.

17 MR. J.M. JIMMERSON: Our position is, and the  
18 evidence is pretty clear on this, at least the paper  
19 evidence, is that when they bought it, they bought  
20 residential property. They bought multi-family property  
21 too, but they bought production residential property.  
22 They bought it at \$100,000 an acre.

23 But the reason they did it wasn't because they  
24 are getting \$100,000 an acre land. It's because they  
25 are getting the rights associated with the multi-family

1 development, which is what Mr. Andrews spoke to. He  
2 said, We were really buying rights and Jon Lash got them  
3 to throw in some land. That's what he said.

4 THE COURT: But that land is what they got for  
5 the 100,000 an acre. Right?

6 MR. J.M. JIMMERSON: Well, they got rights and  
7 land, but you are right.

8 THE COURT: Well, it's tied together. He  
9 explained that.

10 MR. J.M. JIMMERSON: Yes. But the question  
11 is --

12 THE COURT: I'm following you.

13 MR. J.M. JIMMERSON: The question is whether or  
14 not it was designated then or whether it was  
15 redesignated later. Our position is whether it was  
16 designated in the very beginning when they bought it or  
17 whether it was designated later, it doesn't matter,  
18 would be a breach.

19 THE COURT: Your position is any time, anything  
20 they buy, if they, in this developing process, if Pardee  
21 decides to designate it for their purposes in developing  
22 single-family residential, your clients, under this  
23 Commission Agreement, are owed?

24 MR. J.M. JIMMERSON: Yes, Your Honor.

25 THE COURT: Even though they didn't directly

1 purchase -- okay.

2 MR. J.M. JIMMERSON: And the reason for that is  
3 because of the ability to convert it to production  
4 residential property arises from the Option Agreement,  
5 which our clients --

6 THE COURT: Do that again.

7 MR. J.M. JIMMERSON: Pardee's right to acquire  
8 and purchase production residential property from CSI --

9 THE COURT: Is limited by the first option  
10 agreement?

11 MR. J.M. JIMMERSON: No, no.

12 THE COURT: They can't do it any other way?

13 MR. J.M. JIMMERSON: It arises from that Option  
14 Agreement.

15 THE COURT: Are you saying that limits their  
16 ability to buy residential --

17 MS. LUNDVALL: His argument started --

18 THE COURT: It's okay. I'm working on it.

19 MS. LUNDVALL: -- with the ability to reconvert  
20 it. That's quote/unquote.

21 THE COURT: I'm just trying to follow.

22 MR. J.M. JIMMERSON: The ability to convert  
23 it -- the ability to purchase production residential  
24 property arose from the Option Agreement.

25 THE COURT: Absolutely. That's what they

1 intended at the time and that's when they were  
2 contracting for.

3 MR. J.M. JIMMERSON: Exactly, yeah.

4 THE COURT: Go ahead. I just want to make sure  
5 I follow.

6 MR. J.M. JIMMERSON: So the rights to acquire  
7 and to control, possess, and develop single-family homes  
8 arose from that agreement. Later agreements allowed  
9 them and gave them rights to develop multi-family  
10 property and, to a certain extent, these custom lots we  
11 heard a lot about.

12 But the ability to reconvert or convert from  
13 one designation, whether it be multi-family or custom  
14 lots, to production residential property, again stems  
15 from the Option Agreement. Without the Option  
16 Agreement, Pardee would not have had the right to buy,  
17 control, acquire, or develop production residential  
18 homes.

19 So under those -- under that contract, without  
20 that contract, without our clients' efforts, you don't  
21 have that right to convert.

22 More importantly, I don't believe you even need  
23 to even get there in terms of looking at their ability  
24 to reconvert. The Option Property is very clear. When  
25 it defines Option Property, it is the balance of the

1 entire site for land that is or becomes designated for  
2 single-family homes.

3           So whether it is in 2004 or becomes at some  
4 point single-family property, it is Option Property by  
5 that definition. And so when they convert it, it then  
6 becomes single-family property.

7           THE COURT: What happens if they reconvert it  
8 and never do anything with it? It just keeps changing.  
9 It's like a chameleon. It gets to change five different  
10 times? If you take your scenario, your argument,  
11 that's -- I'm having a hard time with that a little bit.

12           So like he even says, you know, Mr. Andrews was  
13 very candid, We probably won't even do that.

14           So your position is they still owe a commission  
15 to your clients just because of what they did. If they  
16 even say anything that that property is going to be  
17 single-family production residential, every time they  
18 use that designation, whether they actually go through  
19 with it or not, your clients get a commission? That's  
20 where your argument goes?

21           MR. J.M. JIMMERSON: Yes. That's our position.

22           THE COURT: Okay. I just want to make sure.

23           MR. J.M. JIMMERSON: And the reason for it,  
24 Your Honor, is because designation is a term of art. It  
25 has real meaning. It is not just some ambiguous, Well,

1 this morning for 15 minutes I thought we were going to  
2 do some production residential property, then we're  
3 going to do multi-family for the rest of the day. No.  
4 It is a conscientious decision by Mr. Andrews and the  
5 rest of his team that this is the plan we're talking.  
6 Now, that may change six months, a year --

7 THE COURT: So when does it become -- for your  
8 purposes of your argument, designation, the minute they  
9 even do anything, put it on a property map or ask for a  
10 tentative plan, that's a permanent designation and then  
11 the commission is owed then? That's your argument?

12 MR. J.M. JIMMERSON: Yes.

13 THE COURT: There's a whole scale here of when  
14 it really becomes -- I know the term of art designation.  
15 But what's the evidence to when is it a designation if  
16 you are using that for purposes of commission? That's  
17 where I'm looking at.

18 MR. J.M. JIMMERSON: Okay.

19 THE COURT: And I didn't -- so that's where I  
20 want to go. Tell me your position is --

21 MR. J.M. JIMMERSON: Our position --

22 THE COURT: -- a tentative map is enough.

23 MR. J.M. JIMMERSON: Tentative map is enough,  
24 especially because it not only represents Pardee's  
25 internal workings, which we heard a lot about. They

1 internally designate. But it's the expression to the  
2 rest of the world that, This is how we're designating  
3 it, by virtue of the fact that they are filing it with  
4 Clark County.

5 THE COURT: So your position is if they hadn't  
6 done the -- let me ask this: Is it your position that  
7 as soon as they put on some of their development maps  
8 RES 5 for that area, was that designation enough for  
9 your clients to get commission based on your theory?

10 MR. J.M. JIMMERSON: Your Honor, to the extent  
11 that it was countersigned by Coyote Springs, I would say  
12 yes. To the extent it was maybe -- for example, in the  
13 future, a memoranda, we're going to want to designate  
14 this, it would have to be some official declaration,  
15 May 1 --

16 THE COURT: Between Pardee and CSI?

17 MR. J.M. JIMMERSON: It may not have to be  
18 between Pardee and CSI. Because we've now learned from  
19 Jon Lash and from Klif Andrews, CSI really didn't care  
20 about how it was designated.

21 THE COURT: That's what I was going to say.  
22 They just -- Harvey just wanted his money. I get that.

23 MR. J.M. JIMMERSON: So once they take an  
24 official position, okay, an official position a  
25 declaration this is now designated for this and then

1 begin to take some subsequent action consistent with  
2 that, whether it's the filing of a tentative map,  
3 whether it's the plans in support thereof, it can't just  
4 be, Well, it's on a piece of paper, it means it's  
5 magically turned into a redesignation. But it needs to  
6 have some combination of an official designation  
7 followed by action and support.

8 THE COURT: And that's your position on the  
9 interpretation?

10 MR. J.M. JIMMERSON: Yes.

11 THE COURT: The tentative map, that's why you  
12 say that's enough. It doesn't matter that it's going to  
13 expire in four years, a year or so from now?

14 MR. J.M. JIMMERSON: Well, we don't know if  
15 it's going to expire.

16 THE COURT: Well, the terms of it said it would  
17 in four years.

18 MR. J.M. JIMMERSON: But we don't know if it  
19 will expire. We don't know if six months before they  
20 could file the final map, get it all done, and --

21 THE COURT: That's what I'm saying. How  
22 much -- how far on that continuum do they need to go  
23 before they get a commission? That's my interest.  
24 Okay. I understand your -- your point is you feel  
25 that's enough for the designation, that they should get

1 a commission.

2 MR. J.M. JIMMERSON: The reason for it is that  
3 if it creates some reliance, if people inside are  
4 relying upon the fact this is going to be designated as  
5 blank, okay, it should apply, because that is -- that is  
6 very specific decisions. They are -- it is a business  
7 judgment. Okay. They are not doing it just for kicks.  
8 It's not arbitrary.

9 THE COURT: No, no. They are trying to develop  
10 their property to the best -- like that's the whole  
11 thing they did in 2010. They were trying to regroup and  
12 get some economic --

13 MR. J.M. JIMMERSON: Exactly.

14 THE COURT: -- downturn.

15 But you say the tentative is enough. You don't  
16 think something like the final map where all -- you  
17 don't feel that's enough for them to get a commission  
18 under your theory of designation?

19 MR. J.M. JIMMERSON: No, Your Honor. And the  
20 reason I would say that is this, is that there's been  
21 very few if -- I don't believe there's a been a single  
22 final map filed with Clark County.

23 THE COURT: Probably not, because their  
24 development didn't go forward.

25 MR. J.M. JIMMERSON: And, yet, they've already

1 previously designated, at a minimum, 2,112 acres of  
2 production residential.

3 THE COURT: That's what they purchased under  
4 the agreement. That, I understand. I understand that  
5 for that property. And they paid a commission. I  
6 understand that.

7 MR. J.M. JIMMERSON: I understand. But the  
8 idea that they can make a decision that this is going to  
9 be designated as production residential property before  
10 any of that happens, if the same reasoning applies, for  
11 example, to the multi-family deal where they did buy  
12 five parcels of production residential property, that  
13 should apply the same way.

14 THE COURT: All right.

15 MR. J.M. JIMMERSON: So it's -- if the Court  
16 wants to wait until the final --

17 THE COURT: I'm just asking your theory. All  
18 I'm doing is asking where your theory is going and what  
19 is your basis for it in the evidence. That's all I'm  
20 trying to understand, what is the basis in the evidence  
21 that you feel supports that they owe a commission to  
22 Mr. Wolfram and Mr. Wilkes on that RES 5 property?  
23 That's all I'm -- and that's what you are asking for.  
24 You are asking for that?

25 MR. J.M. JIMMERSON: Absolutely, a hundred

1 percent, Your Honor.

2 THE COURT: I understood that at the end. So  
3 that's why I'm asking your basis in evidence.

4 MR. J.M. JIMMERSON: The other part of it that  
5 I would marshal in support would be the changed  
6 testimony of Mr. Lash. We have --

7 THE COURT: I know.

8 MR. J.M. JIMMERSON: The most prominent change  
9 in testimony in this entire case was that of Mr. Lash,  
10 and I think it expresses a view that there was a  
11 justified expectation that any and all production  
12 residential property on the site, our clients would get  
13 a commission from. Because when they signed the  
14 agreement, the only way they would be able to get  
15 production residential property is either through  
16 Purchase Property or exercising options.

17 So if that's the understanding, if that's the  
18 justified expectation --

19 THE COURT: That was your clients' expectation?

20 MR. J.M. JIMMERSON: Yes, Your Honor.

21 THE COURT: That any single-family production  
22 residential home that was ever built by Pardee there or  
23 that land was used for that, they got a commission?

24 MR. J.M. JIMMERSON: Exactly. Because at the  
25 time there was no other way to acquire that property

1 other than to buy Purchase Property, which is covered by  
2 Roman numerals I and II, or by exercising options which  
3 is Roman numeral III.

4 THE COURT: All right. I understand your  
5 argument.

6 MR. J.M. JIMMERSON: And then it goes to the  
7 circumvention argument, which is, you know --

8 THE COURT: Obviously, if that's their  
9 understanding, then obviously you can't circumvent it by  
10 doing it. It depends on what the understanding was  
11 whether they circumvented.

12 MR. J.M. JIMMERSON: Exactly.

13 THE COURT: I understand that.

14 MR. J.M. JIMMERSON: So the next issue is this,  
15 and this has to do with information. If that's their  
16 understanding and if that's their expectation and 15  
17 years down the road, 20 years down the road, they find  
18 out that they've been paid for 2,112 acres of  
19 residential property and Pardee has acquired 2,500 acres  
20 of production residential property, as evidenced by  
21 their building, and they've done it through a mechanism  
22 such as through the multi-family deal, or through  
23 redesignating other land that they acquired through  
24 another deal to production residential property, our  
25 clients, at a minimum, would need to be informed as to

1 why they aren't being paid. Under what interpretation  
2 or what theory allows them to do that, to not pay them,  
3 and why their commission payments were accurate.

4 Again, this goes back to why they needed to  
5 know the location of the land, in addition to  
6 designation information, is because they're being told  
7 it's all Purchase Property, but Purchase Property is  
8 defined with hard boundaries at that time of land within  
9 Parcel 1.

10 So in that event, okay, even if they could  
11 avoid getting out of paying a commission, they surely  
12 can't avoid letting them know we're designating land or  
13 redesignating land and so we're not going to pay you  
14 a commission because it's not part of the Option  
15 Agreement or it's not called for in the Commission  
16 Agreement.

17 But I would submit to you, Your Honor, that  
18 that would be that circumvention, that that would be  
19 that avoidance of obligations. And whether intentional  
20 or not, whether it's a mistake, whether it's negligent,  
21 whether it's the most willful thing on the planet, it's  
22 still an avoidance of the obligation.

23 And as Mr. Lash told you, there's no mens rea  
24 necessary, there's no need to defraud under that clause,  
25 there just would need to be some form of action taken to

1 circumvent or avoid their obligation. So if that's the  
2 case, if they have an obligation, at least so far as the  
3 understanding of the parties, to both pay them a  
4 commission for production residential property and to  
5 inform them as to all matters related -- to reasonably  
6 inform them as all matters related to amounts and due  
7 dates of their commission, that they can't get around  
8 that by executing separate agreements, and that's  
9 exactly what we have here.

10 The single-family -- as an aside, there's been  
11 no discussion of Pardee's counterclaim. We would  
12 submit --

13 THE COURT: In her findings of fact, she said  
14 she was withdrawing it.

15 MR. J.M. JIMMERSON: I'm sorry. I did not see  
16 that.

17 THE COURT: Didn't you say you were withdrawing  
18 the counterclaim?

19 MS. LUNDVALL: We would withdraw the  
20 counterclaim in the event that the Court finds the time  
21 and material damages are not a recoverable or  
22 compensable form of damages under the breach of the  
23 covenant of good faith and fair dealing.

24 In other words, if they don't prevail on their  
25 breach of the covenant of good faith and fair dealing,

1 then we acknowledge that we can't either. So they were  
2 mirror images of each other, Your Honor.

3 THE COURT: So you are still going for your  
4 counterclaim?

5 MS. LUNDVALL: Only if, in fact, the Court  
6 finds a breach of the covenant of good faith and fair  
7 dealing.

8 THE COURT: I just saw that briefly when I was  
9 sitting up here.

10 MS. LUNDVALL: If you take a look, I think the  
11 language we did is we said as a conditional  
12 counterclaim, we've alleged this.

13 MR. J.J. JIMMERSON: There was no testimony.

14 THE COURT: Okay.

15 MS. LUNDVALL: There was testimony by the  
16 defense.

17 THE COURT: But you know what, you can't argue.  
18 I'm sorry. Argument is over.

19 I'm really getting tired. It's getting long  
20 now. So could you at least --

21 MR. J.M. JIMMERSON: Five minutes, Your Honor,  
22 and we're done.

23 THE COURT: I'm not cutting you off. I'm  
24 just -- but I don't want to open any more argument. No  
25 evidence, in your opinion, as to any counterclaim by

1 defendants?

2 MR. J.M. JIMMERSON: Yes, Your Honor.

3 MS. LUNDVALL: The Court asked us to remind you  
4 that there was a deposition transcript before the Court.  
5 That deposition transcript is part of the evidence.

6 THE COURT: I'm sorry. What are you referring  
7 to now?

8 MS. LUNDVALL: Jim Stringer.

9 THE COURT: Oh, yeah. I'll looking at it. I  
10 haven't looked at it yet. So I don't know if there's  
11 any evidence in that one or not. I haven't had a chance  
12 to read that.

13 MR. J.M. JIMMERSON: What you will find is that  
14 ultimately the two people or three people who could  
15 inform the understanding of the agreement -- Mr. Lash,  
16 Mr. Wolfram, Mr. Wilkes -- never once testified there  
17 was an obligation of Mr. Wilkes and Mr. Wolfram to  
18 refrain from asking the questions, to inquire further as  
19 to what the status of the development at Coyote Springs  
20 was. Without that testimony, without that explanation  
21 or understanding or any words to that effect, inside  
22 the --

23 MS. LUNDVALL: If Counsel is now addressing our  
24 counterclaim, then he's now going beyond the scope of  
25 what my argument was. Therefore, I would ask him to

1 move on. His rebuttal is limited to --

2 THE COURT: No. If you are still maintaining  
3 your counterclaim, just because you didn't argue it to  
4 me, he certainly gets to address it. I mean, I know  
5 it's rebuttal. I understand that, but, I mean --

6 MS. LUNDVALL: He gets to rebut what I argued.

7 THE COURT: I know.

8 MR. J.M. JIMMERSON: Your Honor, I will finish  
9 with this, and this deals with the claim for an  
10 accounting.

11 THE COURT: It's getting late.

12 MR. J.M. JIMMERSON: I know.

13 The issue here, the claim for accounting, is  
14 whether or not there's a relationship or a duty that  
15 gives rise to the claim for accounting. Nevada law is  
16 very clear. Fiduciary relationship, special  
17 relationship, where a party reasonably imparts special  
18 confidence in the defendant, and the defendant would  
19 reasonably know this confidence, or, three, where a  
20 party has superior knowledge or the material facts are  
21 peculiarly within the knowledge the party sought to be  
22 charged and not within the fair and reasonable reach of  
23 the other party, Dow Chemical versus Mahlum,  
24 114 Nevada 1468.

25 Clearly, this is an issue of superior knowledge

1 and the ability of plaintiffs to get access to it. This  
2 is under the duty to disclose. This is separate and  
3 apart from the special relationship in the context of  
4 the breach of the covenant good faith and fair dealing  
5 in tort.

6 So the duty to disclose arises in these three  
7 situations. That duty clearly is evidenced here because  
8 the designation information wasn't available to my  
9 clients. The information as to the location of where  
10 exactly they're buying Purchase Property wasn't  
11 available to my clients. All of the information  
12 necessary to confirm the amount and due dates, to  
13 confirm the accuracy of the calculations of the  
14 commissions wasn't available to my clients. That is why  
15 there needs to be an accounting sought and rendered in  
16 this case.

17 I began opening by saying this case is about  
18 fairness and will conclude on that remark. Mr. Wolfram  
19 and Mr. Wilkes have spent their entire lives being fair  
20 to people and expecting the same in return.

21 They repeatedly asked Mr. Lash, representatives  
22 of Pardee, and the escrow company for information. In  
23 response they got nothing. In fact, they were told, You  
24 have everything. But they didn't have everything.  
25 Mr. Lash instructed someone to say they have everything

1 when they don't and when he knows they don't. That  
2 isn't being fair with them. That isn't doing the right  
3 thing.

4 And now that we've been through this nine-day  
5 trial, they are asking this Court to fairly observe and  
6 take notice of all the evidence and treat them fairly as  
7 a result and find in favor of them. Thank you, Your  
8 Honor.

9 THE COURT: Thank you.

10 Okay. We're completed; right?

11 MR. J.J. JIMMERSON: Yes, Your Honor.

12 THE COURT: Once again, I do have your revised  
13 findings of fact. I would like -- let me tell you on my  
14 time frame. I'm just concerned -- here's what's going  
15 on with me. I have a products liability case which I  
16 got that starts January 13th. They have already filed  
17 almost 40-some motions in limine, and they are thinking  
18 they may get to 60-some over my holiday.

19 MS. LUNDVALL: Oh, boy.

20 THE COURT: So I tried very hard to kind of put  
21 you so I could have a block of time to look at this, and  
22 I'm really concerned -- I want to be honest with you.  
23 I'd rather just work on it right now while it's fresh in  
24 my mind, But I have motions in limine already filed.  
25 It's an Actos case. It's got Kemp and Eglet. And they

1 just brought in two attorneys from New Jersey,  
2 associated in today with them. I've got five different  
3 law firms the representing the defendant they are  
4 associating in.

5 And you have to be fair to the judge that I  
6 have fair time do this. So I'm going to try to work on  
7 this as much as I can next week, but like I said, my  
8 Christmas and stuff is shot, and this trial is  
9 January 13th. We're already trying to figure out if I  
10 can even hear all the motions in limine before  
11 January 13th. And the trial is supposed to go six weeks  
12 to eight weeks.

13 So I don't want to rush this either because  
14 that's not fair to you guys. So I just want you to  
15 know, if I don't get something out, it's not because I  
16 don't want to work on it, because it makes more sense to  
17 me to do it now. I was trying get some stuff off my  
18 calendar next week, and my law clerk will tell you, as  
19 you can imagine, everything got put on to next week.

20 Because the way this job works, not that I'm  
21 complaining, we basically have a 40-hour week just doing  
22 my motion calendar. You add a 40-hour week with a  
23 trial, I have an 80-hour workweek. It's very difficult  
24 to do that, as you can imagine.

25 So to give you all the time from 8:30 as long

1 as I could, because I wanted it done for you, I pushed  
2 everything.

3 MR. J.J. JIMMERSON: We appreciate it,  
4 Your Honor.

5 THE COURT: Because I think it's more important  
6 to me to give you blocks of time to present it, and to  
7 your witnesses and everything. It just backs up my  
8 days.

9 But I just wanted to explain that to you. It  
10 may be longer than I would every want it to be. I will  
11 start next week, but I also don't want to push. I have  
12 a lot to do here. I'm the first to acknowledge that. I  
13 want -- you've worked very hard to present it, and I  
14 certainly want a fair time to be able to work on it. So  
15 I just wanted to be up-front with you.

16 After that I don't have another big trial.  
17 Next week I have a bench trial. After that I have  
18 another big one, but not until June. So I've asked some  
19 of these other cases to see if someone else can take  
20 them. And I am working with the senior judges to see --  
21 because I have -- it's just really tough. And I have to  
22 have blocks of time. I'm sure you can appreciate. I  
23 can't do this at night.

24 MR. J.J. JIMMERSON: You gave 40 hours today,  
25 Your Honor.

1           THE COURT: I'm working very hard. Please  
2 don't get discouraged with me if it doesn't come as fast  
3 as you would like. I'm just telling you that up-front  
4 because I -- calendar just got really tight on me  
5 because of that trial.

6           MS. LUNDVALL: Thank you, Your Honor.

7           THE COURT: It was a preferential trial  
8 setting. So here we go.

9           MR. J.M. JIMMERSON: We will submit to you our  
10 updated proposed findings of fact and conclusions of law  
11 and decisions within the first half of next week.

12           MS. LUNDVALL: May we get copies of what they  
13 submit?

14           MR. J.J. JIMMERSON: Of course. We'll serve  
15 her, of course.

16           MR. J.M. JIMMERSON: Absolutely.

17           THE COURT: So I just wanted to let you know  
18 and be up-front with you.

19           MS. LUNDVALL: Thank you, Your Honor.

20           THE COURT: Like I said, I will do my very  
21 best. I tried to get somebody else to take my bench  
22 trial next week. Not so much.

23           I truly believe a judge has to have a fair  
24 amount of time to do a fair decision, and I know you all  
25 would agree with that.

1 MR. J.J. JIMMERSON: Thank your staff.

2 MS. LUNDVALL: Thank you, Your Honor.

3 -oOo-

4 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF  
5 PROCEEDINGS.

6  
7 */s/ Jennifer D. Church*

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JENNIFER D. CHURCH, CCR. No. 568, RPR