

1. Any and all written agreements between the Parties;
2. Any and all documents evidencing damages to the Plaintiffs;
3. Any and all correspondence between the Parties;
4. Any and all appropriate Custodian of Record documents;
5. Any and all pleadings in this matter;
6. Documents labeled Bates Numbers PLTL0001-PLTL00244;

These documents are being reproduced as Plaintiffs' Initial NRCP 16.1 Disclosures of Witnesses and Documents had duplicate documents. The duplicate copies have been removed and the documents are listed as follows:

- A. Option Agreement for the Purpose of Real Property and Joint Escrow Instructions dated May 2004 (Bates No. PLTF0001-0080);
- B. Amended and Restated Option Agreement for the Purchase of Real Property and Joint Escrow Instructions dated March 28, 2005, (Bates No. PLTF0081-0152);
- C. Two Assignments of Real Estate Commission and Personal Certification Agreement (Bates No. PLTF0153-0157A)
- D. Letter dated September 2, 2004 from Pardee Homes to Mr. Walt Walkes regarding the attached Commission letter dated September 1, 2004, (Bates No. PLTF0158-0162);
- E. Amendment No. 2 to Option Agreement for the Purchase of Real Property and Joint Escrow Instructions, (Bates No. PLTF0163-0174);
- F. Letter dated April 6, 2009 from Pardee Homes to Mr. Jim Wolfram, (Bates No. PLTF0175-0179);
- G. Letter dated April 23, 2009 from James J. Jimmerson, Esq., to Jim Stringer, Esq., (Bates No. PLTF0180-0187);
- H. Letter dated May 19, 2011 from James J. Jimmerson, Esq., to Jim Stringer, Esq., (Bates No. PLTF0188-0191);
- I. Letter dated July 10, 2009 from Charles E. Curtis to James J. Jimmerson, Esq., (Bates No. PLTF0192-0193);
- J. Letter dated August 26, 2009 from James J. Jimmerson, Esq., to Charles E. Curtis, (Bates No. PLTF0194-0196);
- K. Letter dated November 24, 2009 from Jon E. Lash to Mr. Jim Wolfram, (Bates No. PLTF0197-0202);
- L. Letter dated April 21, 2010 from Jim Wolfram to Mr. Jon Lash, (Bates No. PLTF0203-0205);
- M. Letter dated May 17, 2010 from James J. Jimmerson, Esq., to Mr. John E. Lash, (Bates No. PLTF0206-0209);

- N. Letter dated June 14, 2010 from Charles E. Curtis to James J. Jimmerson, Esq., (Bates No. PLTF0210-0211);
- Bates Nos. PLTF0212-0244 are the duplicative documents produced in Plaintiffs' Initial 16.1 Disclosure of Documents and Witnesses.
7. Documents produced by Stewart Title in response to Plaintiffs' Subpoena Duces Tecum on CD, (Bates No. PLTF0245-PLTF1423);
8. Documents produced by Chicago Title in response to Plaintiffs' Subpoena Duces Tecum on CD, (Bates No. PLTF1424-PLTF10414);
9. Documents produced by Coyote Springs Investments in response to Plaintiff's Duces Tecum on CD, (Bates No. CSI_Wolfram 000014 - CSI_Wolfram0003004), attached hereto;
10. Coyote Springs Investment, LLC's Privilege Log, (Bates No. PLTF10415 - PLTF10417), attached hereto;
11. Affidavit of Custodian of Records, (Bates No. PLTF10418-PLTF10419); attached hereto;
12. Non-Party Coyote Springs Investments, LLC's Supplement and Amended Objection and Response to Plaintiff's Subpoena Duces Tecum, (Bates PLTF10420-PLTF10424, attached hereto.
13. **Chicago Title Company's previously bates stamped documents no. PLTF 1424 through PLTF 10414 (on bottom right of documents bates stamped) and rebated as bates nos: Cht 00001 through Cht 08998 (on bottom left of documents bates stamped), including the Custodian of Records Subpoena to Chicago Title Company including the executed Certificate of Custodian of Records bates stamped as Cht 08997.**
14. **Stewart Title Company's previously bates stamped documents no. PLTF 0245 through PLTF 1423 and rebated as bates nos: Stwt 0001 through 1202. Documents Stwt 0699 and Stwt 0731 are copy coversheets and were inadvertently bates stamped.**
15. Copy of Plat Map recorded in the Clark County Recorder's Office in Book 138, page 51, bates PLTF 10427 through PLTF 10438.
16. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 116, page 35, bates PLTF 10439 through PLTF 10440.
17. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 117, page 18, bates PLTF 10441 through PLTF 10443.
18. Copy of Plat Map recorded in the Clark County Recorder's Office in Book 140, page 57, bates PLTF 10444 through PLTF10456.
19. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 113, page 55, bates PLTF 10457 through PLTF 10462.
20. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 98, page 57, bates PLTF 10463 through PLTF 10468.
21. Copy of redacted billing sheets representing attorney's fees charged by

Jimmerson Hansen, P.C. from November 3, 2010 through October 19, 2012, bates PLTF 10469 through PLTF 10481.

22. Affidavit of Peter J. Dingerson, bates PLTF 10482 through PLTF 10484.

23. Assignment of Rights, Title and Interest from Jay Dana on behalf of General Realty Group Inc. to Walt Wilkes, dated January 11, 2011, bates PLTF 10485.

24. Assignment of Rights, Title and Interest from Jerry Masini on behalf of Award Realty to James Wolfram, dated December 20, 2010, bates PLTF 10486.

25. Letter from Jeffrey King, M.D. dated November 1, 2011 regarding the health of Walt Wilkes, bates PLTF 10487.

Plaintiffs reserve the right to any and all documents the Defendants disclosed by any parties or used at any depositions.

Plaintiffs reserve the right to any and all other relevant documents to this matter.

Plaintiffs reserve the right to identify and produce different and/or additional documents as the investigation and discovery in this case proceeds.

III.

COMPUTATION OF DAMAGES

Plaintiffs calculate their damages to be in excess of \$1,900,000.00 associated with the Defendant's breach of contract and the Defendant's failure to faithfully meet their obligations to the Plaintiffs.

There are two primary components to this calculation. The first component is the loss of future commissions from future sales or takedowns of property located in Clark County, subject to the September 1, 2004 Commission Letter Agreement. There appears to be at least 3,000 acres of property, defined as Option Property under the Option Agreement effective June 1, 2004, currently owned by Coyote Springs Investment, LLC in Township 13 South, Range 63 East M.D.M., Clark County, Nevada. Under the Option Agreement effective June 1, 2004, these 3,000 acres can be purchased by Pardee and designated as Production Residential Property—a purchase and designation that would entitle Plaintiffs to a 1.5% commission on a per-acre price of \$40,000.00. If 3,000 acres were purchased by Pardee under this scenario, Plaintiffs would be entitled to \$1,800,000 in commissions. However, Pardee's course of conduct

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


1 in failing to appropriately discharge its duties under the Commission Letter Agreement
2 has robbed Plaintiffs of this opportunity to be paid these commissions. Pardee's
3 actions have served to reclassify the land originally labeled as Purchase Property and
4 Option Property, and under the new reclassification, all Option Property has been
5 removed from Clark County, thereby divesting Plaintiffs of any hope to collect any part
6 of the \$1.8 million in commissions they could be paid had no reclassification occurred.

7 The second component of this calculation is attorney's fees. Plaintiffs' attorney's
8 fees currently exceed \$102,700.00. This amount represents all work from the date of
9 drafting of the Complaint in November 2010 through October 19, 2012. These attorney's
10 fees constitute damages pursuant to the September 1, 2004 Commission Letter
11 Agreement. As stated in the Agreement, "In the event, either party brings an action to
12 enforce its rights under this Agreement, the prevailing party shall be awarded
13 reasonable attorneys' fees and costs." Plaintiffs in bringing this suit expect to be the
14 prevailing party and, as such, are entitled to their reasonable attorney's fees as
15 damages for Defendant's breach of contract and breach of the covenant of good faith
16 and fair dealing.

17 Finally, Plaintiffs must be compensated for the time and effort expended
18 attempting to discover from public records what information was owed to them under
19 the Commission Letter Agreement. Discovery is still ongoing therefore the Plaintiffs reserve
20 the right to amend and supplement this response as the investigation and discovery in this
21 case proceeds.

22 Dated this 26th October, 2012

JIMMERSON HANSEN, P.C.

23
24
25 
26 JAMES J. JIMMERSON, ESQ.
27 Nevada Bar No. 000264
28 LYNN M. HANSEN, ESQ.
Nevada Bar No. 0244
JAMES M. JIMMERSON, ESQ.
Nevada Bar No. 12599
415 So. Sixth St., Ste. 100
Las Vegas, NV 89101
Attorney for Plaintiffs
James Wolfram and Walt Wilkes

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

RECEIPT OF COPY

The undersigned hereby acknowledges receipt of copy of PLAINTIFFS' FIFTH
SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF WITNESSES AND DOCUMENTS
on this 26th day of October, 2012, at 4:40 a.m./p.m. + 2 CDA

McDONALD CARANO WILSON, LLP

AARON D SHIPLEY KLC

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

EXHIBIT “5”

JA010299



CLERK OF THE COURT

1 **MIL**
2 PAT LUNDVALL (NSBN 3761)
3 AARON D. SHIPLEY (NSBN 8258)
4 McDONALD CARANO WILSON LLP
5 2300 West Sahara Avenue, Suite 1000
6 Las Vegas, Nevada 89102
7 (702) 873-4100
8 (702) 873-9966 Facsimile
9 lundvall@mcdonaldcarano.com
10 ashipley@mcdonaldcarano.com
11 *Attorneys for Defendant*
12 *Pardee Homes of Nevada*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 JAMES WOLFRAM,
16 WALT WILKES

17 Plaintiffs,

18 vs.

19 PARDEE HOMES OF NEVADA,

20 Defendant.

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

**DEFENDANT'S MOTION IN LIMINE TO
EXCLUDE PLAINTIFFS' CLAIM FOR
ATTORNEYS' FEES AS AN ELEMENT
OF DAMAGES**

(MIL #1)

Hearing Date:
Hearing Time:

Trial Date: April 15, 2013

21 Defendant Pardee Homes of Nevada ("Pardee") hereby moves the Court for an
22 order *in limine* on the non-admissibility of the issue of attorneys' fees as an element of
23 damages, sought to be introduced by Plaintiffs James Wolfram and Walt Wilkes
24 ("Plaintiffs") in the trial on this matter. Testimony and evidence at the trial regarding
25 Plaintiffs' alleged attorneys' fees and costs would be improper in the context of this
26 breach of contract case as they cannot be considered an element of Plaintiffs'
27 damages. Such issues should be handled in post-trial briefing only.

1 This Motion is brought pursuant to NRS 47.060, the following Memorandum of
2 Points and Authorities, the exhibits attached hereto, the pleadings and papers on file
3 herein, and any oral argument this Court wishes to consider.

4 RESPECTFULLY SUBMITTED this 1st day of March, 2013.

5 McDONALD CARANO WILSON LLP

6
7 /s/ Aaron D. Shipley
8 Pat Lundvall (#3761)
9 Aaron D. Shipley (#8258)
10 2300 West Sahara Avenue, Suite 1000
11 Las Vegas, Nevada 89102
12 *Attorneys for Defendant Pardee Homes of*
13 *Nevada*

14 **NOTICE OF MOTION**

15 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:**

16 YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that the undersigned
17 will bring the foregoing **DEFENDANT'S MOTION IN LIMINE TO EXCLUDE**
18 **PLAINTIFFS' CLAIM FOR ATTORNEYS' FEES AS AN ELEMENT OF DAMAGES** on
19 for hearing before the above-entitled Court on the 16 day of April,
20 2013, at the hour of 8 : 30 a.m. or as soon thereafter as counsel may be heard.

21 RESPECTFULLY SUBMITTED this 1st day of March, 2013.

22 McDONALD CARANO WILSON LLP

23 /s/ Aaron D. Shipley
24 Pat Lundvall (#3761)
25 Aaron D. Shipley (#8258)
26 2300 West Sahara Avenue, Suite 1000
27 Las Vegas, Nevada 89102
28 *Attorneys for Defendant Pardee Homes of*
Nevada

**DECLARATION OF AARON D. SHIPLEY IN SUPPORT OF DEFENDANT'S MOTION
IN LIMINE TO EXCLUDE PLAINTIFFS' CLAIM FOR ATTORNEYS' FEES AS AN
ELEMENT OF DAMAGES**

AARON D. SHIPLEY, after being sworn, declares as follows:

1. I am licensed to practice law in the State of Nevada, and am a partner with the law firm of McDonald Carano Wilson LLP, attorneys of record for Defendant Pardee Homes ("Pardee").

2. This Declaration is made of my own personal knowledge except where stated upon information and belief, and as to those matters, I believe them to be true.

3. This Declaration is submitted in compliance with EDCR 2.47 and in support of Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages (the "Motion").

4. On February 28, 2013, I spoke to James M. Jimmerson, counsel for Plaintiffs, via telephone, as required by EDCR 2.47. We discussed the issues relevant to this Motion. We disagreed on the issue of whether Plaintiffs could properly seek an award of their attorneys' fees as an element of their damages at trial, as opposed to seeking an award of their fees in post-trial motion practice if they are found to be the prevailing party at trial. Ultimately we were unable to resolve this issue during our telephone conference.

5. Under the circumstances, despite a good faith effort to confer, the motion has become necessary.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 1st day of March, 2013.

/s/ Aaron D. Shipley
AARON D SHIPLEY

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND RELEVANT FACTUAL BACKGROUND

This case, simply put, involves claims for breach of contract arising from the Commission Agreement dated September 1, 2004 ("Commission Agreement" or "Commission Letter"), which Pardee and the Plaintiffs negotiated and executed. A copy of the Commission Letter is attached hereto as **Exhibit A**. The undisputed evidence reveals that Pardee performed all of its contractual obligations.

Plaintiffs acknowledge that their contractual relationship with Pardee is dictated entirely by the Commission Agreement. The Commission Agreement governs the payment of commissions from Pardee to Plaintiffs related to Pardee's purchase of certain property from CSI related to the Project. It is this Commission Agreement that Plaintiffs accuse Pardee of breaching. The Commission Agreement contains an attorneys' fees provision, which states: "In the event either party brings an action to enforce its rights under this Agreement, the prevailing party shall be awarded reasonable attorneys' fees and costs." See Exhibit A, at p. 2.

Plaintiffs have claimed that their attorneys' fees should be considered an element of their damages. Their NRCP 16.1 disclosure states, in part: "The second component of this calculation [of damages] is attorney's fees. Plaintiffs' attorney's fees currently exceed \$102,700.00. This amount represents all work from the date of drafting of the Complaint in November 2010 through October 19, 2012. These attorney's fees constitute damages pursuant to the September 1, 2004 Commission Letter Agreement...Plaintiffs in bringing this suit expect to be the prevailing party and, as such, are entitled to their reasonable attorney's fees as damages for Defendant's breach of contract and breach of the covenant of good faith and fair dealing." See Plaintiffs' Seventh Supplement to NRCP 16.1 Disclosure of Witnesses and Documents, at p. 8:14-22, a copy of which is attached hereto as **Exhibit B**.

Plaintiffs' contention that they are entitled to reimbursement of their attorney's fees as an element of their alleged damages is misguided and contrary to Nevada law.

1 Therefore, Pardee requests the Court issue an order *in limine* that Plaintiffs are
2 precluded from offering any evidence at trial, in the form of documents, testimony,
3 expert opinions and any other evidence, related to their claim for an award of their
4 attorneys' fees. Attorneys' fees in the context of a breach of contract case such as this
5 cannot be awarded as an element of damages. In this context, Attorneys' fees can only
6 be only properly awarded to the prevailing party. There can be no determination of
7 prevailing party until the conclusion of the trial. An order *in limine* on this issue will
8 promote efficiency in preparation for and during the trial.

9 **II. LEGAL ARGUMENT**

10 **A. Legal Standard.**

11 Pursuant to NRS 47.060, a motion in limine is the proper vehicle to prevent the
12 introduction of inadmissible evidence at trial. See NRS 47.080(1). ("[p]reliminary
13 questions concerning the qualification of a person to be a witness, the existence of a
14 privilege or the admissibility of evidence shall be determined by the judge."). The ruling
15 on a motion *in limine* lies soundly within the district court's discretion. See State ex. rel.
16 Dept. of Highways v. Nevada Aggregates and Asphalt Co., 92 Nev. 370, 551 P.2d
17 1095, 1098 (1976).

18 Motions in limine take two forms: (1) to procure a definitive ruling on the
19 admissibility of evidence at the outset of trial; or (2) to prevent counsel for the opposing
20 party from mentioning potentially inadmissible evidence in his opening statement, or
21 eliciting such evidence from a witness until a definitive ruling on the admissibility or non-
22 admissibility of the evidence can be made. Born v. Eisenman, 114 Nev. 854, 962 P.2d
23 1227 (1998); Nev. Rev. St. 47.080; see 21 Charles Alan Wright and Kenneth W.
24 Graham, Jr., Federal Practice and Procedure §5037.6 (2007). This motion takes both
25 forms.

26 An order in limine further promotes efficiency at trial and helps minimize
27 disruptions, increasing uninterrupted flow of evidence during trial. Kelly v. New West
28 Federal Savings, 56 Cal. Rptr. 2d 803, 808 (1996).

1 **B. Plaintiffs Are Precluded From Presenting Evidence At Trial About**
2 **Their Alleged Attorneys' Fees as an Element of Damages.**

3 Plaintiffs argue that they have suffered damages in the form of attorneys' fees.
4 However, Plaintiffs have not specially pled attorneys' fees as an element of their
5 damages. See Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc., 117 Nev.
6 948, 35 P.3d 964, (2001). In Sandy Valley, the Nevada Supreme Court discusses the
7 difference between attorney fees as a cost of litigation and attorney fees as an element
8 of damages. See id., 117 Nev. at 955, 35 P.3d at 968-969. The court acknowledges
9 that attorney fees cannot be recovered as a cost of litigation unless authorized by
10 agreement, statute, or rule. See id., 117 Nev. at 956, 35 P.3d at 969 (internal citation
11 omitted). The Nevada Supreme Court also recognizes that when parties seek attorney
12 fees as a cost of litigation, documentary evidence of the fees is presented generally by
13 post-trial motion. See id. In contrast, however, when attorney fees are claimed as
14 foreseeable damages arising from tortious conduct or a breach of contract, they are
15 considered special damages and must be pled in the complaint pursuant to NRCP
16 9(g). See id. "The mention of attorney fees in a complaint's general prayer for relief is
17 insufficient to meet this requirement." Id.

18 Plaintiffs have only generally alleged attorneys fees, and therefore, cannot now
19 claim their attorneys' fees as an element of damages. In their Amended Complaint, a
20 recovery of attorneys' fees was only mentioned in the Plaintiffs' general prayer for relief.
21 Plaintiffs did not articulate its current position until a very late NRCP 16.1 disclosure.
22 Thus, Plaintiffs have now wrongfully asserted their attorneys' fees as a basis for their
23 argument that they have suffered recoverable damages.

24 Most recently, in 2011 the Nevada Supreme Court again recognized the
25 development of Sandy Valley and its progeny by summarizing:

26 In Sandy Valley Associates v. Sky Ranch Estates, we distinguished
27 between attorney fees as a cost of litigation and as special damages. 117
28 Nev. 948, 955-60, 35 P.3d 964, 968-71 (2001), *receded from on other*
 grounds as stated in Horgan v. Felton, 123 Nev. 577, 579, 170 P.3d 982,
 983 (2007). Attorney fees that are a cost of litigation arise from an

1 agreement, statute, or rule authorizing the fees, whereas attorney fees
2 that are considered special damages are fees that are foreseeable arising
3 from the breach of contract or tortious conduct. Id. at 956, 35 P.3d at 969.
4 In Shuette v. Beazer Homes Holdings Corp., we supplemented Sandy
5 Valley by explaining that fees as special damages "constitute a rather
6 **narrow exception** to the rule prohibiting attorney fees awards absent
7 express authorization." 121 Nev. 837, 862, 124 P.3d 530, 547
8 (2005)(emphasis added).

9 Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc., 127 Nev. Adv.
10 Op. 26, ---, 255 P.3d 268, 279 n. 11 (Jun. 2, 2011). Thus, Plaintiffs have wrongfully
11 asserted their attorneys' fees as a basis for their argument that they have suffered
12 recoverable damages.

13 By completely failing to specifically plead for such an award at the outset of this
14 litigation, Plaintiffs cannot now claim their attorneys' fees as an element of damages.
15 Plaintiffs should be precluded from introducing any evidence at trial to support this
16 claim. In this case, pursuant to the attorneys' fees provision in the Commission
17 Agreement attorneys' fees can only be awarded to the prevailing party. There can be
18 no determination of prevailing party until the conclusion of the trial. Therefore, this
19 issue should be handled in post-trial briefing only. In this regard, if Pardee is the
20 prevailing party at trial, it will seek an award of its attorneys' fees and costs after the
21 trial under the same attorneys' fees provision in the Commission Agreement.

22 ///

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1 **IV. CONCLUSION**

2 Based on the foregoing, Pardee requests the Court issue an order *in limine* to
3 preclude impermissible evidence, in the form of documents, testimony, expert opinions
4 and all other evidence, at trial on the issue of attorneys' fees as an element of Plaintiffs'
5 alleged damages. This early *in limine* ruling will allow the parties to more efficiently
6 prepare for trial.
7

8 RESPECTFULLY SUBMITTED this 1st day of March, 2013.

9 McDONALD CARANO WILSON LLP

10 /s/ Aaron D. Shipley
11 Pat Lundvall (#3761)
12 Aaron D. Shipley (#8258)
13 2300 West Sahara Avenue, Suite 1000
14 Las Vegas, Nevada 89102
15 Attorneys for Defendant Pardee Homes of
16 Nevada
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McDONALD-CARANO-WILSON

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P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP
and that on the 1st day of March, 2013, I served a true and correct copy of the foregoing
**DEFENDANT'S MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' CLAIM FOR
ATTORNEYS' FEES AS AN ELEMENT OF DAMAGES** via U.S. Mail on the following:

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

/s/ Melissa A. Merrill
An Employee of McDonald Carano Wilson LLP

273258

EXHIBIT A

JA010309



10890 Wilshire Boulevard, Suite 1900
Los Angeles, California 90024-4101

JON R. LARSEN
Sr. Vice President
(310) 478-3828 ext. 281
(310) 448-1266

September 1, 2004

Mr. Walt Wilkes
General Realty Group, Inc.
10761 Turquoise Valley Dr.
Las Vegas, Nevada 89144-4141

Mr. Jim Wolfram
Award Realty Group
10761 Turquoise Valley Dr.
Las Vegas, Nevada 89144-4141

Re: Option Agreement for the Purchase of Real Property and Joint Escrow Instructions dated as of June 1, 2004, as amended (the "Option Agreement") between Coyote Springs Investment LLC ("Coyote") and Pardee Homes of Nevada ("Pardee")

Gentlemen:

This letter is intended to confirm our understanding concerning the pending purchase by Pardee from Coyote of certain real property located in the Counties of Clark and Lincoln, Nevada pursuant to the above-referenced Option Agreement. Except as otherwise defined herein, the capitalized words used in this Agreement shall have the meanings as set forth in the Option Agreement.

In the event Pardee approves the transaction during the Contingency Period, Pardee shall pay to you (one-half to each) a broker commission equal to the following amounts:

- (i) Pardee shall pay four percent (4%) of the Purchase Property Price payments made by Pardee pursuant to paragraph 1 of the Option Agreement up to a maximum of Fifty Million Dollars (\$50,000,000);
- (ii) Then, Pardee shall pay one and one-half percent (1-1/2%) of the remaining Purchase Property Price payments made by Pardee pursuant to paragraph 1 of the Option Agreement in the aggregate amount of Sixteen Million Dollars (\$16,000,000); and
- (iii) Then, with respect to any portion of the Option Property purchased by Pardee pursuant to paragraph 2 of the Option Agreement, Pardee shall pay one and one-half percent (1-1/2%) of the amount derived by multiplying the number of acres purchased by Pardee by Forty Thousand Dollars (\$40,000).

Mr. Wale Wilkes
Mr. Jim Wolfram
September 1, 2004
Page 2

Pardee shall make the first commission payment to you upon the Initial Purchase Closing (which is scheduled to occur thirty (30) days following the Settlement Date) with respect to the aggregate Deposits made prior to that time. Pardee shall make each additional commission payment pursuant to clauses (i) and (ii) above concurrently with the applicable Purchase Property Price payment to Coyote. Thereafter, Pardee shall make each commission payment pursuant to clause (iii) above concurrently with the close of escrow on Pardee's purchase of the applicable portion of the Option Property; provided, however, that in the event the required Parcel Map creating the applicable Option Parcel has not been recorded as of the scheduled Option Closing, as described in paragraph 9(c) of the Option Agreement, the commission shall be paid into escrow concurrently with Pardee's deposit of the Option Property Price into Escrow and the commission shall be paid directly from the proceeds of said Escrow.

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

In the event the Option Agreement terminates for any reason whatsoever prior to Pardee's purchase of the entire Purchase Property and Option Property, and Pardee thereafter purchases any portion of the Entire Site from Seller, at the closing of such purchase, Pardee shall pay to you a commission in the amount determined as described above as if the Option Agreement remained in effect.

For purposes of this Agreement, the term "Pardee" shall include any successor or assignee of Pardee's rights under the Option Agreement, and Pardee's obligation to pay the commission to you at the times and in the manner described above shall be binding upon Pardee and its successors and assigns. Pardee, its successors and assigns, shall take no action to circumvent or avoid its obligation to you as set forth in the Agreement. Nevertheless, in no event shall you be entitled to any commission or compensation as a result of the resale or transfer by Pardee or its successor in interest of any portion of the Entire Site after such property has been acquired from Seller and commission paid to you.

In the event any sum of money due hereunder remains unpaid for a period of thirty (30) days, said sum shall bear interest at the rate of ten percent (10%) per annum from the date due until paid. In the event either party brings an action to enforce its rights under this Agreement, the prevailing party shall be awarded reasonable attorneys' fees and costs.

This Agreement represents our entire understanding concerning the subject matter hereof, and all oral statements, representations, and negotiations are hereby merged into this Agreement and are superseded hereby. This Agreement may not be modified except by a written instrument signed by all of us. Nothing herein contained shall create a partnership, joint venture or employment relationship between the parties hereto unless expressly set forth to the contrary. The language of this Agreement shall be construed under the laws of the State of Nevada according to its normal and usual meaning, and not strictly for or against either you or Pardee.

\\cal\exam\1\0\userdata\2\Lawson\Army documents\Land Acq - JEL\Letters\2004 Letters\Wilkes_04.09.02.doc

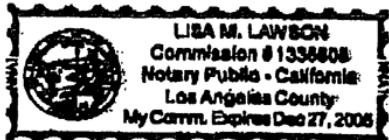
Mr. Walt Wilkes
Mr. Jim Wolfram
September 1, 2004
Page 3

Our signatures below will represent our binding agreement to the above.

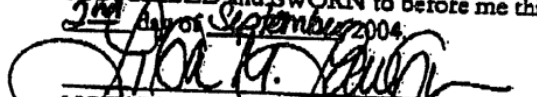
Sincerely,

PARDEE HOMES OF NEVADA,
a Nevada corporation

By: 
Jon E. Lash
Senior Vice President



SUBSCRIBED and SWORN to before me this
2nd day of September 2004.

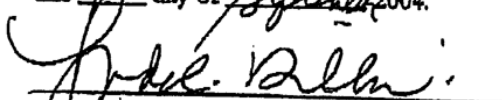

NOTARY PUBLIC in and for the County of
Los Angeles, State of California.

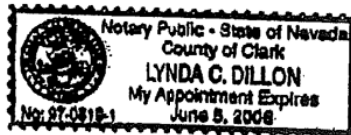
Agreed to and accepted:

GENERAL REALTY GROUP, INC.

By: 
Walt Wilkes

SUBSCRIBED and SWORN to before me
this 1st day of September 2004.


NOTARY PUBLIC in and for the County
of Clark, State of Nevada



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Mr. Walt Wilkes
Mr. Jim Wolfram
September 1, 2004
Page 4

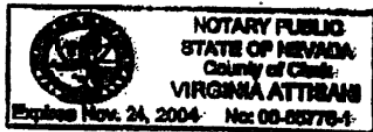
AWARD REALTY GROUP

By:

Jim Wolfram
Jim Wolfram

SUBSCRIBED and SWORN to before me
this 6 day of SEPT, 2004.

Virginia Attisani
NOTARY PUBLIC in and for the County
of Clark, State of Nevada.



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EXHIBIT B

JA010314

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

1 SUPP
2 JAMES J. JIMMERSON, ESQ.
3 Nevada Bar No. 000264
4 LYNN M. HANSEN, ESQ.
5 Nevada Bar No. 0244
6 JAMES M. JIMMERSON, ESQ.
7 Nevada Bar No. 12599
8 JIMMERSON HANSEN, P.C.
9 415 So. Sixth St., Ste. 100
10 Las Vegas, NV 89101
11 Tel No.: (702) 388-7171; Fax No.: (702) 380-6406
12 jjj@jimmersonhansen.com
13 lmh@jimmersonhansen.com
14 jmj@jimmersonhansen.com
15 Attorney for Plaintiffs
16 James Wolfram and Walt Wilkes

DISTRICT COURT
CLARK COUNTY, NEVADA

17 JAMES WOLFRAM AND WALT WILKES
18 Plaintiffs,
19 vs.
20 PARDEE HOMES OF NEVADA,
21 Defendant.

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

PLAINTIFFS' SEVENTH SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF
WITNESSES AND DOCUMENTS

22 COME NOW Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through their
23 attorneys, Lynn M. Hansen, Esq., and James M. Jimmerson, Esq., of the law firm of
24 Jimmerson Hansen, P.C., and hereby submits the following Seventh Supplement to list of
25 witnesses and production of documents, as follows (*new items in bold*):

26 ///

27 ///

28 ///

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

I.

WITNESSES

Plaintiffs provide the following witnesses' identities, last known address and telephone numbers:

1. James Wolfram
c/o Jimmerson Hansen, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171

This person most knowledgeable is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

2. Walt Wilkes
c/o Jimmerson Hansen, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171

This person most knowledgeable is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

3. Frances Butler Dunlap
Chicago Title Company
Las Vegas, Nevada

This person was the head of the Real Estate Commercial Department of Chicago Title Company, is most knowledgeable, and is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

4. PARDEE HOMES OF NEVADA
Custodian of Records
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
(775) 788-2000

Pardee Homes of Nevada is a named Defendant in this matter. Its present or former employees, representatives, agents, person to be designated pursuant to NRCP 30(b)(6) and/or custodians of records are expected to testify regarding the facts and background of this case.

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
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1 5. PARDEE HOMES OF NEVADA
2 Person Most Knowledgeable
3 McDonald Carano Wilson LLP
4 100 West Liberty Street, 10th Floor
5 Reno, Nevada 89501
6 (775) 788-2000

7 Pardee Homes of Nevada is a named Defendant in this matter. Its present or former
8 employees, representatives, agents, person to be designated pursuant to NRCP 30(b)(6)
9 and/or Person Most Knowledgeable are expected to testify regarding the facts and background
10 of this case.

11 6. Jon Lash
12 c/o McDonald Carano Wilson LLP
13 100 West Liberty Street, 10th Floor
14 Reno, Nevada 89501
15 (775) 788-2000

16 Mr. Lash is an employee of PARDEE HOMES OF NEVADA and is expected to testify
17 regarding the facts and background of this case.

18 7. Clifford Anderson
19 c/o McDonald Carano Wilson LLP
20 100 West Liberty Street, 10th Floor
21 Reno, Nevada 89501
22 (775) 788-2000

23 Mr. Anderson is an employee of PARDEE HOMES OF NEVADA and is expected to
24 testify regarding the facts and background of this case.

25 8. Harvey Whitmore
26 c/o Coyote Springs
27 Address Unknown

28 Mr. Whitmore is the owner of the property involved in this lawsuit and is expected to
testify regarding the facts and background of this case.

9. Chicago Title Company
Las Vegas, Nevada
Custodian of Records

The Custodian of Records is expected to testify regarding the facts and background of
this case.

10. Chicago Title Company
Las Vegas, Nevada
Person Most Knowledgeable

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

1 The Person Most Knowledgeable is expected to testify regarding the facts and
2 background of this case.

3 11. Peter J. Dingerson
4 D&W Real Estate
5 5455 S. Durango Dr., Ste 160
6 Las Vegas, NV 89113

7 Mr. Dingerson is the owner of D&W Real Estate and is expected to testify regarding the
8 facts and background of this case.

9 12. Jay Dana
10 General Realty Group
11 6330 S. Eastern Ave Ste 2
12 Las Vegas, NV 89119

13 Mr. Dana is the owner of General Realty Group Inc. and is expected to testify regarding
14 the facts and background of this case.

15 13. Jerry Masini
16 Award Realty Corp.
17 3015 S. Jones Blvd.
18 Las Vegas, NV 89146

19 Mr. Masini is the owner of Award Realty and is expected to testify regarding the
20 facts and background of this case.

21 14. Mark Carmen
22 Exit Realty Number One
23 6600 W. Charleston, Suite #119
24 Las Vegas, Nevada 89146

25 Mr. Carmen is the owner of Las Vegas Realty Center and is expected to testify
26 regarding the facts and background of this case.

27 Plaintiffs reserve the right to call any and all witnesses who may be disclosed or
28 deposed throughout the course of discovery.

Plaintiffs reserve the right to call any and all of Defendant's witnesses; and

Plaintiffs reserve the right to call any and all rebuttal witnesses.

Plaintiffs' experts, if any, as yet unidentified.

Plaintiffs reserve the right to supplement this list of witnesses as discovery
progresses and until the time of trial in this case.

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II.

DOCUMENTS

Pursuant to NRCP 16.1(a)(1)(B), Plaintiffs provide the following documents relating to Plaintiffs and Defendants:

1. Any and all written agreements between the Parties;
2. Any and all documents evidencing damages to the Plaintiffs;
3. Any and all correspondence between the Parties;
4. Any and all appropriate Custodian of Record documents;
5. Any and all pleadings in this matter;
6. **Documents labeled Bates Numbers PLTF0001-PLTL10496.**

These documents are being reproduced as Plaintiffs' Initial NRCP 16.1 Disclosures of Witnesses and Documents had duplicate documents. The duplicate copies have been removed and the documents are listed as follows:

- A. Option Agreement for the Purpose of Real Property and Joint Escrow Instructions dated May 2004 (Bates No. PLTF0001-0080);
- B. Amended and Restated Option Agreement for the Purchase of Real Property and Joint Escrow Instructions dated March 28, 2005, (Bates No. PLTF0081-0152);
- C. Two Assignments of Real Estate Commission and Personal Certification Agreement (Bates No. PLTF0153-0157A)
- D. Letter dated September 2, 2004 from Pardee Homes to Mr. Walt Walkes regarding the attached Commission letter dated September 1, 2004, (Bates No. PLTF0158-0162);
- E. Amendment No. 2 to Option Agreement for the Purchase of Real Property and Joint Escrow Instructions, (Bates No. PLTF0163-0174);
- F. Letter dated April 6, 2009 from Pardee Homes to Mr. Jim Wolfram, (Bates No. PLTF0175-0179);
- G. Letter dated April 23, 2009 from James J. Jimmerson, Esq., to Jim Stringer, Esq., (Bates No. PLTF0180-0187);
- H. Letter dated May 19, 2011 from James J. Jimmerson, Esq., to Jim Stringer, Esq., (Bates No. PLTF0188-0191);
- I. Letter dated July 10, 2009 from Charles E. Curtis to James J. Jimmerson, Esq., (Bates No. PLTF0192-0193);
- J. Letter dated August 26, 2009 from James J. Jimmerson, Esq., to Charles E. Curtis, (Bates No. PLTF0194-0196);

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- 1 K. Letter dated November 24, 2009 from Jon E. Lash to Mr. Jim Wolfram, (Bates
2 No. PLTF0197-0202);
- 3 L. Letter dated April 21, 2010 from Jim Wolfram to Mr. Jon Lash, (Bates No.
4 PLTF0203-0205);
- 5 M. Letter dated May 17, 2010 from James J. Jimmerson, Esq., to Mr. John E. Lash,
6 (Bates No. PLTF0206-0209);
- 7 N. Letter dated June 14, 2010 from Charles E. Curtis to James J. Jimmerson, Esq.,
8 (Bates No. PLTF0210-0211);
- 9 Bates Nos. PLTF0212-0244 are the duplicative documents produced in
10 Plaintiffs' Initial 16.1 Disclosure of Documents and Witnesses.
- 11 7. Documents produced by Stewart Title in response to Plaintiffs' Subpoena Duces
12 Tecum on CD, (Bates No. PLTF0245-PLTF1423);
- 13 8. Documents produced by Chicago Title in response to Plaintiffs' Subpoena
14 Duces Tecum on CD, (Bates No. PLTF1424-PLTF10414);
- 15 9. Documents produced by Coyote Springs Investments in response to Plaintiff's
16 Duces Tecum on CD, (Bates No. CSI_Wolfram 000014 -
17 CSI_Wolfram0003004), attached hereto;
- 18 10. Coyote Springs Investment, LLC's Privilege Log, (Bates No. PLTF10415 -
19 PLTF10417), attached hereto;
- 20 11. Affidavit of Custodian of Records, (Bates No. PLTF10418-PLTF10419); attached
21 hereto;
- 22 12. Non-Party Coyote Springs Investments, LLC's Supplement and Amended
23 Objection and Response to Plaintiff's Subpoena Duces Tecum, (Bates
24 PLTF10420-PLTF10424, attached hereto.
- 25 13. Chicago Title Company's previously bates stamped documents no. PLTF 1424
26 through PLTF 10414 (on bottom right of documents bates stamped) and rebated
27 as bates nos: Cht 00001 through Cht 08998 (on bottom left of documents bates
28 stamped), including the Custodian of Records Subpoena to Chicago Title
Company including the executed Certificate of Custodian of Records bates
stamped as Cht 08997.
14. Stewart Title Company's previously bates stamped documents no. PLTF 0245
through PLTF 1423 and rebated as bates nos: Stwt 0001 through 1202.
Documents Stwt 0699 and Stwt 0731 are copy coversheets and were
inadvertently bates stamped.
15. Copy of Plat Map recorded in the Clark County Recorder's Office in Book 138,
page 51, bates PLTF 10427 through PLTF 10438.
16. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 116,
page 35, bates PLTF 10439 through PLTF 10440.
17. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 117,
page 18, bates PLTF 10441 through PLTF 10443.
18. Copy of Plat Map recorded in the Clark County Recorder's Office in Book 140,
page 57, bates PLTF 10444 through PLTF10456.

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19. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 113, page 55, bates PLTF 10457 through PLTF 10462.
20. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 98, page 57, bates PLTF 10463 through PLTF 10468.
21. Copy of redacted billing sheets representing attorney's fees charged by Jimmerson Hansen, P.C. from November 3, 2010 through October 19, 2012, bates PLTF 10469 through PLTF 10481.
22. Affidavit of Peter J. Dingerson, bates PLTF 10482 through PLTF 10484.
23. Assignment of Rights, Title and Interest from Jay Dana on behalf of General Realty Group Inc. to Walt Wilkes, dated January 11, 2011, bates PLTF 10485.
24. Assignment of Rights, Title and Interest from Jerry Masini on behalf of Award Realty to James Wolfram, dated December 20, 2010, bates PLTF 10486.
25. Letter from Jeffrey King, M.D. dated November 1, 2011 regarding the health of Walt Wilkes, bates PLTF 10487.
26. Affidavit of Jerry Masini, bates PLTF 10488 through PLTF 10490.
27. Assignment signed by Mark Carmen dated December 3, 2012 along with Exhibit A signed by Jay Dana dated January 11, 2011, attached hereto as bates PLTF 10491 through PLTF 10493; and
28. Assignment signed by Peter J. Dingerson dated December 20, 2012 along with Exhibit A signed by Jerry Masini dated December 20, 2010, attached hereto as bates PLTF 10494 through PLTF 10496.

Plaintiffs reserve the right to any and all documents the Defendants disclosed by any parties or used at any depositions.

Plaintiffs reserve the right to any and all other relevant documents to this matter.

Plaintiffs reserve the right to identify and produce different and/or additional documents as the investigation and discovery in this case proceeds.

III.

COMPUTATION OF DAMAGES

Plaintiffs calculate their damages to be in excess of \$1,900,000.00 associated with the Defendant's breach of contract and the Defendant's failure to faithfully meet their obligations to the Plaintiffs.

There are two primary components to this calculation. The first component is the loss of future commissions from future sales or takedowns of property located in Clark County, subject to the September 1, 2004 Commission Letter Agreement. There appears to be at least 3,000 acres of property, defined as Option Property under the Option Agreement effective

Page 7 of 10

ECC Supplement 7_mtd.wpd/h

JA010321

JIMMERSON HANSEN, P.C.
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1 June 1, 2004, currently owned by Coyote Springs Investment, LLC in Township 13 South,
2 Range 63 East M.D.M., Clark County, Nevada. Under the Option Agreement effective June
3 1, 2004, these 3,000 acres can be purchased by Pardee and designated as Production
4 Residential Property—a purchase and designation that would entitle Plaintiffs to a 1.5%
5 commission on a per-acre price of \$40,000.00. If 3,000 acres were purchased by Pardee
6 under this scenario, Plaintiffs would be entitled to \$1,800,000 in commissions. However,
7 Pardee's course of conduct in failing to appropriately discharge its duties under the
8 Commission Letter Agreement has robbed Plaintiffs of this opportunity to be paid these
9 commissions. Pardee's actions have served to reclassify the land originally labeled as
10 Purchase Property and Option Property, and under the new reclassification, all Option
11 Property has been removed from Clark County, thereby divesting Plaintiffs of any hope to
12 collect any part of the \$1.8 million in commissions they could be paid had no reclassification
13 occurred.

14 The second component of this calculation is attorney's fees. Plaintiffs' attorney's fees
15 currently exceed \$102,700.00. This amount represents all work from the date of drafting of
16 the Complaint in November 2010 through October 19, 2012. These attorney's fees constitute
17 damages pursuant to the September 1, 2004 Commission Letter Agreement. As stated in the
18 Agreement, "In the event, either party brings an action to enforce its rights under this
19 Agreement, the prevailing party shall be awarded reasonable attorneys' fees and costs."
20 Plaintiffs in bringing this suit expect to be the prevailing party and, as such, are entitled to their
21 reasonable attorney's fees as damages for Defendant's breach of contract and breach of the
22 covenant of good faith and fair dealing.

23 Finally, Plaintiffs must be compensated for the time and effort expended attempting to
24 discover from public records what information was owed to them under the Commission Letter
25 Agreement. Discovery is still ongoing therefore the Plaintiffs reserve

26 ///

27 ///


28

JIMMERSON HANSEN, P.C.
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1 the right to amend and supplement this response as the investigation and discovery in this
2 case proceeds.

3 Dated this 27th February, 2013.

4 JIMMERSON HANSEN, P.C.

5 
6 JAMES M. JIMMERSON, ESQ.
7 Nevada Bar No. 000264
8 LYNN M. HANSEN, ESQ.
9 Nevada Bar No. 0244
10 JAMES M. JIMMERSON, ESQ.
11 Nevada Bar No. 12599
12 415 So. Sixth St., Ste. 100
13 Las Vegas, NV 89101
14 Attorney for Plaintiffs
15 James Wolfram and Walt Wilkes

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 - Facsimile (702) 387-1187

CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy of PLAINTIFFS' SEVENTH SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF WITNESSES AND DOCUMENTS was made on the 27th day of February, 2013, as indicated below:

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

By electronic service through the E-filing system

☒ By facsimile, pursuant to EDCR 7.26

By receipt of copy as indicated below

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


An Employee of JIMMERSON HANSEN, P.C.

ASSIGNMENT

Reference is made to the January 11, 2011 Assignment by Jay Dana, owner/broker of General Realty Group, Inc. and made on behalf of General Realty Group, Inc., a copy of which is attached hereto as Exhibit A. I, Mark Carmen, owner/broker of Las Vegas Realty Center, and on behalf of Las Vegas Realty Center, hereby assign to Walt Wilkes all the rights, title and interest in that certain Commission Letter Agreement of September 1, 2004, by and between General Realty, Award Realty and Pardee Homes, to the extent that Las Vegas Realty Center has any rights, title or interest in the same.

Dated: December 3, 2012

LAS VEGAS REALTY CENTER

By: 
MARK CARMEN
OWNER/BROKER

PLTF10491

JA010325

EXHIBIT "A"

EXHIBIT "A"

PLTF10492

JA010326

Sent 27/02/2013 - - to p14/17

FROM :

01/11/2011 14:53 17827364383

FX NO. :

GENERALREALTYGROUP

Oct. 26 2012 02:58PM P5

PAGE 01

January 11, 2011

I, Jay Dana, Owner/Broker of General Realty Group INC, on behalf of General Realty Group, INC. hereby assign to Walter D. Wilkes and/or, Las Vegas Realty Center, Mark Carmen, Owner, Broker, all rights, title, and interest in that certain Commission Agreement (Commission Letter) dated September 1, 2004 between General Realty and Pardee Homes

January 11, 2011

By: Jay Dana, Owner/Broker
General Realty Group, INC.

PLTF10485

PLTF10493

JA010327

1 Plaintiffs' claim for acquiring the information from Pardee related to the Plaintiffs' commission
2 amounts based on billings contained in exhibits 31A. The damages for reasonable attorneys' fees
3 and costs are \$135,500.00.

4 **B. PLAINTIFFS' CAUSE OF ACTION FOR BREACH OF THE COVENANT OF**
5 **GOOD FAITH AND FAIR DEALING**
6

7 1. To sustain a claim for breach of the implied covenant of good faith and fair
8 dealing sounding in contract, Plaintiffs must establish: (1) Plaintiffs and Defendant were parties to
9 the contract; (2) the Defendant owed a duty of good faith to Plaintiffs; (3) the Defendant breached
10 that duty by performing in a manner that was unfaithful to the purpose of the contract; and (4)
11 Plaintiff's justified expectations were thus denied. See Perry v. Jordan, 111 Nev. 943, 947, 900
12 P.2d 335, 338 (1995);

13 2. An implied covenant of good faith and fair dealing is recognized in every
14 contract under Nevada law. Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc., 114
15 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). Under the implied covenant, each party must act in a
16 manner that is faithful to the purpose of the contract and the justified expectations of the other party.
17 Morris v. Bank of America Nevada, 110 Nev. 1274, 1278 n. 2, 886 P.2d 454, 457 (1994). The
18 implied covenant of good faith and fair dealing forbids arbitrary, unfair acts by one party that
19 disadvantages the other. Frantz v. Johnson, 116 Nev. 455, 465 n. 4., 999 P.2d 351, 358 (2000).

20 3. Plaintiffs, pursuant to the Commission Agreement, were entitled to
21 commissions for Purchase Price Property and Option Property. Plaintiffs had justifiable expectations
22 that Pardee would keep Plaintiffs reasonably informed as to all matters related to the amount and due
23 dates of their commission payments.

24 4. Plaintiffs needed sufficient information regarding purchases of land by Pardee
25 from CSI at Coyote Springs to enable Plaintiffs to verify the accuracy of commission payments. The
26 designation of the land purchased by Pardee from CSI was the basis for Plaintiffs' entitlement to
27 commissions pursuant to Option Property under iii of the Commission Agreement.
28

1 5. Pardee was not faithful to the purpose of the Commission Agreement by
2 failing to provide information regarding other land designations purchased by Pardee at Coyote
3 Springs so Plaintiffs could verify the accuracy of their commission payments. Without this
4 information, Pardee failed to keep Plaintiffs reasonably informed as to all matters relating to their
5 Commission Agreement.

6 6. Pardee did not act in good faith when it breached its contractual duty to keep
7 Plaintiffs reasonably informed as to all matters relating to the amount and due dates of their
8 commission payments. Plaintiffs did not breach any obligation they had to Pardee under the
9 Commission Agreement by requesting information regarding other land acquisitions by Pardee from
10 CSI at Coyote Springs. Plaintiffs acted in good faith at all times toward Pardee and did not deny
11 Pardee its justified expectations under the Commission Agreement.

12 7. Pardee suffered no recoverable damages from Plaintiffs' inquiries.

13
14 **C. PLAINTIFFS' CLAIM FOR AN ACCOUNTING**

15 1. An accounting is an independent cause of action that is distinct from the
16 equitable remedy of accounting. *See e.g. Botsford v. Van Riper*, 33 Nev. 156, 110 P. 705 (1910);
17 *Young v. Johnny Ribiero Bldg., Inc.*, 106 Nev. 88, 787 P.2d 777 (1990); *Oracle USA, Inc. v. Rimini*
18 *Street, Inc.*, No. 2:10-CV-00106-LRH-PAL, 2010 WL 3257933 (D. Nev. Aug. 13, 2010); *Teselle v.*
19 *McLoughlin*, 173 Cal. App. 4th 156, 92 Cal. Rptr. 3d 696 (Cal. App. 2009); *Mobius Connections*
20 *Group, Inc. v. Techskills, LLC*, No. 2:10-CV-01678-GMN-RJJ, 2012 WL 194434 (D. Nev. Jan. 23,
21 2012).

22 2. To prevail on a claim for accounting, a Plaintiff must establish the existence
23 of a special relationship whereby a duty to account may arise. *See Teselle v. McLoughlin*, 173 Cal.
24 App. 4th 156, 92 Cal. Rptr. 3d 696 (Cal. App. 2009). The right to an accounting can arise from
25 Defendant's possession of money or property which, because of the Defendant's relationship with
26 the Plaintiff, the Defendant is obliged to surrender. *Id.*

27 3. This Court has previously held that for Plaintiffs to prevail on an independent
28

1 cause of action for an accounting, Plaintiffs must establish the existence of a special relationship of
2 trust whereby a duty to account may arise. See Teselle v. McLoughlin, 173 Cal. App. 4th 156 (2009);
3 see also, Order Denying Pardee's Motion for Partial Summary Judgment.

4 4. Courts have found the existence of a special relationship of trust when, in a
5 contractual relationship, payment is collected by one party and the other party is paid by the
6 collecting party. Wolf v. Superior Court, 130 Cal. Rptr. 2d 860 (Cal. Ct. App. 2003); Mobius
7 Connections Group, Inc. v. Techskills, LLC, No. 2:10-CV-01678-GMN-RJJ, 2012 WL 194434 (D.
8 Nev. Jan. 23, 2012).

9 5. In contractual relationships requiring payment by one party to another of
10 profits received, the right to an accounting can be derived from the implied covenant of good faith
11 and fair dealing inherent in every contract, because without an accounting there may be no way by
12 which such a party entitled to a share in profits could determine whether there were any profits.
13 Mobius Connections Group v. Techskills, LLC, Id.

14 6. The Court finds there is a special relationship of trust between Plaintiffs and
15 Pardee that entitles Plaintiffs to an accounting for the information concerning the development of
16 Coyote Springs in the future as it pertains to Plaintiffs' commissions on option property. There is no
17 way for Plaintiffs or their heirs to determine whether a commission payment is due in the future
18 without an accounting of the type of land of any future purchases by Pardee from CSI at Coyote
19 Springs. Access to said information is required to ensure the accuracy of commission payments that
20 may be due and owing in the future.

21 DECISION

22
23 Now, therefore, in consideration of the Findings of Fact and Conclusions of Law by this
24 Court, IT IS HEREBY ORDERED as follows:

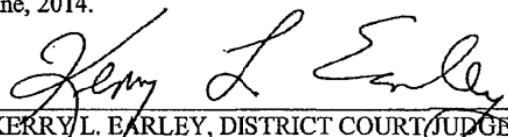
25 1. The Court finds that Defendant Pardee Homes of Nevada is liable to Plaintiffs for
26 breach of contract, breach of the covenant of good faith and fair dealing, and its failure to account to
27 Plaintiffs regarding the information concerning the development of Coyote Springs because it
28

1 pertained to Plaintiffs' present and potential future commissions. Damages are to be awarded to
2 Plaintiffs from Defendant in an amount totaling \$141,500.00

3 2. The Court finds that Plaintiffs are not liable to Defendant for breach of the implied
4 covenant of good faith and fair dealing. As such, no damages will be awarded to Defendant.

5 3. The Court orders both parties to provide to the Court within 60 days after entry of this
6 order supplemental briefs detailing what information should be provided - and under what
7 circumstances - by Pardee to Plaintiffs consistent with this decision. The Court will schedule after
8 receiving the supplemental briefs further proceedings to determine what information should be
9 provided by Pardee to Plaintiffs, and their heirs when applicable, as an accounting.

10
11 DATED this 25 day of June, 2014.

12
13 
14 KERRY L. EARLEY, DISTRICT COURT JUDGE

15
16 CERTIFICATE OF SERVICE

17 I hereby certify that on June 25, 2014, I mailed, electronically served, or placed a copy of
18 this order in the attorney's folder on the first floor of the Regional Justice Center as follows:

19 James M. Jimmerson, Esq. - Jimmerson Hansen
20 Pat Lundvall - McDonald Carano Wilson

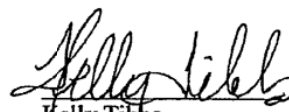
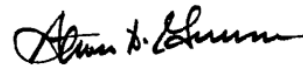
21
22 
23 Kelly Tibbs
24 Judicial Executive Assistant

EXHIBIT “3”

JA010259



CLERK OF THE COURT

1 SAC

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7 Attorney for Plaintiffs

James Wolfram and Walt Wilkes

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 JAMES WOLFRAM,

11 WALT WILKES,

12 Plaintiffs,

13 vs.

14 PARDEE HOMES OF NEVADA,

15 Defendant.

CASE NO.: A-10-632338-C

DEPT NO.: IV

16 SECOND AMENDED COMPLAINT

17 Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through their
18 undersigned counsel, James J. Jimmerson, Esq. of the law firm of Jimmerson Hansen
19 P.C., for their Complaint states as follows:
20

21 GENERAL ALLEGATIONS

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

24 2. That Plaintiff Wolfram has been assigned all of Award Realty's rights, title
25 and interest in that certain Commission Letter dated September 1, 2004, and he is the real
26 party in interest in this case.
27
28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 **FIRST CLAIM FOR RELIEF**

10 **(Accounting)**

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

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

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

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

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

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

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

6 **SECOND CLAIM FOR RELIEF**

7 **(Breach of Contract)**

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

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

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

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

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

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

27 **THIRD CLAIM FOR RELIEF**

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

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

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

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

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

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

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

24 ///

25 ///

26 ///

27

28

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
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WHEREFORE, Plaintiffs pray as follows:

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

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

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

3. For cost of suit.

4. For reasonable attorney's fees.

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

DATED this 6th day of June, 2013.

JIMMERSON HANSEN, P.C.

By 

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CERTIFICATE OF SERVICE

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

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

☐ By electronic service through the E-filing system

☐ By facsimile, pursuant to EDCR 7.26

☐ By receipt of copy as indicated below

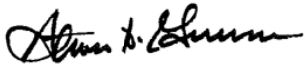
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An Employee of JIMMERSON HANSEN, P.C.

EXHIBIT “4”

JA010268


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

10 JAMES WOLFRAM,
WALT WILKES

11 Plaintiffs,

12 vs.

13
14 PARDEE HOMES OF NEVADA,

15 Defendant.

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

**DEFENDANT'S OPPOSITION TO
PLAINTIFFS' MOTION FOR LEAVE TO
FILE A SECOND AMENDED
COMPLAINT**

Hearing Date: April 26, 2013
Hearing Time: 8:30 a.m.

16
17
18 Pardee Homes of Nevada ("Pardee" or "Defendant") submits the following
19 Opposition ("Opposition") to the Plaintiffs' Motion for Leave to File a Second Amended
20 Complaint ("Motion"). This Opposition is supported by the following Memorandum of
21 Points and Authorities, supporting exhibits, the papers and pleadings on file in this
22 matter, and any argument the Court may permit at the hearing of this matter.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 RESPECTFULLY SUBMITTED this 8th day of April, 2013.

2 McDONALD CARANO WILSON LLP

3
4 /s/ Aaron D. Shipley
5 Pat Lundvall (#3761)
6 Aaron D. Shipley (#8258)
7 2300 West Sahara Avenue, Suite 1000
8 Las Vegas, Nevada 89102
9 *Attorneys for Defendant Pardee Homes of*
10 *Nevada*

11
12 **MEMORANDUM OF POINTS AND AUTHORITIES**

13
14 **I. INTRODUCTION**

15 One year after the deadline to file motions to amend pleadings, nearly five
16 months after the close of discovery, and within 60 days of the current trial date,
17 Plaintiffs filed the instant Motion requesting leave to file a Second Amended Complaint.
18 Yet, it is clear that the Motion and the proposed amended complaint are rife with the
19 same deficiencies previously identified by Pardee in its Motion in Limine to Exclude
20 Attorneys' Fees as an Element of Damages (MIL #1). Even under NRCP 15(a)'s liberal
21 standard, leave to amend to allow Plaintiffs to add an additional element of damages at
22 this extremely late date would greatly prejudice Pardee. Discovery closed months ago
23 and Pardee never received an opportunity to conduct any discovery on the topic of the
24 Plaintiffs' new claim that they are entitled to present their attorneys' fees as special
25 damages at trial. Further, Pardee did not have the opportunity to retain an expert to
26 review Plaintiffs' counsel invoices for their attorneys' fees and to develop an opinion as
27 to the reasonableness thereof. Without the benefit of discovery and an expert witness,
28 Pardee would be unable to adequately defend against the Plaintiffs' presentation of this
purported element of their damages at trial. This would be severely prejudicial to
Pardee.

Beyond these procedural problems, the proposed amendments to the complaint
would be futile because attorneys' fees cannot be rightfully claimed as an element of

1 consequential or special damages in the context of this case. Rather, the issue of
2 attorneys' fees and costs ought to be dealt with at the conclusion of trial through motion
3 practice, not at trial. This case is not the type of rare exception to the general rule that
4 the Nevada Supreme Court has contemplated. In other words, in this case attorneys'
5 fees ought to be handled and decided as a cost of litigation rather than as an element
6 of damage. Therefore, Plaintiffs' Motion should be denied because the proposed
7 purpose of the Second Amended Complaint is futile because it contradicts Nevada
8 law.

9 **II. BRIEF STATEMENT OF RELEVANT FACTS.**

10 By now the Court is familiar with the facts and procedural history in this case.
11 Therefore, only a brief statement of relevant procedural facts is provided for purposes
12 of this Opposition. Plaintiffs filed their original complaint on December 29, 2010.
13 Subsequently, Plaintiffs filed their Amended Complaint on January 14, 2011. The
14 deadline for all parties to file motion to amend pleadings or add parties was March 14,
15 2012. See Scheduling Order filed on November 8, 2011, a copy of which is attached
16 hereto as **Exhibit A**. That deadline did not change despite the parties' stipulation to
17 extend the discovery period 60 days, which was submitted on August 29, 2012. See
18 Stipulation and Order to Extend Discovery Deadlines, a copy of which is attached
19 hereto as **Exhibit B**. The extension was only for the limited purpose of completing
20 depositions. Id. at p.1. All other due dates and deadlines remained the same. Id. at
21 p.2 (¶4). Discovery closed on October 29, 2012. Id.

22 Now, over one year past the deadline to seek leave of the Court to amend their
23 complaint yet again, Plaintiffs filed the instant Motion. Having refused to properly modify
24 their pleading in a timely fashion, Plaintiffs request leave to file a Second Amended
25 Complaint that comports with the Plaintiffs' ever changing and new theory of the case.
26 The Plaintiffs did not put forth this new theory of damages until their fifth supplemental
27 disclosure of witnesses and documents, which was served on October 26, 2012—three
28 days before the discovery cutoff. See Plaintiffs' Fifth Supplement to NRCP 16.1

1 Disclosure of Witnesses and Documents, at p. 7-8, a copy of which is attached hereto as
2 **Exhibit C** (without attached exhibits). In effect, this ambush attack made it impossible for
3 Pardee to conduct any discovery whatsoever regarding this newly advanced theory of
4 Plaintiffs' alleged damages. This is problematic because their new theory of damages
5 requires that they plead with specificity and present their claims for attorneys' fees at trial
6 rather than in post-trial motion practice. If the Court allowed Plaintiffs to proceed in this
7 fashion, Pardee would, in effect, be forced to defend Plaintiffs presentation of damages
8 at trial without the benefit of any discovery or an expert witness. By definition, this would
9 be prejudicial to Pardee.

10 The Court must require plaintiffs to proceed on their first Amended Complaint.
11 The Court should deny Plaintiffs' Motion because it seeks to allow Plaintiffs in this action
12 to have an unfair advantage. But even if the Court were to ignore Plaintiffs' eleventh hour
13 tactics, the Court should also deny the motion as futile because Plaintiffs are not entitled
14 to an award of their attorneys' fees as an element of their alleged damages under
15 Nevada law.

16 **III. LEGAL ARGUMENT**

17 **A. Legal Standard.**

18 Pursuant to NRCP 15(a) a party may amend its pleadings "by leave of court ...
19 and leave shall be freely given when justice so requires." The decision to grant or deny
20 the motion to amend lies with the discretion of the district court. University & Cmty.
21 Coll. Sys. v. Sutton, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004). While NRCP 15(a)
22 provides that leave to amend should be "freely given," a denial is warranted if undue
23 delay, bad faith, or dilatory motives on the part of the movant are involved. See Kantor
24 v. Kantor, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000); see also Stephens v. S. Nevada
25 Music Co., 89 Nev. 104, 105, 507 P.2d 138, 139 (1973). Also, leave to amend is not
26 appropriate when the amendment would be futile. See Reddy v. Litton Industries, Inc.,
27 912 F.2d 291, 296-97 (9th Cir. 1990). Futility occurs when the proposed amendment is
28 frivolous or attempts to advance a claim that is legally insufficient. See Allum v. Valley

1 Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297, 302 (1993) (citation omitted) ("It is
2 not an abuse of discretion to deny leave to amend when any proposed amendment
3 would be futile."). Likewise, if the amendment could not withstand a motion to dismiss,
4 then the amendment should be denied as futile. See 6 Charles Alan Wright, Arthur R.
5 Miller & Mary Kay Kane, Federal Practice and Procedure Civ. 2d §1487 (2006).

6 The proposed Second Amended Complaint is Plaintiffs' third bite at the apple.
7 As the Ninth Circuit has found, a "district court's discretion to deny leave to amend is
8 particularly broad where plaintiff has previously amended the complaint." Sisseton-
9 Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, N.D. & S.D v. United
10 States, 90 F.3d 251, 355 (9th Cir. 1996) (upholding district court's denial of leave to
11 amend) (quoting Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990)). The
12 proposed Second Amended Complaint remains as it was – well short of pleading a
13 claim for attorneys' fees as damages with any sort of viable specificity. Further,
14 Plaintiffs' claim that it is entitled to an award of their attorneys' fees as special damages
15 is legally insufficient under Nevada law.

16 Plaintiffs' Motion should be denied because: (1) it is untimely and highly
17 prejudicial; and (2) their claim for attorneys' fees as an alleged element of their
18 damages in the context of this case is futile and unfounded under Nevada law.

19 **B. Plaintiffs' Motion Should be Denied Because it is Untimely and**
20 **Highly Prejudicial to Pardee.**

21 Plaintiffs' Motion should be denied because it is untimely, and therefore, highly
22 prejudicial to Pardee. Even under NRCP 15(a)'s liberal standard, leave to amend to
23 add an entirely new theory of damages to be presented at trial must be denied because
24 it would not serve justice. The deadline for all parties to seek leave to amend pleadings
25 or add parties was March 14, 2012. That deadline was never extended. Further,
26 discovery closed on October 29, 2012. Now, over one year past the deadline, Plaintiffs
27 have filed the instant Motion with the intention of putting forth an entirely new theory of
28 damages at trial. This alone should warrant denial of Plaintiffs' Motion in its entirety.

Beyond the grossly late filing, the leave requested by Plaintiffs is highly prejudicial to Pardee. The Plaintiffs' did not put forth their new theory of damages until their Fifth Supplement to NRCP 16.1 Disclosure of Witnesses & Docs, which was served on October 26, 2012. See Exhibit C. This was three days before the discovery cutoff. In doing this, Plaintiffs made it impossible for Pardee to conduct any discovery regarding this newly advanced theory concerning damages. Pardee did not have the benefit of addressing this topic in any real detail during the depositions of either of the Plaintiffs. Further, Pardee did not have the opportunity to consult or retain an expert witness to review Plaintiffs' counsel's late produced invoices and concerning the reasonableness of these alleged damages. Put simply, Pardee will be put in the position of having no witnesses or adequate defense to Plaintiffs' attempts to put forth their attorneys' fees as an element of their damages at the trial in this matter. Putting Pardee in this position would be extremely prejudicial, and would amount to an unfair ambush attack on the part of Plaintiffs. For these reasons alone the Motion should be denied.

C. Plaintiffs' Motion Should be Denied Because Nevada Law Does Not Permit the Recovery of Attorneys' Fees as Damages in This Case.

Plaintiffs' Motion should be denied because Plaintiffs' claim for their attorneys' fees as an element of their alleged damages is futile under Nevada law in context of this breach of contract case. Plaintiffs argue that they have suffered special damages in the form of their attorneys' fees. However, neither the original Complaint nor the Amended Complaint pled attorneys' fees as a specific element of damages as required under Nevada law. See Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc., 117 Nev. 948, 35 P.3d 964, (2001). Now, on the eve of trial, Plaintiffs are attempting to modify their Complaint a second time in an attempt to salvage their new theory of their alleged damages.

In Sandy Valley, the seminal case on this particular issue, the Nevada Supreme Court discussed the difference between attorney fees as a cost of litigation and attorney fees as an element of damages. See id., 117 Nev. at 955, 35 P.3d at 968-969. The

1 court acknowledged that attorney fees cannot be recovered as a cost of litigation unless
2 authorized by agreement, statute, or rule. See id., 117 Nev. at 956, 35 P.3d at 969
3 (internal citation omitted). "As an **exception to the general rule**, a district court may
4 award attorney fees as special damages in **limited circumstances**." Horgan v. Felton,
5 123 Nev. 577, 583, 170 P.3d 982, 986 (2007) (emphasis added).

6 In 2011 the Nevada Supreme Court succinctly summarized the development of
7 Sandy Valley and its progeny as follows:

8
9 In Sandy Valley Associates v. Sky Ranch Estates, we distinguished
10 between attorney fees as a cost of litigation and as special damages. 117
11 Nev. 948, 955–60, 35 P.3d 964, 968–71 (2001), *receded from on other*
12 *grounds as stated in Horgan v. Felton*, 123 Nev. 577, 579, 170 P.3d 982,
13 983 (2007). Attorney fees that are a cost of litigation arise from an
14 agreement, statute, or rule authorizing the fees, whereas attorney fees
15 that are considered special damages are fees that are foreseeable arising
16 from the breach of contract or tortious conduct. Id. at 956, 35 P.3d at 969.
17 In Shuette v. Beazer Homes Holdings Corp., we supplemented Sandy
18 Valley by explaining that fees as special damages "constitute a rather
19 **narrow exception** to the rule prohibiting attorney fees awards absent
20 express authorization." 121 Nev. 837, 862, 124 P.3d 530, 547
21 (2005)(emphasis added).

22 Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., Inc., 127 Nev. Adv.
23 Op. 26, ---, 255 P.3d 268, 279 n. 11 (Jun. 2, 2011).

24 The Nevada Supreme court has clarified that attorneys' fees may only be
25 awarded as special damages in only a handful of circumstances, such as: third-party
26 actions involving title insurance or bonds, insurance or indemnity actions, slander of title
27 actions, malicious prosecution, trademark infringement, or false imprisonment. See
28 Sandy Valley, 117 Nev. at 957-58, 35 P.3d at 970; see also Horgan, 123 Nev. at 586-
87, 170 P.3d at 988-89.

Therefore, under Sandy Valley and its progeny, the question regarding whether
attorneys' fees may be considered as an element of damages in those rare cases is
whether they were "reasonably foreseeable" and the "natural and proximate
consequence of the injurious conduct." 117 Nev. at 957, 35 P.3d at 969. "[T]he mere

1 fact that a party was forced to file or defend a lawsuit is insufficient to support an award
2 of attorney fees as damages." Id., 117 Nev. at 957, 35 P.3d at 970.

3 This is a breach of contract case which involves a contract with a prevailing party
4 attorneys' fees provision. Therefore, unless this case fits a narrow exception to the
5 general rule, attorneys' fees may be sought as a cost of litigation at the conclusion of
6 trial in post-trial motions practice. The fact that the Commission Agreement at issue in
7 this case contains an attorneys' fees provision does not automatically imply that
8 litigation was reasonably foreseeable and/or the natural and proximate consequence of
9 injurious conduct. Frankly, Plaintiffs cannot show that there has even been any
10 injurious conduct in this case. Plaintiffs acknowledge they have been compensated in
11 full under the terms of the Commission Agreement. When boiled down, Plaintiffs' only
12 remaining claim is that Pardee has allegedly failed to provide Plaintiffs with documents
13 and information pertaining to option exercises that have never transpired. This is hardly
14 considered a reasonably foreseeable and proximate consequence of the Commission
15 Agreement.

16 Plaintiffs argue that Nevada law allows attorneys' fees as special damages in
17 this case because "Plaintiffs were only able to get the documents and information they
18 were entitled to once they filed suit and were granted the tools of discovery to get some
19 of those records." See Motion, at 8:17-21. Plaintiffs cite to the Sandy Valley and
20 Horgan decisions to support this position. This is a crude stretching of Nevada law. In
21 interpreting Sandy Valley, the Horgan decision is very careful to limit, not expand, the
22 types of cases that would warrant attorneys' fees as special damages. For example, an
23 action to quiet or clarify title does not rise to the level to warrant attorneys' fees as
24 damages. Horgan, 123 Nev. at 587, 170 P.2d at 988. Rather, attorneys' fees are
25 available only in slander of title cases. Id., 123 Nev. at 587, 170 P.2d at 988. As
26 quoted by Plaintiffs in the Motion, the Horgan decision makes it clear that in order to
27 support the proposition that attorneys' fees are available as special damages, there
28 must be elements of "intentional malicious" and "calculated" acts on the part of a

1 defendant that forced the plaintiff into litigation. 123 Nev. at 585-86, 170 P.2d at 987-88
2 (internal quotation omitted); see also Plaintiffs' Motion, at 8:3-10.

3 The instant case does not fit the narrow circumstances contemplated by the
4 Nevada Supreme Court in Horgan. Plaintiffs cannot prove, nor have they even alleged,
5 that Pardee acted intentionally or maliciously to hide information and documents from
6 Plaintiffs. The facts of this case show otherwise. Plaintiffs were provided with
7 information and commission payments until every dollar of the commissions owed to
8 them under the Commission Agreement was paid. Then, when Plaintiffs began
9 inquiring about other takedowns of Option Property, Pardee explained to them (on
10 multiple occasions) that no such exercise of Option Property had occurred. There has
11 been no evidence produced in this case that shows that Pardee acted in a calculated,
12 intentional, or malicious manner when dealing with Plaintiffs. The timely commission
13 payments and multiple communications regarding the status of the project indicate the
14 opposite. Therefore, this is not the type of case that warrants attorneys' fees as special
15 damages. Rather, the attorneys' fees provision in the Commission Agreement allows
16 for attorneys' fees and costs to the prevailing party, which is a determination that out of
17 necessity will be made post trial, not during the trial.

18 For all the foregoing reasons, the Motion should be denied because the
19 amendment sought to be approved is futile under Nevada law.

20 **D. Plaintiffs' Motion Should be Denied Because It Fails to Plead**
21 **Attorneys' Fees as Special Damages With the Requisite Specificity.**

22 Aside from the substantive defects in the Plaintiffs' purported Second Amended
23 Complaint, the Motion should be denied because it is procedurally defective. The
24 Nevada Supreme Court also recognizes that when parties seek attorneys' fees as a
25 cost of litigation, documentary evidence of the fees is presented generally by post-trial
26 motion. In contrast, however, when attorneys' fees are claimed as foreseeable
27 damages arising from tortious conduct or a breach of contract, they are considered
28 special damages and must be pled in the complaint pursuant to NRCP 9(g). See

1 Sandy Valley, 117 Nev. at 956, 35 P.3d at 969. "When attorney fees are alleged as
2 damages, they must be specifically pleaded and proven by competent evidence at trial,
3 just as any other element of damages." 117 Nev. at 957, 35 P.3d at 969. Further, "the
4 party claiming fees as damages must prove the fees as to each claim." 117 Nev. at
5 960, 35 P.3d at 971.

6 If the context of the case warrants the presentation of attorneys' fees as element
7 of damages, then the plaintiff must plead such with Rule 9(g) specificity in order to allow
8 the alleged damages to be properly litigated. In this case, the proposed Second
9 Amended Complaint still fails to meet the requisite specificity. Plaintiffs have simply
10 added the same boilerplate language under each cause of action alleging that as a
11 "direct, natural and proximate result" of Pardee's actions, "Plaintiffs have been forced to
12 retain an attorney" and have "been damaged in the amount of fees and costs expended
13 to retain the services..." See generally Exhibit 1 to the Motion, at ¶¶ 19, 25, and 31.
14 There are no allegations of the attorneys' time spent, billable rate, or overall damage
15 amount. More glaring, there are no allegations to specific the amount of damages
16 specific to **each claim** as required by Nevada law. Because of all these deficiencies
17 the Motion should be denied.

18 IV. CONCLUSION

19 This Court should deny Plaintiffs' Motion for Leave to File Second Amended
20 Complaint because the request for leave is untimely, the purported amendment is futile
21 under Nevada law, and if leave is granted Pardee would suffer unfair prejudice.

22 RESPECTFULLY SUBMITTED this 8th day of April, 2013.

23 McDONALD CARANO WILSON LLP

24
25 /s/ Aaron D. Shipley
Pat Lundvall (#3761)
26 Aaron D. Shipley (#8258)
2300 West Sahara Avenue, Suite 1000
27 Las Vegas, Nevada 89102
Attorneys for Defendant Pardee Homes of
28 Nevada

 **MCDONALD-CARANO-WILSON³**
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P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 8th day of April, 2013, I served a true and correct copy of the foregoing **DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT** by e-service through the Wiznet e-filing system utilized by the Eighth Judicial District Court, Clark County, Nevada:

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

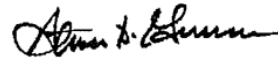
/s/ Melissa A. Merrill
An Employee of McDonald Carano Wilson
LLP

275253

EXHIBIT A

JA010280

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CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

DSO

JAMES WOLFRAM, WALT WILKES,
Plaintiffs,

v.

PARDEE HOMES OF NEVADA,
Defendant.

CASE NO. A632338
DEPT NO. IV

SCHEDULING ORDER

(Discovery/Dispositive Motions/Motions to Amend or Add Parties)

NATURE OF ACTION: Breach of contract

DATE OF FILING JOINT CASE CONFERENCE REPORT(S): 9/26/11

TIME REQUIRED FOR TRIAL: 5-7 days

Counsel for Plaintiffs:

Amanda J. Brookhyser, Esq., Jimmerson Hansen

Counsel for Defendant:

Aaron D. Shipley, Esq., McDonald Carano Wilson

Counsel representing all parties have been heard and
after consideration by the Discovery Commissioner,

IT IS HEREBY ORDERED:

1. all parties shall complete discovery on or before
8/28/12.

2. all parties shall file motions to amend pleadings or
add parties on or before 3/14/12.

RECEIVED

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CLERK OF THE COURT

DISCOVERY
COMMISSIONER

EIGHTH JUDICIAL
DISTRICT COURT

JA010281

1
2 3. all parties shall make initial expert disclosures
3 pursuant to N.R.C.P. 16.1(a)(2) on or before 3/14/12.

4 4. all parties shall make rebuttal expert disclosures
5 pursuant to N.R.C.P. 16.1(a)(2) on or before 5/16/12.

6 5. all parties shall file dispositive motions on or
7 before 9/28/12.

8 Certain dates from your case conference report(s) may
9 have been changed to bring them into compliance with N.R.C.P.
10 16.1.

11 Within 60 days from the date of this Scheduling Order,
12 the Court shall notify counsel for the parties as to the date
13 of trial, as well as any further pretrial requirements in
14 addition to those set forth above.
15

16 Unless otherwise directed by the court, all pretrial
17 disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at
18 least 30 days before trial.

19 Motions for extensions of discovery shall be made to the
20 Discovery Commissioner in strict accordance with E.D.C.R.
21 2.35. Discovery is completed on the day responses are due or
22 the day a deposition begins.
23

24 . . .

25 . . .

26 . . .

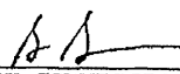
27 . . .
28

**DISCOVERY
COMMISSIONER**

EIGHTH JUDICIAL
DISTRICT COURT

1
2 Unless otherwise ordered, all discovery disputes (except
3 disputes presented at a pre-trial conference or at trial) must
4 first be heard by the Discovery Commissioner.

5 Dated this 7 day of November, 2011.

6
7 
8 DISCOVERY COMMISSIONER

9
10 CERTIFICATE OF SERVICE

11 I hereby certify that on the date filed, I placed a copy
12 of the foregoing DISCOVERY SCHEDULING ORDER in the folder(s)
13 in the Clerk's office or mailed as follows:

14 Amanda J. Brookhyser, Esq.
15 Aaron D. Shipley, Esq.

16
17 
18 COMMISSIONER DESIGNEE
19
20
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DISCOVERY
COMMISSIONER

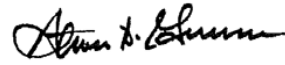
EIGHTH JUDICIAL
DISTRICT COURT

EXHIBIT B

JA010284

ORIGINAL

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CLERK OF THE COURT

1 DISC
2 PAT LUNDVALL
3 Nevada Bar No. 3761
4 AARON D. SHIPLEY
5 Nevada Bar No. 8258
6 McDONALD CARANO WILSON LLP
7 2300 West Sahara Avenue, Suite 1000
8 Las Vegas, Nevada 89102
9 (702) 873-4100
10 (702) 873-9966 Facsimile
11 lundvall@mcdonaldcarano.com
12 ashiplev@mcdonaldcarano.com
13 *Attorneys for Defendant*
14 *Pardee Homes of Nevada*

DISTRICT COURT
CLARK COUNTY, NEVADA

15 JAMES WOLFRAM,
16 WALT WILKES

17 Plaintiffs,

18 vs.

19 PARDEE HOMES OF NEVADA,
20 Defendant.

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

STIPULATION AND ORDER
TO EXTEND DISCOVERY
DEADLINES

(First Request)

(Discovery Commissioner)

21 IT IS HEREBY STIPULATED AND AGREED by and among JAMES WOLFRAM and
22 WALT WILKES ("Plaintiffs") and Defendant PARDEE HOMES OF NEVADA ("Pardee" or
23 "Defendant") that the discovery deadline be extended 60 days for the limited purpose of taking
24 the depositions of Linda Jones, Jon Lash and Harvey Whitmore.

25 In accordance with EDCR 2.35, good cause exists for this extension because Plaintiffs
26 are still waiting for a third party, Coyote Springs, Inc. ("CSI"), to produce documents in
27 response to Plaintiffs' subpoena. Plaintiffs contend that they cannot conduct and complete the
28 depositions of the aforementioned witnesses until CSI produces the requested documents and the
parties have had adequate time to review them. Continuing the current discovery deadline is in
the interest of the parties and judicial economy. Thus, the parties request a sixty (60) day

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JA010285

1 extension from the August 28, 2012 discovery cutoff date to complete the limited discovery
2 identified herein.

3 1. Completed Discovery: Plaintiffs and Defendant each provided initial disclosures.
4 Subsequently, Defendants deposed each of the Plaintiffs. The parties have each exchange and
5 responded to each other's written discovery requests. Plaintiffs have issued several third-party
6 subpoenas requesting the production of documents.

7 2. Discovery that Remains to be Completed: Plaintiffs would like to take three
8 remaining depositions: Linda Jones, Jon Lash and Harvey Whitmore. The parties also reserve
9 the right to propound additional written discovery limited in scope as to any new issues of fact
10 raised in the documents produced by CSI.

11 3. Reasons Why Remaining Discovery Has Not Been Completed: Plaintiffs contend
12 that they cannot conduct and complete the depositions of the aforementioned witnesses until CSI
13 produces the requested documents and the parties have had adequate time to review them.

14 4. A Proposed Schedule for Completing Remaining Discovery: The parties propose
15 a 60 day extension of the discovery deadline to October 28, 2012. All other discovery deadlines
16 dates are to remain the same. 29

17 5. The Current Trial Date: Trial is presently scheduled for a five-week non-jury
18 stack beginning November 13, 2012. This matter previously received preferential status pursuant
19 to NRS § 16.025. The parties request a continuance of the current trial date for a period of not
20 less than 60 days.

21 DATED this 23rd day of August, 2012

DATED this 23rd day of August, 2012

22 McDONALD CARANO WILSON LLP

JIMMERSON, HANSEN, P.C

23
24 PAT LUNDVALL (#3761)
25 AARON D. SHIPLEY (#8258)
26 2300 West Sahara Avenue, Suite 1000
27 Las Vegas, Nevada 89102
Attorneys for Defendant Pardee Homes of
Nevada

28
JAMES J. JIMMERSON, (#264)
LYNN HANSEN (#244)
JAMES M. JIMMERSON (#12599)
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101
Attorney for Plaintiffs

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PHONE 775-788-2000 • FAX 775-788-2020

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4 Subsequently, Defendants deposed each of the Plaintiffs. The parties have each exchange and
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20 less than 60 days.


21 DATED this ___ day of August, 2012

DATED this 23rd day of August, 2012

22 McDONALD CARANO WILSON LLP

JIMMERSON, HANSEN, P.C

23
24 PAT LUNDVALL (#3761)
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28 *Attorneys for Defendant Pardee Homes of Nevada*


JAMES J. JIMMERSON, (#264)
LYNN HANSEN (#244)
JAMES M. JIMMERSON (#12599)
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101
Attorney for Plaintiffs

A-10-632338-C

ORDER

TRIAL DATE TO BE SET

IT IS SO ORDERED this 27th day of August, 2012. ON OR AFTER 14 13

Discovery Commissioner

Submitted by:

McDONALD CARANO WILSON LLP

Patricia Lundvall #10162 *PL*
PAT LUNDVALL (#3761)
AARON D. SHIPLEY (#8258)
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
Attorneys for Defendant Pardee Homes of Nevada

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JA010288

EXHIBIT C

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

1 **SUPP**

2 JAMES J. JIMMERSON, ESQ.

3 Nevada Bar No. 000264

4 LYNN M. HANSEN, ESQ.

5 Nevada Bar No. 0244

6 JAMES M. JIMMERSON, ESQ.

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12 jjj@jimmersonhansen.com

13 lmh@jimmersonhansen.com

14 jmj@jimmersonhansen.com

15 Attorney for Plaintiffs

16 *James Wolfram and Walt Wilkes*

17 **DISTRICT COURT**

18 **CLARK COUNTY, NEVADA**

19 JAMES WOLFRAM AND WALT WILKES

20 Plaintiffs,

21 vs.

22 PARDEE HOMES OF NEVADA,

23 Defendant.

CASE NO.: A-10-632338-C

DEPT NO.: IV

24 **PLAINTIFFS' FIFTH SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF**
25 **WITNESSES AND DOCUMENTS**

26 COME NOW Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through their
27 attorneys, Lynn M. Hansen, Esq., and James M. Jimmerson, Esq., of the law firm of
28 Jimmerson Hansen, P.C., and hereby submits the following Fifth Supplement to list of
witnesses and production of documents, as follows (*new items in bold*):

///

///

///

I.

WITNESSES

Plaintiffs provide the following witnesses' identities, last known address and telephone numbers:

1. James Wolfram
c/o Jimmerson Hansen, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171

This person most knowledgeable is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

2. Walt Wilkes
c/o Jimmerson Hansen, P.C.
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
(702) 388-7171

This person most knowledgeable is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

3. Frances Butler Dunlap
Chicago Title Company
Las Vegas, Nevada

This person was the head of the Real Estate Commercial Department of Chicago Title Company, is most knowledgeable, and is expected to render testimony regarding the facts and circumstances surrounding the subject matter of this litigation.

4. PARDEE HOMES OF NEVADA
Custodian of Records
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89501
(775) 788-2000

Pardee Homes of Nevada is a named Defendant in this matter. Its present or former employees, representatives, agents, person to be designated pursuant to NRCP 30(b)(6) and/or custodians of records are expected to testify regarding the facts and background of this case.

1 5. PARDEE HOMES OF NEVADA
2 Person Most Knowledgeable
3 McDonald Carano Wilson LLP
4 100 West Liberty Street, 10th Floor
5 Reno, Nevada 89501
6 (775) 788-2000

7 Pardee Homes of Nevada is a named Defendant in this matter. Its present or former
8 employees, representatives, agents, person to be designated pursuant to NRCP 30(b)(6)
9 and/or Person Most Knowledgeable are expected to testify regarding the facts and background
10 of this case.

11 6. Jon Lash
12 c/o McDonald Carano Wilson LLP
13 100 West Liberty Street, 10th Floor
14 Reno, Nevada 89501
15 (775) 788-2000

16 Mr. Lash is an employee of PARDEE HOMES OF NEVADA and is expected to testify
17 regarding the facts and background of this case.

18 7. Clifford Anderson
19 c/o McDonald Carano Wilson LLP
20 100 West Liberty Street, 10th Floor
21 Reno, Nevada 89501
22 (775) 788-2000

23 Mr. Anderson is an employee of PARDEE HOMES OF NEVADA and is expected to
24 testify regarding the facts and background of this case.

25 8. Harvey Whitemore
26 c/o Coyote Springs
27 Address Unknown

28 Mr. Whitemore is the owner of the property involved in this lawsuit and is expected to
testify regarding the facts and background of this case.

9. Chicago Title Company
Las Vegas, Nevada
Custodian of Records

The Custodian of Records is expected to testify regarding the facts and background of
this case.

10. Chicago Title Company
Las Vegas, Nevada
Person Most Knowledgeable

1 The Person Most Knowledgeable is expected to testify regarding the facts and
2 background of this case.

3 11. Peter J. Dingerson
4 D&W Real Estate
5 5455 S. Durango Dr., Ste 160
6 Las Vegas, NV 89113

7 Mr. Dingerson is the owner of D&W Real Estate and is expected to testify
8 regarding the facts and background of this case.

9 12. Jay Dana
10 General Realty Group
11 6330 S. Eastern Ave Ste 2
12 Las Vegas, NV 89119

13 Mr. Dana is the owner of General Realty Group Inc. and is expected to testify
14 regarding the facts and background of this case.

15 13. Jerry Masini
16 Award Realty Corp.
17 3015 S. Jones Blvd.
18 Las Vegas, NV 89146

19 Mr. Masini is the owner of Award Realty and is expected to testify regarding
20 the facts and background of this case.

21 Plaintiffs reserve the right to call any and all witnesses who may be disclosed or
22 deposed throughout the course of discovery.

23 Plaintiffs reserve the right to call any and all of Defendant's witnesses; and

24 Plaintiffs reserve the right to call any and all rebuttal witnesses.

25 Plaintiffs' experts, if any, as yet unidentified.

26 Plaintiffs reserve the right to supplement this list of witnesses as discovery
27 progresses and until the time of trial in this case.

28 II.

DOCUMENTS

Pursuant to NRCP 16.1(a)(1)(B), Plaintiffs provide the following documents relating to
Plaintiffs and Defendants:

1 damages. As *Liu* is specifically cited in the FFCLO, clearly the entire basis for Defendant's current
2 motion to amend is FALSE, frivolous, vexatious and has unnecessarily multiplied these
3 proceedings.

4 Moreover, as the parties extensively argued this very issue at pre-trial and trial stages (*See*
5 Exhibits 4-10), Defendant is wrongfully seeking another bite at the apple under the guise that the
6 2014 *Liu* decision somehow affects this Court's considerate determination to award special
7 damages to Plaintiffs. Knowing that the June 27, 2014 FFCLO specifically references BOTH the
8 *Liu* and *Sandy Valley* cases as a basis for the award of special damages, Defendant falsely claims
9 that this "Court could not benefit from *Liu*'s protracted discussion" regarding the circumstances
10 allowing an award of special damages, as *Liu* was not decided "until almost a year later, on March
11 27, 2014." *See* Defendant's Motion, page 7, footnote 2. Considering this Court's decision was
12 made after the *Liu* case and specifically cited the *Liu* case, Defendant's actions in filing this is
13 sanctionable.
14

15
16 Moreover, it is an entire waste of this Court's time and the parties' resources to have to
17 address this matter for the umpteenth time, when the *Liu* decision does NOTHING to undercut,
18 limit, nor change the *Sandy Valley* decision such that this Court should reconsider the award of
19 special damages to Plaintiffs. There is absolutely NO basis under *Liu* for this Court to amend its
20 decision to award special damages, especially considering this Court cited this very case in its
21 FFCLO and considering Defendant has unsuccessfully made this same argument in four (4)
22 previous court filings (Exhibits "4", "5", "6", "9") and upon oral argument (Exhibits "7" – "8"),
23 which makes Defendant's entire motion vexatious and unwarranted, justifying an award of
24 attorney's fees for Plaintiffs as set forth in their Countermotion below. There was no new evidence
25 brought forward by the Defendant Pardee in its meritless motion.
26
27
28

1 The *Liu* decision confirmed the *Sandy Valley* decision and only clarified *Horgan*'s partial
2 abrogation of *Sandy Valley*. See *Liu v. Christopher Homes, LLC*, 321 P.3d 875, 130 Nev. Adv.
3 Op. 17 (2014), See also *Sandy Valley*, 117 Nev. at 948 and *Horgan*, 123 Nev. at 577, 170 P.3d at
4 982 (which had NO effect on the Court's award of special damages to Plaintiffs). In *Liu*, the trial
5 court, relying on *Horgan*, denied Liu's specially pleaded request to recover attorney fees,
6 concluding that because the breach of contract related to title to real property, and because Liu
7 failed to allege and prove slander of title, Liu could not recover the attorney fees sought as special
8 damages. *Liu* 321 P. 3d at 876. The Nevada Supreme Court reversed this decision and clarified
9 *Horgan* in conjunction with *Sandy Valley*.

11 The Nevada Supreme Court took the opportunity to explain that *Horgan* "must be read as
12 a whole, without particular portion read in isolation, [so]as to discern the parameters of its
13 holding." *Id.* at 878 (citations omitted). The Court further discussed that *Horgan* did not hold that
14 a party in any matter relating to real property must prevail on a slander of title claim in order to
15 recover attorney fees as special damages, and rather, that the court contemplated the ability to
16 recover attorney fees as special damages that were incurred in an action to clarify or remove a
17 cloud on a title. *Id.* at 878-879.

19 While Plaintiff Liu did not incur attorney fees by asserting equitable or declaratory relief
20 claims to clarify or remove a cloud on a title, Liu, was a third-party who pled to recover attorney
21 fees as special damages incurred in defending against a breach of contract action. Thus, the court
22 determined that "a party to a contract may recover from a breaching party the attorney fees that
23 arise from the breach that caused the former party to accrue attorney fees in defending himself or
24 herself against a third party's legal action." *Id.* at 880. Thus, the Nevada Supreme Court merely
25 clarified the *Sandy Valley* decision, by reconciling the same with the *Horgan* decision, as follows:
26
27

1 In light of the above, *Sandy Valley* permits, and *Horgan* does not bar, Liu's claim to recover
2 attorney fees as special damages that were purportedly sustained in defending herself
3 against K&D's suit, which was allegedly caused by CHR's breach of the Agreement.
Accordingly we hold that the district court erred in relying on *Horgan* to conclude that Liu
cannot recover attorney fees as special damages.

4 *Id.*

5 The *Liu* Court, in reversing the trial court's decision to deny Liu's claim for attorney's fees
6 as special damages, asserted that "*Horgan* does not apply to preclude such recovery here." *Id.* at
7 876, 881. Further, the Nevada Supreme Court commented on the dissent, setting forth in footnote
8 3 as follows:
9

10 The dissent disagrees with our conclusions, relying on a concurrence in *Horgan* which
11 noted that there are claims, other than slander of title, under which a party can recover
12 attorney fees as special damages, such as "actions for malicious prosecution, abuse of
13 process, wrongful attachment, trademark infringement, false imprisonment or arrest." 123
14 Nev. at 587, 170 P.3d at 988-89 (Maupin, J., concurring). **The dissent appears to
conclude that because the *Horgan* concurrence did not include a breach of contract
claim within its list, it is persuasive authority that attorney fees that arise from a
breach of contract cannot be recovered as special damages. We disagree. We do not
read the *Horgan* concurrence as conveying a comprehensive and exclusive list of
claims on which a party can recover attorney fees as special damages. Rather, the
15 *Horgan* concurrence stressed that the *Horgan* opinion did not preclude the recovery of
16 attorney fees as special damages in circumstances other than those presented in that appeal.
17 *Id.* In so doing, it offered **examples** of claims under which one may recover attorney fees.
18 *Id.* Thus, like the *Horgan* concurrence, we conclude that *Horgan* does not bar the recovery
19 of attorney fees in circumstances that are not addressed in *Horgan*, such as the
circumstances that are present in this appeal.**

20 *Id.* at 881 (emphasis added).

21 Moreover, Defendant disingenuously misapplies the *Liu* discussions and falsely claims that
22 recovery of attorney fees as special damages in a breach of contract claim may "only" be recovered
23 when the breach causes the former party to incur fees in a legal dispute brought by a third party.
24 See Defendant's Motion at 8:1-12. Contrary to Defendant's false argument, in discussing the
25 *Horgan* court's decision, the *Liu* court noted that there was **no** "retreat from *Sandy Valley*'s
26 conclusion that a party to a contract may recover, as special damages, the attorney's fees that arise
27
28

1 from another party's breach of contract when the breach causes the former party to incur attorney
2 fees in a legal dispute brought by a third party." *Id.* at 880, citing *Horgan v. Felton*, 123 Nev. 577,
3 579, 583-86, 170 P.3d 982, 983, 986-88 (omitting from its discussion Sandy Valley's language
4 that concerns the recovery of attorney fees as special damages that arise from a breach of contract).
5 How Defendant falsely transformed the above quote to claim this is a new basis for the Court to
6 now deny Plaintiffs their award of attorney's fees as special damages is absurd and legally
7 unsound. Clearly, the *Liu* decision only dealt with one example of a case that allowed such a
8 recovery and not the "only" case in which attorney's fees may be recovered as special damages.
9 Otherwise, if this was the holding, then Sandy Valley would have been abrogated. Rather, *Liu*
10 served to expand upon the limitations and abrogation that *Horgan* placed upon *Sandy Valley*.

11
12 The *Liu* decision served to **expand upon, not limit** the *Sandy Valley* decision, and
13 therefore, Defendant is disingenuously – and vexatiously, using this decision in its fifth (5th)
14 attempt to open the door for its failed arguments. *See* Exhibits (4, 5, 6, 9 and 7-8). The faulty basis
15 for Defendant's argument is that Plaintiff's award is erroneous as it does not allegedly fall under
16 one of the three limited circumstances set forth in *Sandy Valley* and *Liu*. *See* Defendant's Motion
17 at 1:26-27, 5:26-27, 6:1-7, 7:10-12. As set forth in the footnote above, there is no comprehensive
18 nor exclusive list of claims in which recovery of attorney fees as special damages. While *Sandy*
19 *Valley* provides that the mere fact that a party is forced to file suit is not enough to support
20 attorneys' fees as an element of damages and discusses three (3) specific scenarios where fees as
21 special damages would be appropriate, at no point in this discussion does the court suggest, much
22 less determine, that these are the only circumstances where an award of fees as special damages
23 would be allowed. *Sandy Valley*, 117 Nev. at 957-58, 35 P.3d at 970. The Court merely discussed
24 examples involving attorney fees as special damages where attorney fees may be an element of

1 damages in cases when a plaintiff becomes involved in a third-party legal dispute due to breach of
2 conduct or tortious conduct by defendant; that they may also be awarded as damages where a party
3 incurring the fees in recovering real or personal property acquired through defendant's wrongful
4 conduct or in clarifying or removing a cloud upon title to property; or that actions for declaratory
5 or injunctive relief may involve claims for attorney fees as damages when the actions were
6 necessitated by the opposing party's bad faith conduct. *Id.* at 957-958, 970.
7

8 Nothing in *Sandy Valley* or its progeny suggests that the only actions qualifying for
9 attorney fee damages are limited to those specifically listed therein. In fact, *Works v. Kuhn*, 103
10 Nev. 65, 732 P.2d 1373 (1989), which was cited within the *Sandy Valley* decision, does not involve
11 the claims listed in *Sandy Valley* and thus, disproves the limitation argument. *Works v. Kuhn*, 103
12 Nev. 65, 732 P.2d 1373 (1989). In *Works*, the court granted fees "to defray the expenses and costs
13 that respondents have incurred in retaining counsel to represent them..." in an appeal concerning
14 claims for breach of accord and satisfaction and malicious prosecution. *Works*, 103 Nev. at 69.
15 If the *Sandy Valley* Court intended to restrict the causes of action qualifying for attorney fee
16 damages, it would not have cited *Works* with approval.
17

18 The circumstances in which Plaintiffs are entitled to an award of attorney's fees as special
19 damages under *Sandy Valley* has not changed since the parties extensively argued this very same
20 issue. *Liu*, citing *Sandy Valley*, confirmed that attorney fees may be recovered when they are pled
21 as such pursuant to NRCP 9(g) and are proven to be a "natural and proximate consequence of the
22 injurious conduct. *Liu* 321 P. 3d at 878. Under *Sandy Valley*, "When attorney fees are considered
23 an element of damages, they must be the natural and proximate consequence of the injurious
24 conduct." *Sandy Valley* 117 Nev. at 957, 35 P.3d at 969. As fully previously argued, Plaintiffs'
25 Second Amended Complaint adequately pled Plaintiffs' claim for attorney fees as special damages,
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1 which was subsequently proven at trial. *See* Exhibits “3, 11.”

2 Plaintiffs’ Complaint is replete with allegations demonstrating how Defendant’s injurious
3 conduct naturally and proximately caused Plaintiffs’ expenditure of attorney’s fees. Paragraphs 8
4 through 15 of the Complaint detail how over the course of twenty (20) months, Plaintiffs tried in
5 vain to retrieve the information and documents owed to them under the September 1, 2004
6 Commission Letter Agreement. *See* Exhibit 3 at ¶¶ 8-15. These efforts involved requests to
7 Defendant, third party title companies, and document searches at the Clark County Recorder’s
8 Office. *Id.* at ¶ 13. Defendant not only failed to provide the necessary records to Plaintiffs, but
9 the information Defendant did provide was intended to mislead Plaintiffs. *Id.* A comprehensive
10 review of Defendant’s actions towards Plaintiffs reveals that Defendant failed to uphold its duty
11 to act in good faith towards Plaintiffs. *Id.* at ¶ 30. After all of these events, Plaintiffs were left
12 with no option other than hiring an attorney to file suit and use the power of discovery and appeal
13 to the Court to compel an accounting and the production of the information owed to Plaintiffs. *Id.*
14 at ¶¶ 19, 25, 31.

15 Furthermore, Plaintiffs’ claims involves a breach of the implied covenant of good faith and
16 fair dealing, as well as equitable or injunctive relief regarding the accounting, all stemming from
17 Defendant’s bad faith. Under *Sandy Valley*, “actions for declaratory or injunctive relief may
18 involve claims for attorney fees as damages when the actions were necessitated by the opposing
19 party’s bad faith conduct.” *Sandy Valley*, 117 Nev. at 958. Nevada law is clear that claims for
20 breaches of the implied covenant of good faith and fair dealing are “bad faith” claims no matter if
21 they are claims founded on contract principles or tort principles. Plaintiffs fully briefed these
22 issues and hereby attaches these court filings as if fully incorporated herein. *See Plaintiffs’*
23 *Supplement to Motion For Leave to File A Second Amended Complaint Pursuant to the Court’s*
24

1 *Order on Hearing on April 26, 2013* filed with the court on May 10, 2013, that is attached hereto
2 as Exhibit "13;" *Plaintiffs' Reply in Further Support of Their Motion for Leave to File a Second*
3 *Amended Complaint* filed with the court on April 23, 2013, that is attached hereto as Exhibit "14;"
4 and *Plaintiffs' Opposition to Defendant's Motion in Limine to Exclude Plaintiffs' Claim for*
5 *Attorneys' Fees As An Element of Damages (MIL #1)* filed with the court on March 20, 2013, that
6 is attached hereto as Exhibit "15." (Plaintiffs further incorporate by reference Plaintiffs' Motion
7 to Strike Judgment entered June 15, 2015 and filed June 29, 2015, Plaintiffs' Opposition to
8 Defendant's Motion for Attorney's Fees filed June 29, 2015, and Plaintiffs' Motion for Attorney's
9 Fees filed June 29, 2015, by reference as if fully stated herein).

11 Over the course of a three (3) week trial, in which the Court took the matter under
12 submission, Plaintiffs proved the above allegations, resulting in an award of \$135,500 in attorney's
13 fees as special damages as set forth in the Court's June 25, 2014 FFCLO. In the face of these
14 findings, the Court made a determination that Plaintiffs were owed a Judgment in the amount of
15 \$141,500, composed of \$6,000.00 of time that Mr. Wolfram expended at a reasonable rate of
16 \$75.00 per hour, for over eighty (80) hours that he spent to communicate with Pardee in an effort
17 to obtain information that Defendant was contractually obligated to provide, but failed to do so, as
18 the Court so found. In addition, the Court heard the testimony of Plaintiffs' counsel, Mr.
19 Jimmerson, who testified that the efforts directly associated with Mr. Jimmerson's law firm to
20 acquire the information from Pardee, and the Court found the sum of \$135,000 to be reasonable
21 and necessary. *See* Exhibit "11." The Court's specific findings were based on BOTH *Sandy Valley*
22 and *Liu*, and therefore, this Court has already considered and addressed the *Liu* decision when
23 awarded Plaintiffs' attorneys fees as special damages, making Defendant's entire motion to amend
24 in this regard vexatious and frivolous.
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1 IV. COUNTERMOTION FOR ATTORNEYS FEES IN THE AMOUNT OF \$10,975.

2 EDCR 7.60(b) provides in relevant part as follows:

3 The court may, after notice and an opportunity to be heard, impose upon an
4 attorney or a party any and all sanctions which may, under the facts of the
5 case, be reasonable, **including** the imposition of fines, **costs or attorney's fees** when
6 an attorney or a party **without just cause**:

7 (1) Presents to the court a motion or an opposition to a motion which is
8 **obviously frivolous, unnecessary or unwarranted.**

9 (2) Fails to prepare for a presentation.

10 (3) So **multiplies** the proceedings in a case as to increase costs
11 unreasonably and **vexatiously.**

12 (4) Fails or refuses to comply with these rules.

13 (5) Fails or refuses to comply with any order of a judge of the court.
14 (Emphasis added).

15 In addition, NRS 18.010 provides in relevant part as follows:

16 In addition to the cases where an allowance is authorized by specific
17 statute, the court may make an allowance of attorney's fees to a
18 prevailing party:

19 (a) When he has not recovered more than \$20,000; or

20 (b) Without regard to the recovery sought, when the court finds that the
21 claim, counterclaim, cross-claim or third-party complaint or defense of the
22 opposing party was brought or **maintained without reasonable ground or to**
23 **harass the prevailing party.** The court shall liberally construe the provisions
24 of this paragraph in **favor of awarding attorney's fees in all appropriate**
25 **situations.** It is the intent of the Legislature that the **court award attorney's**
26 **fees** pursuant to this paragraph and impose sanctions pursuant to Rule 11 of the
27 Nevada Rules of Civil Procedure in **all appropriate situations to punish for**
28 **and deter frivolous or vexatious claims** and defenses because such
claims and defenses overburden limited judicial resources, hinder the
timely resolution of meritorious claims and increase the costs of engaging in
business and providing professional services to the public.

(Emphasis added)

29 Considering this Court has extensively heard, addressed and disposed of the very same
30 arguments that Defendant attempts to renew, with four (4) previous written court filings by

1 Defendant (Exhibits “4, 5, 6, and 9”) and oral argument (Exhibits “7-8”), as well as this Court’s
2 specific reference to the *Liu* case in the FFCLO as the basis for the special damages award (Exhibit
3 “2” at 14:24-27) – therefore makes Defendant’s entire motion herein vexatious, frivolous and
4 unwarranted, such that Plaintiffs are deserving of attorneys’ fees under EDCR 7.60 and NRS
5 18.010, to wit, attorney fees in the amount of \$10,975 as requested. *See* Affidavit of James J.
6 Jimmerson, Esq. attached hereto.

7
8 With respect to determining the reasonableness of counsel’s services, certain factors must
9 be addressed, known as the *Brunzell* factors. *Brunzell v. Golden Gate National Bank*, 85 Nev.
10 345, 455 P.2d 31 (1969). As to the qualities of the advocate, respectfully, we suggest that the
11 supervising counsel is an AV rated, Preeminent Lawyer, with many further accolades. As to the
12 “character and quality of the work performed,” we ask the Court to find our work in this matter to
13 have been adequate, both factually and legally, in which we have diligently reviewed the applicable
14 law, explored the relevant facts, and have properly applied one to the other. Finally, as to the result
15 reached, this remains to be determined when the Court rules on the present matter. With respect
16 to the character of the work to be done and work actually performed, the parties had a long history
17 of litigation that needed to be reviewed, such that the time and skill of counsel and staff, merit the
18 fees charged for those tasks, and billing statements can be provided to show counsel’s time and
19 attention given to the work, denoted with proper investigation into the relevant facts, review of the
20 applicable law, and appropriate application of one to the other. The law was thoroughly researched
21 and briefed, the facts were thoughtfully presented, and ample substantiation was provided. Finally
22 as to the result reached, this remains to be determined when the Court rules on the present matter;
23 however, as set forth above, said fees are reasonable.

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27 ///


1 **V. CONCLUSION**

2 For the reasons stated herein, Plaintiffs respectfully request this Court to deny Defendant's
3 Motion to Amend Judgment and grant Plaintiffs an award of attorneys' fees and costs for having
4 to defend against this clearly frivolous motion.

5 DATED this 17 day of July, 2015.

7 Respectfully submitted,

8 JIMMERSON HANSEN, P.C.

9
10 
11 JAMES J. JIMMERSON, ESQ.
12 Nevada State Bar No. 000264
13 HOLLY A. FIC, ESQ.
14 Nevada State Bar No. 007699
15 415 So. Sixth St., Ste. 100
16 Las Vegas, NV 89101
17 (702) 388-7171
18 Attorneys for Plaintiffs
19
20
21
22
23
24
25
26
27
28

1 CERTIFICATE OF SERVICE

2 I hereby certify that service of a true and correct copy PLAINTIFFS' OPPOSITION TO
3 PARDEE HOMES OF NEVADA'S MOTION TO AMEND JUDGMENT AND
4 COUNTERMOTION FOR ATTORNEY'S FEES was made on the 17th day of July, 2015, as
5 indicated below:
6

7 ☒ pursuant to EDCR 8.05(a), EDCR 8.05(f), NRCR 5(b)(2)(D) and
8 Administrative Order 14-2 captioned "In the Administrative Matter of
9 Mandatory Electronic Service in the Eighth Judicial District Court," by
10 mandatory electronic service through the Eighth Judicial District Court's
electronic filing system;

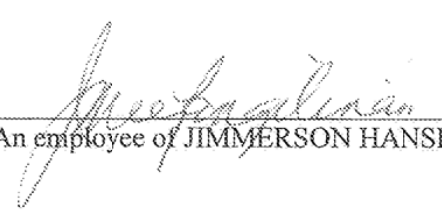
11 ☐ by placing same to be deposited for mailing in the United States Mail, in a
12 sealed envelope upon which first class postage was prepaid in Las Vegas,
Nevada to Nevada State Welfare, Dept. of Human Resources;

13 ☐ by electronic mail;

14 ☐ by hand-delivery with signed Receipt of Copy.
15

16 To the attorney(s) listed below at the address, email address, and/or facsimile number indicated
below:

17 Pat Lundvall, Esq.
18 Rory T. Kay, Esq.
19 MCDONALD CARANO WILSON, LLP
20 2300 W. Sahara Ave., Suite 1000
Las Vegas, NV 89102
Attorneys for Defendant

21
22 
An employee of JIMMERSON HANSEN, P.C.
23
24
25
26
27
28

AFFIDAVIT OF JAMES J. JIMMERSON, ESQ.

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

James J. Jimmerson, being duly sworn deposes and says:

1. I am an attorney duly licensed to practice law in the State of Nevada, and I am a shareholder of the law firm of Jimmerson Hansen, P.C., and counsel for Plaintiffs, JAMES WOLFRAM and WALTER D. WILKES and ANGELA L. LIMBOCKER-WILKES LIVING TRUST, ANGELA L. LIMBOCKER-WILKES, TRUSTEE in the above entitled matter. I have personal knowledge of all matters contained herein, and am competent to testify thereto, except for those matter stated on information and belief, and to those matters, I believe them to be true.

2. I am lead counsel on the Wolfram case, for the Plaintiffs, and I know the amount of efforts that has been spent to prepare Plaintiffs' Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees, filed July 17, 2015.

3. Conservatively speaking, Holly A. Fic, a seasoned 14-year lawyer of our Firm spent an excess of 20 hours at \$400.00 per hour. In addition, the undersigned spent at least 5 hours at the rate of \$595.00 per hour, in reviewing and correcting and amending her work which is excellent, in addition to the amount of costs through the date and time of preparation of this Affidavit.

4. I incorporate the argument within the Plaintiffs' Opposition, specifically the law with regard to compensating counsels for services when warranted. *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969) and its progeny. These fees

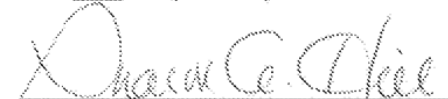
JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 - Facsimile (702) 387-1167

1 and costs are reasonable and are necessarily incurred.

2 FURTHER, AFFIANT SAYETH NAUGHT.

3
4 
JAMES J. JIMMERSON, ESQ.

5 SUBSCRIBED AND SWORN to before me
6 this 17th day of July, 2015.

7 
8 NOTARY PUBLIC in and for said
9 County and State

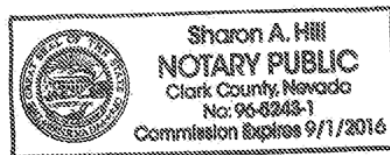
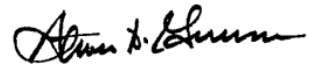


EXHIBIT “1”

JA010232



CLERK OF THE COURT

1 **NJUD**
2 PAT LUNDVALL (NSBN 3761)
3 RORY T. KAY (NSBN 12416)
4 McDONALD CARANO WILSON LLP
5 2300 West Sahara Avenue, Suite 1200
6 Las Vegas, Nevada 89102
7 (702) 873-4100
8 (702) 873-9966 Facsimile
9 lundvall@mcdonaldcarano.com
10 rkay@mcdonaldcarano.com
11 *Attorneys for Defendant*
12 *Pardee Homes of Nevada*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 JAMES WOLFRAM,
16 WALT WILKES

17 Plaintiffs,

18 vs.

19 PARDEE HOMES OF NEVADA,
20 Defendant.

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

**NOTICE OF ENTRY OF
JUDGMENT**

21 PLEASE TAKE NOTICE that a **JUDGMENT** was entered in the above-
22 referenced case on the 3rd day of June, 2015, a copy of which is attached hereto.

23 DATED this 15th day of June, 2015.

24 McDONALD CARANO WILSON LLP

25 /s/ Pat Lundvall
26 PAT LUNDVALL (#3761)
27 RORY T. KAY (#12416)
28 2300 West Sahara Avenue, Suite 1200
Las Vegas, Nevada 89102
Attorneys for Defendant Pardee Homes of Nevada

McDONALD-CARANO-WILSON
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 **MCDONALD-CARANO-WILSON**
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P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

CERTIFICATE OF SERVICE

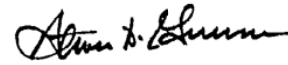
I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on this 15th day of June, 2015, I served a true and correct copy of the **NOTICE OF ENTRY JUDGMENT** via Wiznet electronic service as utilized by the Eighth Judicial District in Clark County, Nevada.

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

/s/ Sally Wexler
An Employee of McDonald Carano Wilson LLP

336337.1

JA010234



CLERK OF THE COURT

1 **JUDG**
2 PAT LUNDVALL (NSBN 3761)
3 RORY T. KAY (NSBN 12416)
4 McDONALD CARANO WILSON LLP
5 2300 West Sahara Avenue, Suite 1200
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9 lundvall@mcdonaldcarano.com
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11 *Attorneys for Defendant*
12 *Pardee Homes of Nevada*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 JAMES WOLFRAM,
16 WALT WILKES

17 Plaintiffs,

18 vs.

19 PARDEE HOMES OF NEVADA,
20 Defendant.

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

JUDGMENT

21 AND RELATED CLAIMS

22 On October 23, 2013, the above-referenced matter came on for bench trial
23 before the Honorable Judge Kerry Earley. The Court, having reviewed the record,
24 testimony of witnesses, the documentary evidence, stipulations of counsel, the papers
25 submitted by the respective parties, and considered the arguments of counsel at trial in
26 this matter, entered Findings of Fact and Conclusions of Law on June 25, 2014.

27 In the Findings of Fact and Conclusions of Law, the Court ordered the parties to
28 provide supplemental briefing within 60 days detailing what future information
29 Defendant Pardee Homes of Nevada ("Pardee") and its successors and/or assigns
30 should provide Plaintiffs James Wolfram and Walt Wilkes ("Plaintiffs") and their
31 successors and/or assigns consistent with the Court's decision on the accounting cause
32 of action.

1 After reviewing the parties' supplemental briefing, the Court then entered an
2 order on April 20, 2015 reflecting its decision on the supplemental briefing (the
3 "Accounting Order") The Notice of Entry of the Accounting Order was filed on May 13,
4 2015.

5 In accordance with the Findings of Fact and Conclusions of Law entered on June
6 25, 2014 and the Accounting Order entered on May 13, 2015, the Court finds the
7 following:

8 Plaintiffs claimed \$1,952,000 in total damages related to their causes of action.
9 Specifically, Plaintiffs claimed \$1,800,000 in damages related to lost future
10 commissions from Pardee's purported breach of the Commission Agreement, \$146,500
11 in attorney's fees incurred as special damages in prosecuting the action, and \$6,000 in
12 consequential damages for time and effort expended searching for information
13 regarding what Pardee purportedly owed them under the Commission Agreement.

14 Having considered the entire record, including testimony of witnesses, the
15 documentary evidence, stipulations of counsel, the papers submitted by the respective
16 parties, and the arguments of counsel at trial in this matter, the Court enters judgment
17 as follows:

18 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT JUDGMENT IS**
19 **ENTERED** against Plaintiffs and for Pardee as to Plaintiffs' claim for \$1,800,000 in
20 damages related to lost future commissions under the Commission Agreement. Pardee
21 has not breached the Commission Agreement in such a way as to deny Plaintiffs any
22 future commissions, and Pardee has paid all commissions due and owing under the
23 Commission Agreement.

24 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT JUDGMENT IS**
25 **ENTERED** in favor of Plaintiffs and against Pardee on Plaintiffs' causes of action for
26 breach of contract and breach of the implied covenant of good faith and fair dealing.
27 Plaintiffs are entitled to damages from Pardee in an amount totaling \$141,500.00, of
28 which \$6,000 are consequential damages from Pardee's breach of the Commission

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1 Agreement and the remaining \$135,500.00 are special damages in the form of
2 attorney's fees and costs.

3 **IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED THAT**
4 **JUDGMENT IS ENTERED** in favor of Plaintiffs and against Pardee on Plaintiffs' cause
5 of action for accounting. Pardee shall provide Plaintiffs with future accountings related
6 to the Commission Agreement consistent with the Accounting Order entered by the
7 Court on May 13, 2015.

8 **IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED THAT**
9 **JUDGMENT IS ENTERED** in favor of Plaintiffs and against Pardee on Pardee's cause
10 of action for breach of the implied covenant of good faith and fair dealing.

11 This Judgment may be amended upon entry of any further awards of interest,
12 costs and/or attorney's fees.

13 DATED this 3rd day of June, 2015.

14 
DISTRICT COURT JUDGE

17 Submitted by:

18 McDONALD CARANO WILSON LLP

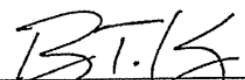
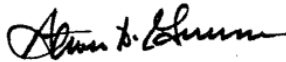
19 
20 PAT LUNDVALL (NSB #3761)
21 RORY T. KAY (NSB #12416)
22 2300 West Sahara Avenue, Suite 1200
23 Las Vegas, Nevada 89102
24 Attorneys for Pardee Homes of Nevada
25
26
27
28

EXHIBIT “2”

JA010238


CLERK OF THE COURT

1 NEOJ
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3 Nevada State Bar No.: 00264
4 jjj@jimmersonhansen.com
5 LYNN M. HANSEN, ESQ.
6 Nevada State Bar No.: 00244
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8 415 South 6th Street, Suite 100
9 Las Vegas, Nevada 89101
10 Attorney for Plaintiffs

11 DISTRICT COURT
12 CLARK COUNTY, NEVADA

13 JAMES WOLFRAM and)
14 WALT WILKES,)
15) CASE NO.: A-10-632338-C
16 Plaintiffs,) DEPT. NO.: IV
17)
18 vs.)
19)
20 PARDEE HOMES OF NEVADA,)
21)
22 Defendant.)

23 NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

24 PLEASE TAKE NOTICE that the Findings of Fact and Conclusions of Law and
25 Order was entered in the above-captioned matter on June 25, 2014. A true and correct file
26 -stamped copy of said Order is attached hereto.

27 Dated this 27 day of June, 2014.

28 JIMMERSON HANSEN, P.C.


JAMES J. JIMMERSON, ESQ.
Nevada State Bar No.: 00264-12547
LYNN M. HANSEN, ESQ.
Nevada State Bar No.: 00244
415 South 6th Street, Suite 100
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415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone: (702) 388-7171 • Facsimile (702) 387-1162

CERTIFICATE OF SERVICE

I hereby certify that service of a true and correct copy NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER was made on the 27 day of June, 2014, as indicated below:

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

By facsimile, pursuant to EDCR 7.26 (as amended)

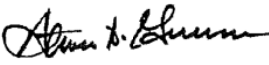
X By receipt of copy as indicated below

Pat Lundvall, Esq.
Aaron D. Shipley, Esq.
MCDONALD CARANO WILSON, LLP
2300 W. Sahara Ave., Suite 1000
Las Vegas, NV 89102
Attorneys for Defendant


An employee of JIMMERSON HANSEN, P.C.

1 ORDR

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA


CLERK OF THE COURT

4 JAMES WOLFRAM and
5 WALT WILKES,

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

6 Plaintiffs,

Trial Date: October 23, 2013

7 vs.

8 PARDEE HOMES OF NEVADA,

9 Defendant.

10 AND RELATED CLAIMS

11 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

12 On October 23, 2013, this matter came on for bench trial before the Honorable Kerry L.
13 Earley. The Court, having reviewed the record, the testimony of witnesses, the documentary
14 evidence, stipulations of counsel, the papers submitted by the respective parties, and considered the
15 arguments of counsel at trial in this matter, with good cause appearing therefor, the Court now enters
16 the following Findings of Fact and Conclusions of Law. Plaintiffs James Wolfram ("Wolfram") and
17 Walt Wilkes ("Wilkes") (collectively "Plaintiffs") filed this action against defendant Pardee Homes
18 of Nevada ("Pardee") alleging claims for breach of contract, breach of the covenant of good faith
19 and fair dealing, and accounting related to a Commission Agreement entered into on September 1,
20 2004, between Plaintiffs and Pardee (See Second Amended Complaint). As a conditional
21 counterclaim, Pardee alleges against Plaintiffs breach of the covenant of good faith and fair dealing
22 arising from the Commission Agreement.

23 **I. FINDINGS OF FACT**

24 **A. THE PARTIES**

- 25
26
27 1. Plaintiffs James Wolfram and Walt Wilkes have been licensed real estate
28

KERRY L. EARLEY
DISTRICT JUDGE
DEPARTMENT IV

1 brokers working in Southern Nevada and the surrounding area for over 35 years.

2 2. Plaintiff Wolfram previously worked for Award Realty Group. Plaintiff
3 Wilkes previously worked for General Realty Group. In a previous order, the Court ruled that
4 Wolfram and Wilkes were assigned all claims from Award Realty Group and General Realty Group,
5 and, therefore, had standing to assert the claims at issue.

6 3. Defendant Pardee Homes of Nevada ("Pardee") is a Nevada corporation
7 operating as a residential homebuilder constructing homes and other structures in Southern Nevada
8 and elsewhere.

9 4. In the 1990's, Harvey Whittemore, through his then-owned company, Coyote
10 Springs Investment LLC ("CSI") began developing a project to be known as ("Coyote Springs").
11 The project included over 43,000 acres of unimproved real property located north of Las Vegas in
12 the Counties of Clark and Lincoln.

13 5. In 2002, Plaintiffs had begun tracking the status and progress of Coyote
14 Springs located in the Counties of Clark and Lincoln, Nevada.

15 6. By 2002, Plaintiffs had become acquainted with Jon Lash, who was then
16 responsible for land acquisition for Pardee's parent company, Pardee Homes. Plaintiffs had
17 previously worked with Mr. Lash in the pursuit of different real estate transactions, but none were
18 ever consummated prior to the Coyote Springs transaction.

19 7. After learning that Mr. Whittemore had obtained water rights for Coyote
20 Springs, Plaintiffs contacted Mr. Lash and asked if he would be interested in meeting with Mr.
21 Whittemore of CSI, for the purposes of entering into an agreement for the purchase of real property
22 in Coyote Springs. When Mr. Lash agreed, Plaintiffs contacted Mr. Whittemore advising they had a
23 client interested in Coyote Springs and wanted to schedule a meeting.

24 8. Mr. Lash agreed to allow Plaintiffs to represent Pardee as a potential
25 purchaser, and a meeting was scheduled to take place at Pardee's office in Las Vegas. Present at the
26 meeting were Plaintiffs, Mr. Whittemore from CSI, and Mr. Lash and Mr. Klif Andrews from
27 Pardee. While this meeting was introductory in nature, it ultimately resulted in plans to structure a
28

1 deal between Pardee and CSI to develop Coyote Springs after approximately 200 meetings between
2 Pardee and CSI. During the extensive negotiating process, Mr. Whittemore, on behalf of CSI,
3 expressed CSI's decision to only sell certain portions of real estate at Coyote Springs. Pardee made
4 it clear that it only wanted to purchase the land designated as single-family detached production
5 residential ("Production Residential Property") at Coyote Springs. At that time it was understood by
6 Pardee and CSI, that CSI was to maintain ownership and control of all other land at Coyote Springs
7 including land designated as commercial land, multi-family land, the custom lots, the golf courses,
8 the industrial lands, as well as all other development deals at Coyote Springs.

9 9. Plaintiffs only participated in the initial meeting, as Pardee and CSI informed
10 Plaintiffs their participation was not required for any of the negotiations by Pardee to purchase
11 Production Residential Property. As such, Plaintiffs were the procuring cause of Pardee's right to
12 buy Production Residential Property in Coyote Springs from CSI.

13 **B. OPTION AGREEMENT BETWEEN CSI and PARDEE AND COMMISSION**
14 **AGREEMENT**
15

16 10. In or about May 2004, Pardee and CSI entered into a written agreement
17 entitled Option Agreement for the Purchase of Real Property and Joint Escrow Instructions ("Option
18 Agreement"), which set forth the terms of the deal, among many others, concerning Pardee's
19 acquisition of the Production Residential Property from CSI at Coyote Springs.

20 11. Prior to the Commission Agreement at issue in this case being agreed upon
21 between Pardee and Plaintiffs, the Option Agreement was amended twice. First, on July 28, 2004,
22 Pardee and CSI executed the Amendment to Option Agreement for the Purchase of Real Property
23 and Joint Escrow Instructions. Subsequently, on August 31, 2004, Pardee and CSI executed the
24 Amendment No. 2 to Option Agreement for the Purchase of Real Property and Joint Escrow
25 Instructions. (The Option Agreement, along with the subsequent amendments, will be collectively
26 referred to as the "Option Agreement"). Plaintiffs acknowledged receiving the Option Agreement
27 and the two amendments.
28

1 12. At the time of Pardee's and CSI's original negotiations, the land was the
2 rawest of all in terms of land development. No zoning, parceling, mapping, entitlements, permitting,
3 etc., had been accomplished. All of that work had yet to be done. At that time multiple issues were
4 outstanding that would impact the boundaries of any land to be acquired by Pardee from CSI for
5 Production Residential Property. Those issues included, among others, the BLM reconfiguration,
6 Moapa Dace and other wildlife protections, moving a utility corridor from Coyote Springs to federal
7 lands, and the design by Jack Nicklaus of the golf courses. At multiple places in the Option
8 Agreement it was acknowledged by CSI and Pardee that boundaries of various lands would change.

9 13. At the same time Pardee was negotiating with CSI, Pardee was also
10 negotiating with Plaintiffs concerning their finders' fee/commissions. Pardee and Plaintiffs
11 extensively negotiated the Commission Agreement dated September 1, 2004. Plaintiffs were
12 represented by James J. Jimmerson, Esq. throughout those negotiations. Plaintiffs offered edits, and
13 input was accepted into the Commission Agreement under negotiation, with certain of their input
14 accepted by Pardee. The Plaintiffs' and Pardee's obligations to each other were agreed to be set
15 forth within the four corners of the Commission Agreement. Plaintiffs and Pardee acknowledge that
16 the Commission Agreement was an arms-length transaction.

17 14. The Commission Agreement between Plaintiffs and Pardee provided that, in
18 exchange for the procuring services rendered by Plaintiffs, Pardee agreed to (1) pay to Plaintiffs
19 certain commissions for land purchased from CSI, and (2) send Plaintiffs information concerning the
20 real estate purchases made under the Option Agreement and the corresponding commission
21 payments.

22 15. Since Mr. Wolfram and Mr. Wilkes had already performed services for
23 Pardee, the Commission Agreement placed no affirmative obligation on them.

24 16. The Commission Agreement, dated September 1, 2004, was executed by
25 Pardee on September 2, 2004, by Mr. Wolfram on September 6, 2006, and Mr. Wilkes on September
26 4, 2004.

1 17. The Commission Agreement provides for the payment of "broker
2 commission[s]" to Plaintiffs in the event that Pardee approved the transaction during the
3 Contingency Period, equal to the following amounts:

4 (i) Pardee shall pay four percent (4%) of the Purchase Property Price
5 payments made by Pardee pursuant to Paragraph 1 of the Option
6 Agreement up to a maximum of Fifty Million Dollars (\$50,000,000);

7 (ii) Then, Pardee shall pay one and one-half percent (1-1/2%) of the
8 remaining Purchase Property Price payments made by Pardee pursuant
9 to paragraph 1 of the Option Agreement in the aggregate amount of
Sixteen Million Dollars (\$16,000,000); and

10 (iii) Then, with respect to any portion of the Option Property
11 purchased by Pardee pursuant to paragraph 2 of the Option
12 Agreement, Pardee shall pay one and one-half percent (1-1/2%) of the
amount derived by multiplying the number of acres purchased by
Pardee by Forty Thousand Dollars (\$40,000).

13 18. The Commission Agreement states that all of the capitalized terms used in the
14 Commission Agreement shall have the exact meanings set forth in the Option Agreement. Copies of
15 the Option Agreement, the amendments including changes to the Purchase Property Price, and the
16 subsequent Amended and Restated Option Agreement were given to Plaintiffs by Stewart Title
17 Company, the escrow company chosen by Pardee and CSI to handle all of its land transactions.
18 Plaintiffs also acknowledge receiving these documents. However, Amendments 1 through 8 to the
19 Amended and Restated Option Agreement between CSI and Pardee were not provided to Plaintiffs
20 until after this litigation was commenced by Plaintiffs.

21 19. The term "Purchase Property Price" was defined in Amendment No. 2 to the
22 Option Agreement as Eighty-Four Million Dollars (\$84,000,000), which was payable in installments
23 over a period of time. The due dates for commissions' payable under paragraphs i and ii were
24 described in the Commission Agreement as follows:

25 Pardee shall make the first commission payment to you upon the Initial
26 Purchase Closing (which is scheduled to occur thirty (30) days following the
27 Settlement Date) with respect to the aggregate Deposits made prior to that
28 time. Pardee shall make each additional commission payment pursuant to

1 clauses (i) and (ii) above concurrently with the applicable Purchase Property
2 Price payment to Coyote.

3 20. By virtue of Amendment No. 2 increasing the Purchase Property Price from
4 \$66 million to \$84 million, Plaintiffs became entitled to commissions on the increased Purchased
5 Property Price, which they subsequently received.

6 21. Commission payments required under paragraphs i and ii were not dependent
7 upon acreage or location of the lands being acquired, or upon the closing of any land transaction. In
8 sum, when Pardee paid CSI a portion of the Purchase Property Price, under the agreed schedule,
9 then Plaintiffs were also paid their commission. Pardee and CSI anticipated that the Purchase
10 Property would be, and was, cooperatively mapped and entitled before the specific location of any
11 lands designated for single family detached production residential would be transferred by CSI to
12 Pardee.

13 22. The due date for any commissions payable under paragraph iii was described
14 in the Commission Agreement as follows: "Thereafter, Pardee shall make such commission
15 payment pursuant to clause (iii) above concurrently with the close of escrow on Pardee's purchase of
16 the applicable portion of the Option Property; provided, however, that in the event the required
17 Parcel Map creating the applicable Option Parcel has not been recorded as of the scheduled Option
18 Closing, as described in paragraph 9(c) of the Option Agreement, the commission shall be paid into
19 escrow concurrently with Pardee's deposit of the Option Property Price into escrow and the
20 commission shall be paid directly from the proceeds of said Escrow."

21 23. The general term "Option Property" is defined in the Option Agreement as
22 follows: "the remaining portion of the Entire Site which is or becomes designated for single-family
23 detached production residential use, as described below . . . in a number of separate phases (referred
24 to herein collectively as the "Option Parcels" and individually as an "Option Parcel"), upon the
25 terms and conditions hereinafter set forth." The general definition of "Option Property" was never
26 changed by CSI and Pardee in any documents amending either the initial Option Agreement or the
27 subsequent Amended and Restated Option Agreement. The definitions of other capitalized terms
28 found within the Commission Agreement were never changed by CSI and Pardee.

1 24. The Commission Agreement requires Pardee to provide Plaintiffs with
2 notifications and information concerning future transactions between Pardee and CSI under the
3 Option Agreement. Specifically, the Commission Agreement states:

4 Pardee shall provide to each of you a copy of each written option
5 exercise notice given pursuant to paragraph 2 of the Option
6 Agreement, together with information as to the number of acres
7 involved and the scheduled closing date. In addition, Pardee shall
8 keep each of you reasonably informed as to all matters relating to the
9 amount and due dates of your commission payments. (Emphasis
10 Added)

11 25. After executing the Commission Agreement, Plaintiffs never entered into
12 another agreement with Pardee concerning the development of Coyote Springs.

13 26. Pardee's purchase of the "Purchase Property Price" property and any Option
14 Property designated in the future as single family detached production residential lands was a
15 separate and distinct transaction from any other purchases by Pardee from CSI for unrelated property
16 at Coyote Springs.

17 27. The relationship between Pardee and Plaintiffs was such that Plaintiffs
18 reasonably imparted special confidence in Pardee to faithfully inform them of the developments at
19 Coyote Springs which would impact their future commission payments. Pardee and CSI agreed to
20 designate documents relevant to the development of Coyote Springs as confidential. Among said
21 documents were documents relating to the designation of the type of property Pardee was purchasing
22 from CSI during the development of Coyote Springs that were part of a distinct and separate
23 agreement between Pardee and CSI.

24 28. The designation of the type of property Pardee was purchasing from CSI
25 during the development of Coyote Springs was material to Plaintiffs to verify if the commissions
26 they had received were accurate and, if not, what amount they were entitled as further commissions
27 pursuant to the Commission Agreement.

28 29. Pardee should have known that the Plaintiffs needed to have access to
information specifying the designation as to the type of property being purchased by Pardee from
CSI during the development of Coyote Springs to verify the accuracy of their commissions.

1 30. Although certain documents were public record regarding the development of
2 Coyote Springs, the documents referencing internally set land designations for certain land in
3 Coyote Springs were not available to Plaintiffs.

4 **C. PARDEE'S PERFORMANCE UNDER THE COMMISSION AGREEMENT**
5

6 31. Pardee did purchase "Purchase Property Price" property from CSI for
7 \$84,000,000.00. Plaintiffs have been paid in full their commissions on the \$84,000,000.00 Purchase
8 Property Price.

9
10 32. Plaintiffs were informed of the amount and due dates of each commission
11 payment for the Purchase Property Price: first through Stewart Title Company, and then Chicago
12 Title Company, pursuant to the Commission Agreement.

13 33. Under the express terms of the Commission Agreement, pursuant to
14 paragraphs i and ii, these commissions were based solely on the Purchase Property Price for the
15 land, not the number of acres acquired or the location of those acres. Under the Purchase Property
16 formula, they were entitled to a percentage of the Purchase Property Price. There was no benefit or
17 additional commission for additional acreage being purchased if there is no corresponding increase
18 in price.

19 34. Plaintiffs were paid a total of \$2,632,000.00 in commissions pursuant to
20 paragraphs i and ii of the Commission Agreement.

21 35. Pardee did not pay more than 84,000,000.00 as the Purchase Property Price to
22 CSI under the Option Agreement, the Amended and Restated Option Agreement, or any
23 amendments thereto. CSI has never received more than \$84,000,000.00 as payment under the
24 Option Agreement, the Amended and Restated Option Agreement, or any amendments thereto.

25 36. No commission to Plaintiffs is payable under clause (iii) of the Commission
26 Agreement unless the property purchased fell within the definition of Option Property purchased
27 pursuant to paragraph 2 of the Option Agreement.
28

1 Pardee as of the present time has not exercised any options to purchase single
2 family production residential property pursuant to paragraph 2 of the Option Agreement. Therefore,
3 Pardee as of the present time does not owe any commission to Plaintiffs under paragraph iii of the
4 Commission Agreement.

5 37. The other provision of the Commission Agreement alleged by Plaintiffs to
6 have been breached states as follows:

7 Pardee shall provide to each of you a copy of each written option
8 exercise notice given pursuant to paragraph 2 of the Option
9 Agreement, together with information as to the number of acres
10 involved and the scheduled closing date. In addition, Pardee shall
11 keep each of you reasonably informed as to all matters relating to the
12 amount and due dates of your commission payments.

13 38. Pardee did provide information relating to the amount and due dates on
14 Plaintiffs' commission payments under paragraphs i and ii. Specifically, Plaintiffs were paid their
15 first commission at the Initial Purchase Closing and then each commission thereafter concurrently
16 with each Purchase Property Price payment made by Pardee to CSI pursuant to Amendment No. 2 to
17 the Option Agreement as was required by the Commission Agreement. Each commission payment
18 was made pursuant to an Order to Pay Commission to Broker prepared by Stewart Title (later
19 Chicago Title) which contained information including the date, escrow number, name of title
20 company, percentage of commission to be paid, to whom and the split between Plaintiffs. Each
21 Order to Pay Commission to Broker was signed by Pardee and sent to either Plaintiffs brokerage
22 firms or Plaintiffs directly. Each commission check received by Plaintiffs contained the amount,
23 escrow number, payee and payer, along with a memo explaining how the amount was determined.
24 When Plaintiffs were overpaid commissions, a letter was sent by Pardee explaining the overpayment
25 and how the amount and due dates to compensate for the overpayment would be handled. An
26 Amended Order to Pay Commission to Broker reflecting these changes was sent to and signed by
27 each Plaintiff. A letter was sent by Pardee to Plaintiffs informing them when Pardee made its last
28 payment of the Purchase Property Price to CSI.

39. However, from the documents in Plaintiffs' possession provided by Pardee,

1 Plaintiffs were unable to verify the accuracy of any commission payments that may have been due
2 and owing pursuant to paragraph iii of the Commission Agreement. The documents in Plaintiffs'
3 possession included the Option Agreement and Amendments No. 1 and No. 2 to the Option
4 Agreement, the Amended and Restated Option Agreement, various Orders to Pay Commissions, and
5 their commission payments. Amendments Nos. 1 through 8 to the Amended Restated Option
6 Agreement were not provided to Plaintiffs until after commencement of this litigation.

7 40. When Plaintiffs began requesting information regarding Pardee's land
8 acquisitions from CSI, the only information provided by Pardee was the location of the Purchase
9 Property purchased for the Purchase Property Price from CSI. All information provided was limited
10 to the single family production property acquisitions. Pardee informed the Plaintiffs that it had
11 purchased from CSI additional property at the Coyote Springs development, but took the position
12 that any documentation regarding the designations of the use of the additionally purchased property
13 was confidential and would not be provided to Plaintiffs. Interestingly, Pardee had already provided
14 to Plaintiffs the initial Option Agreement, Amendments No. 1 and 2 and the Amended Restated
15 Option Agreement, which were also confidential documents between Pardee and CSI.

16 41. Although Pardee co-developed with CSI a separate land transaction
17 agreement for the acquisition of lands designated for other uses than single family detached
18 production residential lots, Pardee had a separate duty to Plaintiffs pursuant to the Commission
19 Agreement to provide information so Plaintiffs could verify the accuracy of their commission
20 payments.

21 42. Without access to the information regarding the type of land designation that
22 was purchased by Pardee as part of the separate land transaction with CSI, Plaintiffs were not
23 reasonably informed as to all matters relating to the amount of their commission payments as they
24 could not verify the accuracy of their commission payments.

25 43. Although the complete documentation when provided in this litigation
26 verified that Plaintiffs were not due any further commissions at this time for the additional purchases
27 of land by Pardee, Pardee still had a duty to provide sufficient information regarding the designation
28

1 of the type of land that had been purchased to Plaintiffs. Plaintiff Wolfram attempted through public
2 records to ascertain information regarding the additional lands, but he was unable to verify the
3 required information of the land use designations.

4 44. Plaintiffs have also contended that they are entitled to a commission if Pardee
5 re-designates any of its land purchased from CSI to single family production residential property.
6 Plaintiffs are not entitled to commissions on any re-designation of lands by Pardee pursuant to the
7 Commission Agreement.

8 II. CONCLUSIONS OF LAW

9 A. PLAINTIFFS' CAUSE OF ACTION FOR BREACH OF CONTRACT

10 1. To sustain a claim for breach of contract, Plaintiffs must establish (1) the
11 existence of a valid contract between Plaintiffs and Defendant; (2) a breach by Defendant, and (3)
12 damages as a result of the breach. *Richardson v. Jones*, 1 Nev. 405, 405 (1865); *Calloway v. City of*
13 *Reno*, 116 Nev. 250, 256, 993 P.3d 1259, 1263 (2000) (*overruled on other grounds by Olson v.*
14 *Richard*, 120 Nev. 240, 241–44, 89 P.3d 31, 31–33 (2004)).

15 2. Contract interpretation strives to discern and give effect to the parties'
16 intended meaning...before an interpreting court can conclusively declare a contract ambiguous or
17 unambiguous, it must consult the context in which the parties exchanged promises. *Galardi v.*
18 *Naples Polaris*, 129 Nev. Adv. Op. 33, 301 P.3d 364, 367 (2013).

19 3. Contractual provisions should be harmonized whenever possible, and
20 construed to reach a reasonable solution. *Eversole v. Sunrise Villas VIII Homeowners Ass'n*, 112
21 Nev. 1255, 1260, 925 P.2d 505, 509 (1996).

22 4. The Commission Letter Agreement constitutes a valid and enforceable
23 contract between Plaintiffs and Defendant.
24
25
26
27
28

1 5. Pardee agreed to pay commissions and provide information to keep Plaintiffs
2 reasonably informed as to all matters relating to the amount and due date of their commissions
3 pursuant to the express terms of the Commission Agreement.

4 6. The language of the Commission Agreement required the payment of
5 commissions under paragraphs i and ii according to percentages of the Purchase Property Price.
6 Undisputedly, those commissions were paid.

7 7. The Commission Agreement also required Pardee to pay commissions on the
8 purchase of Option Property if Pardee exercised its option to purchase Option Property pursuant to
9 paragraph 2 of the Option Agreement.

10 8. Pardee has never exercised any such option.

11 9. Pardee paid Plaintiffs in full and timely commissions on the \$84,000,000.00
12 Purchase Property Price.

13 10. The Purchase Property Price was \$84,000,000.00.

14 11. CSI has not received more than \$84,000,000.00 for the single family detached
15 production residential land acquisition by Pardee from CSI at the Coyote Springs project.

16 12. From the very beginning, CSI and Pardee acknowledged that the specific
17 boundaries of the Purchase Property and Option Property may change, for a variety of reasons.
18 There are many references to the changing boundaries of property at Coyote Springs in Pardee's and
19 CSI's Option Agreement. There are many factors that necessitated those changes, including the
20 BLM configuration, moving the utility corridor, mapping, the subdivision process, the entitlement
21 and permitting processes, the Moapa Dace issue and other wildlife issues, and the design by Jack
22 Nicklaus of the golf courses. There were a number of factors that were out of CSI's and Pardee's
23 control that were expected to change and did change the boundaries and configuration of the
24 Purchase Property. As a result of those boundaries changing, so too did the potential boundaries for
25 Option Property change.

26 13. The Plaintiffs' commissions pursuant to paragraphs i and ii were solely based
27 on the Purchase Property Price, not the acreage acquired by Pardee or its location or its closing.
28

1 Therefore, the change in boundaries had absolutely no impact on the amount or due date of
2 Plaintiffs' commissions.

3 14. Plaintiffs were also entitled to be paid commissions if Pardee exercised
4 option(s) to purchase Option Property pursuant to paragraph 2 of the Option Agreement. To exercise
5 such an option is a multi-step process involving a myriad of written documents. If such an option
6 had been exercised by Pardee those documents would be found in the public record. Since Pardee as
7 of the present time has not exercised any options pursuant to paragraph 2 of the Option Agreement,
8 no commissions are due at the present time to Plaintiffs.

9 15. In addition, the Commission Agreement required Pardee to keep Plaintiffs
10 reasonably informed as to all matters relating to the amount and due dates of Plaintiffs' commission
11 payments.

12 16. Plaintiffs did not receive amendments 1 through 8 to the Amended and
13 Restated Option Agreement. Although those amendments did not change Plaintiffs' commissions
14 due under the Commission Agreement, the information contained in the amendments contained the
15 designation information about the separate land transactions involving multi-family, custom lots,
16 and commercial. This information was needed by Plaintiffs as it was necessary to determine the
17 impact, if any on their commission payments. However, Pardee could have provided the requisite
18 information in various forms other than the amendments. Pardee failed to provide information in any
19 form required by Plaintiffs to determine the accuracy of their commission payments.

20 17. Pardee did not keep Plaintiffs reasonably informed as to all matters relating to
21 the amount of their commission payments that would be due and owing pursuant to the Commission
22 Agreement. Therefore, Pardee breached the Commission Agreement.

23 18. Plaintiffs satisfied any and all of their obligations under the Commission
24 Agreement.

25 19. In order to award consequential damages, the damages claimed for the breach
26 of contract must be foreseeable. See Barnes v. W.U. Tel. Co., 27 Nev. 438, 76 P. 931 (1904). Under
27 the watershed case, Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (1854), foreseeability requires
28

1 that: (1) damages for loss must “fairly and reasonably be considered [as] arising naturally . . . from
2 such breach of contract itself,” and (2) the loss must be “such as may reasonably be supposed to
3 have been in the contemplation of both parties, at the time they made the contract as the probable
4 result of the breach of it.” *See Clark County School District v. Rolling Plains Const., Inc.*, 117 Nev.
5 101, 106, 16 P.3d 1079, 1082 (2001) (disapproved of on other grounds, 117 Nev. 948). Stated
6 another way, the damages claimed for the breach of contract must be foreseeable. *Id.*

7 20. Plaintiffs suffered foreseeable damages due to Defendant’s breach of not
8 keeping Plaintiffs reasonably informed as to all matters relating to the amount due and owing on the
9 Commission Agreement in the form of their time and efforts attempting to obtain the information
10 owed to them pursuant to the Commission Agreement. The testimony by Plaintiff Wolfram was that
11 he expended 80 hours of time to obtain said information by going through public records and
12 contacting different sources. Using a rate of \$75.00 per hour for Mr. Wolfram’s time as a real estate
13 agent, the damages total \$6,000.00.

14 21. Plaintiffs also suffered damages in the form of the attorney’s fees and costs
15 incurred as they were necessary and reasonably foreseeable to obtain the requisite information
16 regarding the land designations of land acquired by Pardee from CSI in the Coyote Development
17 pursuant to the separate transaction between Pardee and CSI. Plaintiffs specifically requested
18 numerous times from Pardee information to determine the land designations of these additional
19 purchases, but to no avail. In fact, Mr. Lash on behalf of Pardee instructed a third party that said
20 information should not be provided. CSI was not able to provide the requisite information due to the
21 confidentiality agreement with Pardee. Plaintiffs had no alternative but to file suit, use the litigation
22 process to obtain the requisite information, and request an equitable remedy from this Court to
23 obtain said information in the future. The above-referenced facts allow this Court to award
24 reasonable attorney’s fees and costs as special damages. *See Liu v. Christopher Homes, LLC*, 103,
25 Nev. Adv. Op. 17, 321 P.3d, 875 (2014); *Sandy Valley Assoc v. Sky Ranch Owners Assoc.*, 117 Nev.
26 948, 35 P.3d 964 (2001).

27 Mr. Jimmerson testified regarding the attorney’s fees and costs to pursue the
28

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 72371

Electronically Filed
~~Feb 28 2018~~ 12:59 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

PARDEE HOMES OF NEVADA

Appellant,

v.

JAMES WOLFRAM and WALT WILKES, et al.

Respondents.

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

JOINT APPENDIX – VOLUME 65 OF 88

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10/24/2012	Declaration of Aaron D. Shipley in Support of Defendant's Motion for Summary Judgment	1	JA000207- JA000211

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07/24/2015	Declaration of John W. Muije, Esq. In Support of Motion for Reconsideration	67	JA010523- JA010581
08/05/2013	Defendant Pardee Homes of Nevada's Response to Plaintiffs' Motions in Limine #1-5; And #20-25	17	JA002815- JA002829
07/22/2013	Defendant's Motion for Partial Summary Judgment	17	JA002772- JA002786
10/24/2012	Defendant's Motion for Summary Judgment	1	JA000063- JA000082
03/01/2013	Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages (MIL #1)	13	JA002145- JA002175
03/01/2013	Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Damages in the Form of Compensation for Time (MIL #2)	13	JA002176- JA002210
11/29/2012	Defendant's Opposition to Plaintiff's Counter Motion for Partial Summary Judgment Re: Real Parties in Interest	13	JA002054- JA002065
04/08/2013	Defendant's Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint	16	JA002471- JA002500
05/10/2013	Defendant's Supplemental Brief in Support of Its Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint	16	JA002652- JA002658
07/08/2015	Errata to Motion to Strike "Judgment", Entered June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59, as Unnecessary and Duplicative Orders of Final Orders Entered on June 25, 2014 and May 13, 2015, and as such, is a Fugitive Document	62	JA009645- JA009652

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07/16/2015	Errata to Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	65	JA010186- JA010202
07/08/2015	Errata to Plaintiffs' Motion Pursuant to NRCp 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015, to Amend the Findings of Fact/Conclusions of Law and Judgment Contained Therein, Specifically Referred to in the Language Included in the Judgment at Page, 2, Lines 8 through 13 and the Judgment at Page 2, Lines 18 through 23 to Delete the Same or Amend the Same to Reflect the True Fact that Plaintiff Prevailed on their Entitlement to the First Claim for Relief for an Accounting, and Damages for their Second Claim for Relief of Breach of Contract, and Their Third Claim for Relief for Breach of the Implied Covenant for Good Faith and Fair Dealing and that Defendant Never Received a Judgment in its form and Against Plaintiffs Whatsoever as Mistakenly Stated Within the Court's Latest "Judgment"	62	JA009653- JA009662
05/13/2015	Findings of Fact and Conclusions of Law and Supplemental Briefing re Future Accounting	49	JA007708- JA007711
06/25/2014	Findings of Fact, Conclusions of Law and Order	48	JA007457- JA007474
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08/24/2015	Minute Order Denying Plaintiff's Motion for Reconsideration, Ex Parte (With Notice) of Application for Order Shortening Time Regarding Stay of Execution and Order Shortening Time Regarding Stay of Execution	67	JA010679
03/21/2013	Motion to File Second Amended Complaint	15	JA002434- JA002461
06/29/2015	Motion to Strike "Judgment", Entered June 15, 2015 Pursuant to N.R.C.P. 52 (B) And N.R.C.P. 59, As Unnecessary and Duplicative Orders of Final Orders Entered on June 25, 2014 And May 13, 2015, And as Such, Is A Fugitive Document	53	JA008328- JA008394
12/08/2015	Notice of Defendant Pardee Homes of Nevada's Non-Reply and Non-Opposition to "Plaintiff's Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees"	69	JA010896- JA010945
10/13/2017	Notice of Entry of Amended Judgment	88	JA014130- JA014143
06/27/2014	Notice of Entry of Findings of Fact, Conclusions of Law and Order	48	JA007475- JA007494
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05/17/2016	Notice of Entry of Judgment	71	JA011392- JA011396
01/10/2017	Notice of Entry of Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion for Attorney's Fees and Costs	86	JA013629- JA013635

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01/10/2017	Notice of Entry of Order and Judgment from August 15, 2016 Hearings Regarding Plaintiff's Motion for Attorney's Fees and Costs	86	JA013622- JA013628
10/25/2013	Notice of Entry of Order Denying Motion for Partial Summary Judgment	31	JA004812- JA004817
07/25/2014	Notice of Entry of Order Granting Motion to Expunge Lis Pendens	48	JA007574- JA007578
06/05/2013	Notice of Entry of Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002665- JA002669
01/13/2017	Notice of Entry of Order on Defendant's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	86	JA013652- JA013656
05/13/2015	Notice of Entry of Order on Findings of Fact and Conclusions of Law and Supplemental Briefing re Future Accounting	49	JA007712- JA007717
07/10/2015	Notice of Entry of Order on Pardee's Emergency Motion to Stay Execution of Judgment; and Ex Parte Order Shortening Time	62	JA009755- JA009758
01/12/2017	Notice of Entry of Order on Plaintiffs' Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60	86	JA013645- JA013648
04/03/2013	Notice of Entry of Order re Order Denying Defendants Motion for Summary Judgment	16	JA002465- JA002470

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03/15/2013	Notice of Entry of Order re Order Granting Plaintiffs Countermotion for Summary Judgment	14	JA002354-JA002358
10/13/2017	Notice of Entry of Order Re: Defendant Pardee Homes of Nevada's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014147-JA014151
12/16/2011	Notice of Entry of Stipulated Confidentiality Agreement and Protective Order	1	JA000040-JA000048
08/30/2012	Notice of Entry of Stipulation and Order to Extend Discovery Deadlines (First Request)	1	JA000055-JA000060
07/14/2017	Notice of Entry of Supplemental Order Regarding Plaintiffs' Entitlement to, and Calculation of, Prejudgment Interest	88	JA014111-JA014117
11/07/2012	Opposition to Defendant's Motion for Summary Judgment and Plaintiffs' Counter Motion for Partial Summary Judgment	2	JA000322-JA000351
07/14/2014	Opposition to Pardee's Motion to Expunge Lis Pendens	48	JA007495-JA007559
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion for Attorney's Fees and Costs	86	JA013619-JA013621
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Defendants Motion to Amend Judgment	86	JA013613-JA013615
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Plaintiff's Motion for Attorney's Fees and Costs	86	JA013616-JA013618
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06/05/2013	Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002662- JA002664
01/12/2017	Order on Defendant's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	86	JA013649- JA013651
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01/12/2017	Order on Plaintiffs' Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60	86	JA013643- JA013644
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10/12/2017	Order Re: Defendant Pardee Homes of Nevada's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014144- JA014146
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09/12/2015	Pardee Homes of Nevada's Consolidated Reply in Support of (1) Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015; and (2) Motion for Attorney's Fees and Costs	68	JA010812- JA010865
12/30/2015	Pardee Homes of Nevada's Consolidated Response to: (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiffs' Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees; and (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	69	JA010946- JA010953
06/01/2016	Pardee Homes of Nevada's Motion to Amend Judgment	72	JA011455- JA011589
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06/27/2016	Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	82	JA013025- JA013170
07/15/2015	Pardee Homes of Nevada's Opposition to Plaintiff's Motion for Attorney's Fees and Costs	62	JA009759- JA009771

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06/30/2016	Pardee Homes of Nevada's Reply in Support of Motion to Amend Judgment; and Opposition to Plaintiffs' Countermotion for Attorney's Fees	82	JA013183-JA013196
07/01/2016	Pardee Homes of Nevada's Reply in Support of Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	82	JA013197-JA013204
03/23/2016	Pardee Homes of Nevada's Response to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders	71	JA011214-JA011270
08/25/2014	Pardee Homes of Nevada's Supplemental Brief Regarding Future Accounting	49	JA007699-JA007707
02/08/2017	Pardee Notice of Appeal	86	JA013657-JA013659
07/08/2015	Pardee's Emergency Motion to Stay Execution of Judgment: and Ex Parte Order Shortening Time	62	JA009663-JA009710
06/06/2016	Pardee's Motion for Attorney's Fees and Costs	72	JA011590-JA011614
05/28/2015	Pardee's Motion for Attorney's Fees and Costs	49	JA007718-JA007734
06/24/2014	Pardee's Motion to Expunge Lis Pendens – section filed under seal	48	JA007411-JA007456

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04/07/2017	Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders	86	JA013660- JA013668
05/10/2017	Pardee's Reply in Support of Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014069- JA014071
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07/08/2015	Pardee's Supplemental Briefing in Support of its Emergency Motion to Stay Execution of Judgment	62	JA009711- JA009733
08/25/2014	Plaintiff's Accounting Brief Pursuant to the court's Order Entered on June 25, 2014	49	JA007647- JA007698
09/12/2016	Plaintiffs' Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016	86	JA013566- JA013590
05/23/2016	Plaintiffs' Memorandum of Costs and Disbursements	71	JA011397- JA011441
06/08/2016	Plaintiffs' Motion for Attorney's Fees and Costs	77	JA012115- JA012182
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07/18/2013	Plaintiffs' Motion in Limine To Permit James J. Jimmerson, Esq. To Testify Concerning Plaintiffs' Attorney's Fees and Costs (MIL #25)	17	JA002732- JA002771
06/29/2015	Plaintiffs' Motion Pursuant to NRCp 52(b) and 59 to Amend The Court's Judgment Entered on June 15, 2015, to Amend the Findings of Fact/conclusions of Law and Judgment Contained Therein, Specifically Referred to in the Language Included in the Judgment at Page 2, Lines 8 Through 13 and the Judgment At Page 2, Lines 18 Through 23 to Delete the Same or Amend The Same to Reflect the True Fact That Plaintiff Prevailed On Their Entitlement to the First Claim for Relief For an Accounting, and Damages for Their Second Claim for Relief of Breach of Contract, and Their Third Claim for Relief for Breach of the Implied Covenant for Good Faith and Fair Dealing and That Defendant Never Received a Judgment in its Form and Against Plaintiffs Whatsoever as Mistakenly Stated Within the Court's Latest "Judgment – sections filed under seal	54-56	JA008395- JA008922
03/14/2016	Plaintiffs' Motion to Settle Two (2) Competing Judgments and Orders	70	JA011168- JA011210
06/21/2016	Plaintiffs' Opposition to Defendant, Pardee Homes of Nevada's, Motion to Amend Judgment and Plaintiffs' Countermotion for Attorneys' Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60	81	JA012813- JA013024
08/06/2013	Plaintiffs Opposition to Defendants Motion for Partial Summary Judgment	17	JA002830- JA002857

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03/20/2013	Plaintiffs Opposition to Defendant's Motion in Limine to Exclude Plaintiffs Claim for Attorney's Fees as an Element of Damages MIL 1	15	JA002359- JA002408
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07/17/2015	Plaintiffs' Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees	65-67	JA010203- JA010481
06/30/2015	Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	57-58	JA008923- JA009109
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05/12/2017	Plaintiffs' Opposition to Pardee's Motion Stay Execution of Judgment and Post-Judgment Orders	88	JA014072- JA014105
07/08/2015	Plaintiffs' Opposition to Pardee's Motion to Retax Costs	60-61	JA009284- JA009644
06/20/2016	Plaintiffs' Opposition to Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	77-79	JA012183- JA012624
11/04/2016	Plaintiffs' Reply Brief in Support of Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016	86	JA013603- JA013612
04/23/2013	Plaintiffs Reply in Further Support of Motion for Leave to File Second Amended Complaint	16	JA002503- JA002526

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01/11/2016	Plaintiffs' Reply to Defendants Consolidated Response to (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiff's Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees And (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	69	JA010954- JA010961
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09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion Pursuant to NRCP 52(b) and NRCP 59 to Amend the Court's Judgment Entered on June 15, 2015	68	JA010768- JA010811
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion to Strike "Judgment" Entered June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59	68	JA010723- JA010767
04/20/2016	Plaintiffs' Reply to Defendant's Response and Supplement to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders	71	JA011271- JA011384

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05/10/2013	Plaintiffs Supplement to Motion for Leave to File a Second Amended Complaint Pursuant to the Courts order on Hearing on April 26, 2013	16	JA002627- JA002651
12/08/2015	Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	68	JA010866- JA010895
09/27/2013	Plaintiffs Supplement to Their Opposition to Defendants Motion for Partial Summary Judgment	19-21	JA002988- JA003203
07/22/2013	Plaintiffs Supplemental Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the Form of Compensation for Time MIL 2	17	JA002787- JA002808
10/25/2013	Plaintiffs Trial Brief Pursuant to EDCR 7.27	31	JA004818- JA004847
06/19/2015	Plaintiffs, James Wolfram and Walt Wilkes' Memorandum of Costs and Disbursements	52	JA008159- JA008191
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01/07/2013	Reply Brief in Support of Defendant's Motion for Summary Judgment	13	JA002081- JA002101
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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
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10/23/2013	Trial Exhibit TT	27	JA004256- JA004262
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Dated this 28th day of February, 2018.

McDONALD CARANO LLP

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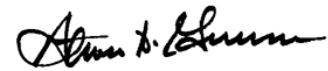
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of McDonald Carano LLP, and on the 28th day of February, 2018, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system:

/s/ Beau Nelson

An Employee of McDonald Carano LLP



CLERK OF THE COURT

1 ERR
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12 *Pardee Homes of Nevada*

DISTRICT COURT
CLARK COUNTY, NEVADA

10 JAMES WOLFRAM,
11 WALT WILKES

Plaintiffs,

12 vs.

13 PARDEE HOMES OF NEVADA,

14 Defendant.

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

ERRATA TO PARDEE HOMES OF
NEVADA'S OPPOSITION TO
PLAINTIFFS' MOTION FOR
ATTORNEY'S FEES AND COSTS

Hearing Date: August 10, 2015
Hearing Time: 9:00 a.m.

17 AND RELATED CLAIMS

18
19
20 Attached hereto is a revised Opposition to Plaintiffs' Motion for Attorneys' Fees
21 and Costs filed by Pardee Homes of Nevada. The revised Opposition adds the
22 language found at pages 11-12, which had been inadvertently deleted from the
23
24
25
26
27
28

1 Opposition filed July 15, 2015. The inadvertent deletion occurred based upon a
2 miscommunication between the author and her assistant.

3 DATED this 16th day of July, 2015.

4 MCDONALD CARANO WILSON LLP

5
6 /s/ Pat Lundvall

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 16th day of July, 2015, I served a true and correct copy of the foregoing **ERRATA TO PARDEE HOMES OF NEVADA'S OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS**, via e-service through Wiznet as utilized in the 8th Judicial District on the following:

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13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 JAMES WOLFRAM,
16 WALT WILKES

17 Plaintiffs,

18 vs.

19 PARDEE HOMES OF NEVADA,

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21 **AND RELATED CLAIMS**

22 **I. INTRODUCTION**

23 While a mish-mash, it appears that Plaintiffs' Motion for Attorney's Fees and
24 Costs (the "Motion") is based on their oft-repeated but baseless assertion that they
25 never sought \$1.8 million in allegedly lost commissions during this litigation. By
26 claiming that this issue never existed, Plaintiffs suggest they were the prevailing party in
27 the lawsuit and are therefore entitled to their attorney's fees and costs based upon the
28 contractual provision found in the parties' Commission Agreement. Notably absent
from the Motion's "statement of facts," however, is any citation to the actual filings,
transcripts and arguments the Court considered during this case.

1 This absence is for good reason because the entire record shows that Plaintiffs
2 consistently and continually claimed \$1.8 million in damages from before they filed the
3 lawsuit up until its conclusion, and reaffirmed that claim in their recent Motion to Strike
4 Judgment. Specifically, Plaintiffs claimed they were owed additional commission
5 payments in the following ways, all of which are verifiable by specific reference to the
6 record:

- 7 • Pre-litigation demand letters from Plaintiffs' counsel to Pardee;
- 8 • Nine different NRCP 16.1 damages disclosures claiming \$1.9 million in
9 damages;
- 10 • Plaintiffs' pre-trial brief;
- 11 • Plaintiffs' opening statement;
- 12 • Plaintiffs' direct and cross-examinations of witnesses;
- 13 • Plaintiffs' closing argument;
- 14 • Plaintiffs' proposed findings of fact and conclusions of law; and
- 15 • Plaintiffs recent Motion to Strike Judgment.

16
17 In each of these, Plaintiffs' core theory was that Pardee had purchased Option Property
18 that translated into additional commissions due under subparagraph (iii) of the
19 Commission Agreement, and that Pardee had re-designated certain land on the Coyote
20 Springs Project. Plaintiffs claimed that when Pardee purchased Option Property and
21 re-designated the land, Pardee owed additional commissions to Plaintiffs under
22 subparagraph (iii) and had failed to pay the same. Plaintiffs also argued that Pardee
23 failed to provide information about the Project, but only because Plaintiffs' believed
24 such information was needed to calculate their purportedly unpaid commissions. Thus,
25 the end in this litigation was always Plaintiffs' claim to \$1.8 million in additional
26 commissions, and the information Plaintiffs demanded was simply the specific
27 information to calculate those commissions.

1 When the Court rejected Plaintiffs' contentions of Option Property purchases or
2 re-designation, and therefore Plaintiffs' claims to any additional commissions in its
3 Findings of Fact and Conclusions of Law, the Court also ended any credible argument
4 that the Plaintiffs were the prevailing party in this litigation. Plaintiffs lost on the most
5 substantial and important issue in the case. Under Nevada law they are not entitled to
6 their attorney's fees and costs pursuant to the attorney fee provision found in the
7 Commission Agreement.¹

8 Plaintiffs also premise their request for attorneys' fees and costs upon an Offer
9 of Judgment they served pre-trial. Small problem: the Offer of Judgment is invalid
10 because it contains an impermissible condition and Plaintiffs failed to beat their Offer of
11 Judgment. Nevada law clearly prohibits a conditional offer of judgment. And most
12 important, compliance with that condition would have subjected Pardee to the \$1.8
13 million in additional commissions sought by Plaintiffs, but rejected by this Court.

14 II. ARGUMENT.

15 A. Legal Standard For Recovery of Attorney's Fees.

16 NRS 18.010(1) states that the fees of an attorney for his or her services are
17 governed by agreement, express or implied, which is not restrained by law. Thus, a
18 district court may award attorney's fees only if authorized to do so by statute, rule or
19 contract, and parties "are free to provide for attorney fees by express contractual
20

21 ¹ Plaintiffs' advance their erroneous claims about the \$1.8 million in lost
22 commissions in five separately filed documents: (1) Motion to Strike, (2) Motion to
23 Amend, (3) Opposition to Pardee's Motion for Attorney's Fees, (4) Opposition to
24 Pardee's Motion to Retax Plaintiffs' Memorandum of Costs, and (5) Plaintiffs' Motion for
Attorney's Fees and Costs. Rather than consolidate some of these filings to ease the
Court's burden, Plaintiffs instead repeat the identical statement of facts, cite and attach
the same exhibits, and make the same legal arguments in each of these filings.

25 Mindful of the Court's busy schedule, Pardee hereby incorporates the statement
26 of facts sections from its Motion for Attorney's Fees and Costs and its separately filed
27 Consolidated Opposition to Plaintiffs' Motion to Amend and Motion to Strike, both of
28 which are attached as Exhibits F and G. Because these filings thoroughly discuss the
facts proving that Plaintiffs continually claimed \$1.8 million in damages during the
litigation, Pardee does not encumber the Court with having to read them again in this
current opposition.

1 provision.” See *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P. 3d 501, 515 (2012). The
2 goal in “interpreting an attorney fees provision, as with all contracts, is to discern the
3 intent of the contracting parties.” *Id.*

4 In considering which party is the prevailing party under contract analysis, the trial
5 judge should always be mindful that “[c]ontract provisions for the payment of attorney’s
6 fees by the losing party provide an incentive to settle and reduce litigation.” *Dimick v.*
7 *Dimick*, 112 Nev. 402, 405, 915 P.2d 254, 256 (1996). Thus if the contract at issue
8 “does not define ‘prevailing party’ . . . , [then] a court may base its attorney fees decision
9 on a pragmatic definition of the extent to which each party has realized its litigation
10 objective.” *Santisas v. Goodin*, 17 Cal. 4th 599, 622 (1998). Such analysis reinforces
11 the settlement objectives of attorney’s fees provisions.

12 The term “prevailing party” is “broadly construed so as to encompass plaintiffs,
13 counterclaimants, and defendants.” *Valley Elec. Ass’n v. Overfield*, 121 Nev. 7, 10, 106
14 P.3d 1198, 1200 (2005). A party prevails if “it succeeds on any significant issue in
15 litigation. . . .” *Cole-Monahan v. Salvo*, No. 62849, 2014 WL 5686290, at *2 (Nev. Nov.
16 3, 2014); see also *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 810 (Fla. 1992)
17 (“[T]he party prevailing on the significant issue in the litigation is the party that should be
18 considered the prevailing party for attorney’s fees.”). This standard requires the trial
19 court to take into account the practical realities of the case. See *Wohlgemuth v.*
20 *Caterpillar Inc.*, 207 Cal. App. 4th 1252, 1264 (2012) (“[T]he trial court should take a
21 pragmatic approach to determine which party has prevailed. That is, the trial court
22 would determine which party succeeded on a practical level, by considering the extent
23 to which each party realized its litigation objectives.”).

24 In determining how to apportion attorney’s fees and costs in cases where neither
25 party was entirely victorious, the trial court has discretion to award fees and costs using
26 its sound judgment. See *Gunderson v. D.R. Horton, Inc.*, 130 Nev. Op. 9, 319 P.3d
27 606, 616 (noting a trial court’s discretion “includes the power to determine questions to
28 which no strict rule of law is applicable but which, from their nature, and the

1 circumstances of the case, are controlled by the personal judgment of the court.”); see
2 also *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 594, 879 P.2d 1180, 1188 (1994)
3 (stating “a trial court must award a reasonable fee, however the method upon which a
4 reasonable fee is determined is subject to the direction of the court.”). The Court is free
5 to consider “unsuccessful claims” by the plaintiff and apportion attorney’s fees to the
6 defendant on such claims. See *Tarkanian*, 110 Nev. at 596, 879 P.2d at 1189
7 (“Tarkanian’s unsuccessful claims have been considered at various points throughout
8 this litigation, and the fees were accordingly reduced to arrive at a reasonable fee
9 award.”).

10 B. Plaintiffs Cannot Recover Their Attorney’s Fees and Costs Under Either
11 the Contract Provision Or Their Offer Of Judgment.

- 12 1. Plaintiffs did not prevail in this litigation under the Commission
13 Agreement, the Court’s Findings of Fact and Conclusions of Law,
14 or the Judgment.

15 Plaintiffs contend that the Court can “simply” look at the Court’s Findings of Fact
16 and Conclusions of Law to see it is “clear” that Plaintiffs are the prevailing party. See
17 Motion at 10:3-6. Given Plaintiffs’ previous attempts to rewrite history in this case, it is
18 understandable why Plaintiffs wish to mis-direct the Court’s field of view. But Plaintiffs’
19 actions throughout the entirety of this case make it clear that they sought \$1.8 million in
20 lost commissions in this litigation and failed to prove them at trial.

21 As one of many examples, Plaintiffs’ trial brief repeatedly discusses Plaintiffs’
22 claims to additional unpaid commissions from Pardee. The Plaintiffs clearly argue that
23 Pardee purchased Option Property on the Project, thereby entitling the Plaintiffs to
24 additional commissions. See Plaintiffs’ Trial Brief at 6:4-6 (“With these facts at the
25 Court’s disposal, the Court will quickly conclude that the land purchased by Pardee is
26 Option Property.”), attached as Exhibit A. The Plaintiffs claimed the Court would “learn
27 that Plaintiffs were not paid their commissions according to the appropriate formulas
28 and that only Pardee [had] the information necessary to properly calculate Plaintiffs’
commissions.” See *id.* at 3:21-23. The Plaintiffs promised “evidence of how Pardee

1 acquired land for which a commission would be owed to Plaintiffs, but that Pardee
2 executed other agreements to avoid paying these commissions.” *Id.* at 3:23-25.
3 Finally, the Plaintiffs argued that they were “entitled to commissions as specified by
4 subparagraph (iii)” of the Commission Agreement.” *Id.* at 13:5. This was because
5 “Pardee still insisted that it had not purchased Option Property and that [the Plaintiffs’]
6 commissions were appropriately calculated and paid,” statements the Plaintiffs argued
7 “were false” and purportedly showed that “Pardee [was] in breach of the Commission
8 Letter Agreement.” *Id.* at 9:16-19.

9 Once trial began, Plaintiffs served Pardee with their Thirteenth Supplemental
10 NRCP 16.1 disclosures between the seventh and eighth day of trial. See Plaintiffs’
11 Thirteenth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents,
12 attached as Exhibit B. In these mid-trial damages disclosures, Plaintiffs were
13 unequivocal in the damages they were seeking: **“Plaintiffs calculate their damages to**
14 **be in excess of \$1,930,000.00 associated with the Defendant’s breach of contract**
15 **and the Defendant’s failure to faithfully meet their obligations to the Plaintiffs.”**
16 See *id.* at 10:17-19 (emphasis added).

17 Plaintiffs’ counsel also told CSI’s former principal during direct examination that
18 counsel was at trial “to talk to [him] about my clients’ entitlement to information and
19 **whether or not that translates to dollars.**” See October 24, 2013 Reporter’s
20 Transcript of Bench Trial Before the Honorable Judge Kerry L. Earley, District Court
21 Judge at 4:19-21 (emphasis added), attached as Exhibit C. Thus, Plaintiffs were only
22 asking for information because they believed it was evidence to the ultimate end,
23 additional commissions from Pardee.

24 At the conclusion of trial, the Plaintiffs’ Proposed Findings of Fact and
25 Conclusions of Law asked the Court to conclude that “Defendant materially breached
26 its obligations under the Commission Letter Agreement by purchasing Option Property
27 and failing to appropriately calculate and pay to Plaintiffs the commission owed under
28 the Option Property Formula . . . [and] [p]urchasing Production Residential Property and

1 failing to appropriately pay and inform Plaintiffs of the purchases.” See Plaintiffs’
2 Proposed Findings of Fact and Conclusion of Law and Decision at 15:25-16:8, attached
3 as Exhibit D. In each of these instances, among others, Plaintiffs were resolute that
4 they were seeking \$1.8 million in additional commissions as damages from Pardee.

5 But the Court entirely denied Plaintiffs’ claims to \$1.8 million in additional
6 commissions. Specifically, the Court found that “the complete documentation . . . in this
7 litigation verified that Plaintiffs were not due any further commissions at this time for the
8 additional purchases of land by Pardee” Findings of Fact and Conclusions of Law
9 at 10:25-27, attached as Exhibit E. The Court further found that Pardee had not
10 purchased any Option Property, and although “Plaintiffs have also contended that they
11 are entitled to a commission if Pardee re-designates any of its land purchases from CSI
12 to single family production residential property[,] Plaintiffs are not entitled to
13 commissions on any re-designations of lands by Pardee pursuant to the Commission
14 Agreement.” *Id.* at 11:4-7. The Court also concluded that “No commission to Plaintiffs
15 is payable under clause (iii) of the Commission Agreement unless the property
16 purchased fell within the definition of Option Property purchased pursuant to paragraph
17 2 of the Option Agreement. Pardee as of the present time has not exercised any
18 options to purchase single family production residential property pursuant to paragraph
19 2 of the Option Agreement.” *Id.* at 8:25-9:4. Thus the Court concluded that “Pardee
20 paid Plaintiffs in full and timely commissions” on the entirety of the land on the Project.
21 *Id.* at 12:11-13.

22 Accordingly, by stepping back and viewing the entirety of the documents and
23 arguments both parties presented in this case, **it is Pardee and not Plaintiffs who**
24 **prevailed on the main issue in the litigation.** Pardee successfully defeated Plaintiffs’
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1 claims to \$1.8 million, which was the most substantial and heavily litigated issue in the
2 case.²

- 3 2. Plaintiffs cannot recover their attorney's fees pursuant to NRCP 68
4 or NRS 17.115 because their Offer of Judgment was invalid and
the Judgment did not exceed their Offer of Judgment.

5 a. *The Offer of Judgment was conditional and therefore invalid.*

6 "An offer of judgment must be unconditional and for a definite amount in order to
7 be valid for the purposes of NRCP 68." *Pombo v. Nevada Apartment Ass'n*, 113 Nev.
8 559, 562 938 P.2d 725, 727 (1997). Here, the Plaintiffs' Offer of Judgment was hardly
9 unconditional. In Paragraphs 1 and 3, Plaintiffs' Offer of Judgment was expressly
10 conditioned upon the parties deeming certain land as "Option Property," which under
11 the offer's plain terms would have entitled Plaintiffs to the substantial additional
12 commissions they claimed Pardee owed. *See generally* Offer of Judgment at 2:7-4:9,
13 attached as Exhibit H. Specifically, the Plaintiffs noted that, as "part and parcel of this
14 Offer of Judgment," Pardee must accept "the following conditions:"

- 15 1. All purchases of real property designated for detached production
16 residential use, which includes, without limitation, all single-family
17 detached production residential lots (which shall include lots of which
18 custom homes are constructed), all land for roadways, utilities,
19 government facilities, including schools and parks (which school and
20 park sites are subject to the provisions of paragraph 7(c) of the Option
21 Agreement for the Purchase of Real Property and Joint Escrow
22 Instructions); open space required or designated for the benefit of the
23 residential development pursuant to the master plan, a habitat
24 conservation plan, or development agreement, drainage ways or any
25 other use associated with or resulting from the development of the
26 Purchase Property and each Option Parcel of the Option Property
made in the future, shall be deemed Option Property under the terms
of the Option Agreement for the Purchase of Real Property and Joint
Escrow Instructions executed May, 2004, Bates stamp numbers
PLTF0001-00800; and Pardee shall provide advanced notice of the
pendency of an escrow, fourteen (14) days prior to close of escrow, to
advise James Wolfram or Walter Wilkes, their heirs, successors or
assigns, of the impending purchase, of the date of close of escrow,

27 ² As discussed in Pardee's Motion for Attorney's Fees, this \$1.8 million
28 represented over 92% of Plaintiffs' total claimed damages.

1 and then to further advise them as to their entitlement to commissions
2 under the terms of the Option Agreement . Notices to Mr. Wilkes and
3 Mr. Wolfram, during their life shall be to them directly, with copies to
4 their counsel, Jimmerson Hansen, P.C., James J. Jimmerson, Esq.
5 and James M. Jimmerson, Esq., and following the passing of either
6 one of the Plaintiffs, to their heirs and assigns to be designated at the
7 appropriate time. Upon request by Mr. Wolfram, Mr. Wilkes, their
8 counsel, or their future designees, Pardee shall provide true and
9 complete copies of executed agreements or contracts concerning the
10 purchase of real property between Pardee Homes of Nevada and
11 Coyote Springs Investment, LLC (or affiliated entities). Mr. Wolfram
12 and Mr. Wilkes and their counsel understand that receipt of the
13 requested documents may require consent to certain confidentiality
14 agreements. Mr. Wolfram, Mr. Wilkes and their counsel agree to be
15 bound by the necessary confidentiality agreements.

16

- 17 3. With respect to any portion of Option Property purchased by Pardee
18 pursuant to this offer of Judgment, Pardee shall pay to Plaintiffs one
19 and one-half percent (1 ½%) of the amount derived by multiplying the
20 number of acres purchased by [Pardee] by Forty Thousand Dollars
21 (\$40,000.00).

22 See Exhibit H, Offer of Judgment at 2:7-4:9. By accepting Plaintiffs' offer, Pardee
23 would not only be agreeing to pay the express \$149,000, but also the implied \$1.8
24 million in additional commissions under Plaintiffs' theory that Plaintiffs claimed as lost
25 commissions. Plaintiffs' offer was accordingly conditional and invalid under *Pombo* for
26 the purposes of NRCP 68 and MRS 17.115.

27 In *Pombo*, the Nevada Supreme Court cited to *Stockton Kenworth v. Mentzer*
28 *Detroit Diesel*, 101 Nev. 400, 404, 705 P.2d 145, 148 (1985) as support for the legal
principle that an offer of judgment must be "unconditional." In *Stockton*, Stockton sued
Mentzer to recover possession of a truck that Mentzer was repairing. 101 Nev. at 401,
705 P.2d at 147. Mentzer issued an offer of judgment offering to buy good title to the
truck for \$10,000. 101 Nev. at 402, 705 P.2d at 147. The Court found that the condition
requiring Stockton to obtain good title to the truck following acceptance of the offer of
judgment was impermissible. 101 Nev. at 404, 705 P.2d at 148. As in *Pombo*, the
condition in *Stockton* meant that Stockton could not resolve this litigation simply by

1 accepting the offer of judgment. As in both *Pombo* and *Stockton*, the conditions 1 and
2 3 from Plaintiffs' Offer of Judgment meant that Pardee could not resolve the litigation
3 simply by accepting the Offer of Judgment.

4 Additionally, *Beattie v. Thomas* counsels that "while the purpose of NRCP 68 is
5 to encourage settlement, it is not to force [parties] unfairly to forego legitimate claims [or
6 defenses]." 99 Nev. 579, 588, 668 P.2d 268, 274 (1983). Pardee had a legitimate
7 defense to Plaintiffs' claims to these additional commissions related to Option Property,
8 and in fact the Court corroborated this defense at the trial's conclusion when it found
9 that "the complete documentation . . . in this litigation verified that Plaintiffs were not
10 due any further commissions at this time for the additional purchases of land by Pardee
11" Exhibit E, Findings and Conclusions at 10:25-27. Thus, Plaintiffs' conditional
12 Offer of Judgment was nothing more than an attempt to force Pardee to unfairly forego
13 a valid defense. After Pardee rejected this unfair offer, Plaintiffs cannot now punish it
14 for the defense ultimately succeeding at trial, and so Plaintiffs are not entitled to any
15 attorney's fees under NRCP 68.

16 *b. The Judgment did not exceed the Offer of Judgment.*

17 Plaintiffs play a shell game with their Offer of Judgment as they attempt to argue
18 they beat their \$149,000 Offer of Judgment at trial, when they clearly did not. Plaintiffs
19 falsely inflate the value of the Judgment such that it exceeds their Offer of Judgment,
20 therefore purportedly entitling them to their attorney's fees under NRCP 68. See
21 *generally* Motion at 11:19-12:6. Specifically, they make this leap by increasing their
22 calculation of the Judgment over \$33,000 in purportedly due and owing prejudgment
23 interest, and also by discounting their Offer of Judgment by \$15,741.20, an amount
24 allegedly reflecting the interest included in the Offer of Judgment. See Motion at 11:6-9
25 ("The final judgment was exclusive of legal interest, and Plaintiffs are entitled to
26 prejudgment interest on that figure, raising the award to a sum in excess of \$175,000 . .
27 . ."); see *also* Exhibit 5 to Plaintiffs' Motion.

1 But again, the record reveals that such calculations are disingenuous at best. To
2 begin, the Judgment expressly excluded any “awards of interest, costs and/or
3 attorney’s fees.” See Judgment at 3:11-12, attached as Exhibit E. Contrary to the
4 Plaintiffs’ unbridled assumption of \$33,000 or more in prejudgment interest, the Court
5 has yet to award them such interest and so they cannot include it in the Judgment’s
6 total for the purposes of NRCP 68 analysis. Moreover, the sum of \$33,000 is premised
7 upon an interest calculation beginning when the complaint was filed. But Plaintiffs’
8 financial award was based almost exclusively on sums incurred after the complaint was
9 filed, so they are not entitled to pre-judgment interest even if requested.

10 Second, the Plaintiffs have provided no basis in law or fact to discount the value
11 of their Offer of Judgment by the amount of interest they hope the Court may eventually
12 award them. Instead, Plaintiffs’ Offer of Judgment is for exactly what it says: \$149,000.
13 With the Judgment being only \$141,500, their recovery did not exceed their offer of
14 \$149,000, and so they have no entitlement to attorney’s fees under NRCP 68.

15 3. Plaintiffs have not shown that their attorneys’ fees are reasonable and
16 supported by proper evidentiary documentation.

17 The Court no doubt recalls that it awarded Plaintiffs \$135,000 in attorney’s fees
18 as special damages at the trial’s conclusion. See Findings and Conclusions, Exhibit D,
19 at 15:2-3. (“The damages for reasonable attorneys’ fees and costs are \$135,000.”)
20 Yet, in Plaintiffs’ Motion, they demand another \$270,517.50, with no indication that they
21 have separated the Court’s previous attorney’s fee award from the amount they are
22 now claiming. Instead, it appears as if they are double counting or double-dipping the
23 time entries and **therefore asking that the Court award them the same attorney’s**
24 **fees twice.**

25 For example, the exhibits attached to Plaintiffs’ Motion provide no distinction
26 between the time entries already awarded by the Court and those that the Plaintiffs are
27 now seeking to recover upon, nor does the Motion itself clarify the issue for the Court
28 such that it could award these newly claimed fees. Exhibit 6 includes a “Computation of

1 Attorney Fees Damages” section but does not illustrate whether the Court previously
2 awarded those fees or whether they are part of Plaintiffs’ new claims. Exhibit 8 includes
3 time entries beginning May 11, 2013, but includes no descriptions as to whether these
4 are new fees or previously awarded fees. Moreover, Plaintiffs make no attempt to show
5 in Exhibit 8 whether the time entries were for the accounting cause of action (which
6 provided the basis for the Court’s prior attorney’s fees award) or for the breach of
7 contract or breach of the implied duty causes of action.

8 Compounding the inherent confusion from Plaintiffs’ Motions and attached
9 exhibits, Plaintiffs’ counsel’s declaration states that Plaintiffs incurred \$484,128.98³ in
10 attorney’s fees and damages, an amount well in excess of their previous attorney’s fee
11 award and the amount they now claim in this Motion.

12 In the absence of any further explanation on these matters, the Court cannot
13 grant Plaintiffs their claimed attorney’s fees because of Nevada Supreme Court
14 precedent. Specifically, the Nevada Supreme Court has held that an award of
15 attorney’s fees must be supported by “substantial evidence” and that such fees must be
16 reasonable and necessary. *Logan v. Abe*, 2015 WL 3533249 at *4, 131 Nev. Adv. Op.
17 31, -- P.3d – (June 4, 2015); see also *Shuette v. Beazer Homes Holdings Corp.*, 121
18 Nev. 837, 124 P.3d 530 (2005). Here, the Plaintiffs have not proven that their newly
19 claimed attorney’s fees are not duplicative of their previously awarded fees, much less
20 by substantial evidence. Without that evidence and explanation, the Court cannot
21 assess the reasonableness of the fees, nor their necessity and must therefore deny
22 them.

23
24 ³ This disclosed figure also belies Plaintiff’s contention that this was only a case
25 about “documents” and not \$1.8 million in additional commissions as “damages.”
26 Under Plaintiff’s latest theory, the Court would have to believe that the Court would
have to believe that Plaintiffs incurred nearly \$500,000 in attorney’s fees solely to
recover information that would not entitle them to additional commissions.

27 Nonsense. Plaintiffs incurred such high legal fees precisely because they were
28 trying to recover \$1.8 million in damages for lost commissions, in an amount that would
make the case economically feasible. The information they sought was simply the
evidence they believed would prove their entitlement to additional commissions.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 15th day of July, 2015, I served a true and correct copy of the foregoing **PARDEE HOMES OF NEVADA'S OPPOSITION TO PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS**, via e-service through Wiznet as utilized in the 8th Judicial District on the following:

James J. Jimmerson
Holly A. Fic
Kim Stewart
JIMMERSON, HANSEN, P.C.
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101

Attorney for Plaintiffs

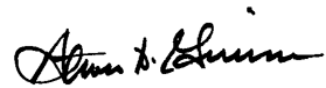
and

John W. Muije
John W. Muije & Assoc.
1840 E. Sahara Ave., #106
Las Vegas, NV 89104

Co-counsel for Plaintiffs

/s/ Sally Wexler
An Employee of McDonald Carano Wilson
LLP

338184



CLERK OF THE COURT

OPP

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Attorneys for Plaintiffs

JAMES WOLFRAM and WALTER D. WILKES
And ANGELA L. LIMBOCKER-WILKES LIVING TRUST,
ANGELA L. LIMBOCKER-WILKES, TRUSTEE

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES WOLFRAM and WALTER D. WILKES)
and ANGELA L. LIMBOCKER-WILKES LIVING)
TRUST, ANGELA L. LIMBOCKER-WILKES,)
TRUSTEE,)

Plaintiffs,)

v.)

PARDEE HOMES OF NEVADA,)

Defendant.)

Case No.: A-10-632338-C

Dept. No. IV

Date of Hearing: 08/05/15

Time of Hearing: 9:00 a.m.

**PLAINTIFFS' OPPOSITION TO PARDEE HOMES OF NEVADA'S MOTION TO
AMEND JUDGMENT AND COUNTERMOTION FOR ATTORNEY'S FEES**

Plaintiffs, JAMES WOLFRAM and ESTATE OF WALT WILKES, DECEASED, by and
through their counsel of record, JAMES J. JIMMERSON, ESQ., of the law firm of JIMMERSON
HANSEN, P.C. hereby submit their Opposition and Countermotion that is based on the pleadings
and papers on file, the documents attached hereto and arguments of counsel at the hearing of this


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Motion and Countermotion. The Plaintiffs further request such other and further relief as the Court deems proper in the premises.

DATED this 17 day of July, 2015.

JIMMERSON HANSEN, P.C.



JAMES J. JIMMERSON, ESQ.
Nevada State Bar No. 000264
415 So. Sixth St., Ste. 100
Las Vegas, NV 89101
Attorney for Plaintiffs

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Pardee Homes of Nevada's ("Pardee") Motion to Amend Judgment regarding the June 15, 2015 Judgment filed by Defendant is untimely and should not be considered by this Court. Rather, Defendant's motion should be stricken for failure to comply with the ten (10) day time limits set forth in NRCP 52(b) and 59(e). While Plaintiffs believe this so-called June 15, 2015 Judgment is a fiction fabricated by Defendant and a fugitive document in which Plaintiffs timely filed a (1) Motion Pursuant to NRCP 52(b) and 59 to Amend The Court's Judgment Entered on June 15, 2015, et al. and (2) Motion to Strike "Judgment," Entered June 15, 2015 et al., on June 29, 2015, Defendant is untimely in its current motion procedurally and substantially regarding its amendment of the Court's Finding of Facts and Conclusions of Law, and Order filed June 25, 2014 ("FFCLO").

Defendant was the drafter of this alleged "Judgment," which they drafted during May, 2015 and submitted to the Court for signature. *See* Notice of Entry of Judgment, attached hereto as Exhibit "1," page 3 of Judgment, line 13. Said Judgment was signed by the Court on June 3, 2015, yet not filed for eight (8) judicial days. Notice of Entry thereupon was filed on June 15, 2015, with actual notice to both parties on June 15, 2015, and therefore, the ten (10) day time limitations for NRCP 52 and 59 began to toll. Thus, Defendant had more than sufficient and adequate time within which to contemplate and timely submit a motion to amend a judgment, by June 29, 2015.¹ By Defendant's own statements, claiming "[p]ursuant to NRCP 52(b) and 59(e),

¹ Plaintiffs timely filed their motion to amend this Judgment within ten (10) judicial days, having been served on June 15, 2015 with Notice of Entry of the Judgment- the ten (10) judicial days having passed on June 29, 2013. With the Notice of Entry of Judgment, both Plaintiffs and Defendant had only ten (10) judicial days to file any NRCP 52 or 59 motion, or by June 29, 2015 at the latest. Defendant's motion to amend was not filed until July 2, 2015, which is untimely. Since Defendant commenced the time in which the Judgment was entered and notice thereupon, Defendant no longer shall have three (3) days for mailing responsive pleading.

1 defendant...moves the Court to amend its findings and judgment awarding plaintiffs...certain
2 attorney's fees as special damages," this being their only basis to amend, Defendant acknowledges
3 their motion is frivolous as Defendant is beyond the ten (10) day time frames required by NRCPL
4 52(b) and 59(e). In fact they are vexatiously and wrongfully attempting to bootstrap this Court's
5 June 25, 2014 FFCLO, which Defendant FAILED to seek to amend or appeal. *See* June 27, 2014
6 Notice of Entry of Findings of Fact, Conclusions of Law and Order attached hereto as Exhibit "2."
7 The failure to seek to amend or appeal the Court's Order of June 25, 2014, or even the Court's
8 Order of May 13, 2015, render Defendant Pardee's Motion to Amend Judgment devoid of merit.

10 Moreover, a review of the history of this case will show that Defendant has filed four (4)
11 written briefs, opposed by Plaintiffs, regarding the very same arguments they now present, and
12 Defendant has orally argued the same. Thus, this Court has extensively addressed and considered
13 the very same arguments that Defendant's once again attempt to renew, under the guise that the
14 2014 *Liu* case somehow denies this Court the authority to award Plaintiffs their special damages.
15 Outrageously, Defendant does this in the face of this Court's specific findings of fact and
16 conclusion which include and address the Liu case. *Id.* at 14:24-27. *See*, Exhibit "2" attached
17 hereto. As such, Defendant's motion is vexatious, unwarranted and has unnecessarily multiplied
18 the proceedings, requiring sanctions, considering the parties have extensively argued and briefed
19 this matter, which the Court has addressed and decided thereupon in favor of Plaintiffs, and is
20 therefore, moot.

23 A review of the Court's June 25, 2014 FFCLO reveals that as to each of the Plaintiffs'
24 claims within its original Complaint and as amended through its Amended Complaint and
25 ultimately through its second Amended Complaint, this Court determined there was a breach by
26 the Defendant for each of the three (3) claims for relief that were properly pled by Plaintiffs from
27

1 the outset. This case was about gaining information and documents and was conservatively pled
2 by Plaintiffs, who were forced to file a lawsuit only because of the consistent and willful refusal
3 of Defendant to keep Plaintiffs reasonably informed as the Commission Agreement required
4 during the course of Pardee's development of their residential home construction at Coyote
5 Springs.

6
7 The Court will recall that the claims for relief never changed throughout the Complaint,
8 the Amended Complaint, and the Second Amended Complaint. The first count was seeking an
9 accounting by virtue of the superior relationship and knowledge that Pardee had over the Plaintiffs
10 and the information that it had and refused to provide to the Plaintiffs; the second count was for
11 breach of contract for Defendant's failure to provide this information, and the damages that flowed,
12 and within that contract, the breach of the implied covenant and good faith and fair dealing to treat
13 fairly the Plaintiffs with regard to the provision of information to keep them reasonably informed
14 as required by the Commission Agreement between the parties. The Commission Agreement was
15 Exhibit "1" at the time of trial.

16
17 Reading of the Amended Complaint and Second Amended Complaint reveals that this was
18 a case about gaining information and the refusal of the Defendant to keep Plaintiffs reasonably
19 informed which was their contractual obligation. The breach of contract was the failure to keep
20 Plaintiffs so informed. Only if, by virtue of the failure of the Defendant to keep Plaintiffs'
21 reasonably informed, it was discovered that Plaintiffs believed that Defendant had exercised its
22 option to acquire additional land outside of the boundaries of the original takedown of properties,
23 for which was additional commissions may be due. It was a breach of contract for the failure to
24 provide information to ascertain whether in fact additional monies, if any, were due by Defendant
25 to Plaintiffs. Defendant knew this sad reality: It foolishly rejected Plaintiffs' Offer of Judgment
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1 in the principal sum of \$133,761.25, which together with interest from the date of service of the
2 Amended Complaint, February 9, 2011, to the date of service of the Offer of Judgment, April 29,
3 2013, totaled \$149,000.00. By comparison, the Court's final Order granted final Judgment in
4 Plaintiffs' favor for \$141,500.00 plus applicable legal interest, totaling approximately
5 \$187,000.00. *See* Exhibit "2" attached hereto.

6 **II. PROCEDURAL HISTORY AND STATEMENT OF FACTS**

7
8 The case was commenced by Plaintiffs' Complaint filed December 29, 2010. An Amended
9 Complaint was filed on January 14, 2011. The Second Amended Complaint was filed, after
10 permission from the Court was received, on June 6, 2013, a copy of which is attached hereto as
11 Exhibit "3.". All three (3) Complaints were the same in alleging three (3) Claims for Relief as 1.
12 Request for An Accounting due to Defendant's failure to keep the Plaintiffs reasonably informed;
13 2. Defendant's Breach of Contract for failing to keep the Plaintiffs reasonably informed; and 3.
14 Defendant's Breach of the Implied Covenant of Good Faith and Fair Dealing for failing to keep
15 the Plaintiffs reasonably informed.
16

17 The Second Amended Complaint was filed by the Plaintiffs, after being approved by the
18 Court, to specifically identify a portion of Plaintiffs' attorney's fees as direct damages as result of
19 Defendant's failure to keep the Plaintiffs reasonably informed. With respect to said Complaint,
20 on March 21, 2013, Plaintiffs filed a Motion for Leave to File Second Amended Complaint to
21 include their prayer for special damages as follows:
22

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

28 26. As a direct, natural and proximate result of Defendant's breach of contract,
Plaintiffs have been forced to spend a significant amount of time and effort attempting to
get the information owed to them from alternative sources. Plaintiffs have therefore been

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

3 ***

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

10 ***

11 WHEREFORE, Plaintiffs pray as follows:

- 12 1. For the documents promised to them including, but not limited to, an accurate
13 parcel map with Assessor's Parcel numbers, and an accounting of all transfers
14 or title or sales.
- 15 2. For general damages in a sum in excess of \$10,000.00.
- 16 3. For **special damages in a sum in excess of \$10,000.00**.

17 *Id.* (emphasis added).

18 On April 8, 2013, Defendant filed its Opposition to Plaintiffs' Motion for Leave to file a
19 Second Amended Complaint, a copy of which is attached hereto as Exhibit "4." Defendant argued
20 that Plaintiffs were not entitled to an award of attorney's fees as special damages because this was
21 a breach of contract case with a prevailing party attorneys' fees provision, and therefore this case
22 did not fall under the narrow exceptions set forth by *Sandy Valley* and *Horgan*. *Id.* at 6-9. *See also*,
23 *Sandy Valley*, 117 Nev. at 948, 35 P.3d at 964 and *Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982
24 (2007).

25 Further, on March 1, 2013, Defendant filed a Motion in Limine to Exclude Plaintiffs' Claim
26 for Attorneys' Fees as an Element of Damages (MIL#1), a copy of which is attached hereto as
27 Exhibit "5" and a Reply thereto that is attached hereto as Exhibit "6." Defendant's entire argument
28 was based on *Sandy Valley* and *Horgan*. *Id.*

Subsequently, on April 26, 2013, the parties presented "extensive oral argument"

1 addressing Plaintiff's request to plead attorney's fees as special damages. *See* April 26, 2013 Court
2 Minutes attached hereto as Exhibit "7" and May 16, 2013 Court Minutes attached hereto as Exhibit
3 "8." The Court Minutes specifically set forth that Plaintiffs argued "the facts as pled established
4 the necessity for attorney's fees under the provisions of *Sandy Valley*," while Defendant countered
5 that "the claims for attorney's fees were futile, as they were not recoverable." *See* Exhibit "7."
6 The Court ordered the motion be continued to Chamber's Calendar for written decision, following
7 supplemental briefing on the issue of futility and that discovery was reopened "for the limited
8 purpose of obtaining information as to whether the attorney's fees and costs incurred by James J.
9 Jimmerson's firm were special damages..." *Id.*

11 As a result of the April 16, 2013 hearing, the Court allowed the parties to file Supplemental
12 briefs due by May 10, 2013, which the parties complied therewith, and Defendant filed its
13 Supplemental Brief in Support of Its Opposition to Plaintiffs' Motion for Leave to File a Second
14 Amended Complaint, a copy of which is attached hereto as Exhibit "9." Once again, Defendant
15 argued that Plaintiffs were not entitled to award of attorney's fees as special damages under the
16 extremely limited circumstances set forth in *Sandy Valley* and *Horgan*. *Id.*

18 On May 16, 2013, this Court, after considering the extensive oral argument of counsel
19 presented on April 26, 2013, and the May 10, 2013 supplemental briefing by the parties, granted
20 Plaintiffs' motion for leave to file a Second Amended Complaint which included special damages.
21 *See* Exhibit "3" attached hereto. Consistent with the Court Minutes (Exhibit "8"), the Order
22 Granting Plaintiffs' Motion for Leave to File a Second Amended Complaint was filed on June 5,
23 2013, with Notice of Entry thereupon on June 6, 2013, a copy of which is attached hereto as Exhibit
24 "10," that specifically included the following findings:

26 ...The Court ordered at the hearing on April 26, 2013 that discovery is to be reopened for
27 the limited purpose of Defendant obtaining information regarding any alleged attorney's
28

1 fees as special damages....The Court granted Defendant the opportunity to conduct the
2 aforementioned discovery to avoid any prejudice to Defendant.

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

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

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

22 See Exhibit 7, page 2 (emphasis added).

23 The trial proceeded in this matter, and on December 13, 2013, Plaintiffs provided evidence
24 supporting their claim for an award of attorney's fees as special damages. See excerpt of the
25 December 13, 2013 Transcript of Trial Proceedings, Volume I attached hereto as Exhibit "11." In
26 addition to oral testimony, Plaintiffs provided Exhibit 31A (Exhibit "O" at trial), in which
27 Plaintiffs "were trying to present, as part of the plaintiff's case in chief, the damages that would
28 speak to a couple of elements..." *Id.* at 103:19-21. The Court requested clarification of the
highlighted portions of the exhibit in which James J. Jimmerson, Esq. provided testimony that said
highlights supported the first claim for relief for accounting, the second claim for relief for breach
of the implied covenant of good faith and fair dealing, and the third claim for breach of contract
for failure to keep Plaintiffs reasonably informed. *Id.* at 104:5-18. The Court admitted Plaintiffs'

1 Exhibit 31A, Trial Exhibit "O." *Id.* at 105. Mr. Jimmerson presented full testimony, proving
2 entitlement to the award of attorney's fees as special damages, which this Court addressed and
3 considered as relating to Plaintiffs' attorneys' fees totaling "a little over \$135,000." *Id.* at 105-
4 106:12 through 108.

5 Following a three (3) week trial commencing on October 23, 2013 and ending on December
6 13, 2013, the Court took the matter under submission. In the interim, while under submission, the
7 Nevada Supreme Court issued the *Liu vs. Christopher Holmes, LLC* decision. The Court read the
8 *Liu* decision, and concluded its holding that Plaintiff is entitled to include a portion of its attorney
9 fees as money damages. The Court read and understood the holding of *Liu* and found that it
10 supported the Court's decision for granting Plaintiffs' their money damages. The citation to this
11 is found within the Court's FFCLO filed June 25, 2014 at page14, lines 26-27. *See* Exhibit 2. As
12 such, the citing of *Liu* by Defendant as somehow a "new" law is not correct, since the Court, on
13 its own, found *Liu* and considered it, and incorporated it within the Court's FFCLO, filed June 25,
14 2014. The Court can see the desperation and bad faith of Defendant Pardee in its meritless efforts
15 to fabricate a "Judgment" filed on June 15, 2015, and a phony Motion to Amend the Judgment
16 filed untimely upon grounds that lack any merit whatsoever.

17 On June 25, 2014 the Court's FFCLO was entered, with Notice of Entry thereupon having
18 been filed on November 27, 2014. *See* Exhibit "2" attached hereto. The Court found that Defendant
19 had breached its written Commission Letter Agreement of September 1, 2004, by failing to keep
20 the Plaintiffs reasonably informed. Specifically, the Court found that Defendant owed to Plaintiffs
21 an obligation and duty to keep the Plaintiffs reasonably informed with regard to Pardee's purchase
22 of real estate designated for single-family residential use, which the Defendant failed to do. As a
23 result of Defendant's breach of its contract with Plaintiffs, Defendant caused Plaintiffs damages

1 in the total sum of \$141,500.00, composed of \$6,000.00 in research time expended by Plaintiff,
2 James Wolfram, and \$135,500.00 in attorney's fees that the Court awarded as special damages.

3 Specifically included in the FFCLLO, under "Conclusions of Law" was the following:

4 21. Plaintiffs also suffered damages in the form of the attorney's fees and costs incurred
5 as they were necessary and reasonably foreseeable to obtain the requisite information
6 regarding the land designations of land acquired by Pardee from CSI in the Coyote
7 Development pursuant to the separate transaction between Pardee and CSI. Plaintiffs
8 specifically requested numerous times from Pardee information to determine the land
9 designations of these additional purchases, but to no avail. In fact, Mr. Lash on behalf of
10 Pardee instructed a third party that said information should not be provided. CSI was not
11 able to provide the requisite information due to the confidentiality agreement with Pardee.
12 Plaintiffs had no alternative but to file suit, use the litigation process to obtain the requisite
13 information, and request an equitable remedy from this Court to obtain said information in
14 the future. **The above-referenced facts allow this Court to award reasonable attorney's
15 fees and costs as special damages. *See Liu v. Christopher Homes, LLC*, 103, Nev. Adv.
16 Op. 17, 321 P.3d, 875 (2014); *Sandy Valley Assoc v. Sky Ranch Owners Assoc.*, 117 Nev.
17 948, 35 P.3d 964 (2001).**

18 Mr. Jimmerson testified regarding the attorney's fees and costs to pursue the
19 Plaintiffs' claim for acquiring the information from Pardee related to the Plaintiffs'
20 commission amounts based on billings contained in exhibits 31A. The damages for
21 reasonable attorneys' fees and costs are \$135,500.00.

22 *Id.* at 14:14-28 and 15:1-3 (emphasis added).

23 As a result of the Court's conclusions of law, the Court's "Decision" set forth as follows:

24 Now, therefore, in consideration of the Findings of Fact and Conclusions of Law by this
25 Court, IT IS HEREBY ORDERED as follows:

26 1. The Court finds that Defendant Pardee Homes of Nevada is liable to Plaintiffs for
27 breach of contract, breach of the covenant of good faith and fair dealing, and its failure to
28 account to Plaintiffs regarding the information concerning the development of Coyote
Springs because it pertained to Plaintiffs' present and potential future commissions.
Damages are to be awarded to Plaintiffs from Defendant in an amount totaling
\$141,500.00.

2. The Court finds that Plaintiffs are not liable to Defendant for breach of the implied
covenant of good faith and fair dealing. As such, no damages will be awarded to Defendant.

3. The Court orders both parties to provide to the Court within 60 days after entry of
this order supplemental briefs detailing what information should be provided - and under
what circumstances — by Pardee to Plaintiffs consistent with this decision. The Court will
schedule after receiving the supplemental briefs further proceedings to determine what

1 information should be provided by Pardee to Plaintiffs, and their heirs when applicable, as
2 an accounting.

3 *Id.* at 17:23-28, 18:1-9.

4 The above award for \$141,500.00 included the award of special damages with respect to
5 reasonable attorneys' fees and costs in the amount of \$135,500.00, plus \$6,000.00 for Mr.
6 Wolfram's time, in which the Court specifically addressed oral and written evidence regarding the
7 same at trial. With respect to the Court's third Order above, an Order on Findings of Fact and
8 Conclusions of Law and Supplemental Briefing Re Future Accounting ("Supplemental Order"),
9 with Notice of Entry thereupon, was filed on May 13, 2015, a copy of which is attached hereto as
10 Exhibit "12." The Supplemental Order did not change, nor affect the award of special damages in
11 the amount of \$135,500.00. Defendant did not file a motion for reconsideration, nor to amend, or
12 appeal of the Court's final order regarding the June 25, 2014 FFCLO (Exhibit "3") and May 13,
13 2015 Supplemental Order (Exhibit "12").
14

15 **III. LEGAL ARGUMENT:**

16 **A. Defendant Filed Its Motion to Amend Beyond the Ten (10) Days**
17 **Allowed and Therefore Denial for Untimeliness is Proper.**

18 NRCP RULE 52, FINDINGS BY THE COURT; JUDGMENT ON PARTIAL
19 FINDINGS, provides in relevant part as follows:
20

21 (a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the
22 court shall find the facts specially and state separately its conclusions of law thereon and
23 judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory
24 injunctions the court shall similarly set forth the findings of fact and conclusions of law
25 which constitute the grounds of its action. Requests for findings are not necessary for
26 purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due
27 regard shall be given to the opportunity of the trial court to judge the credibility of the
28 witnesses. The findings of a master, to the extent that the court adopts them, shall be
considered as the findings of the court. It will be sufficient if the findings of fact and
conclusions of law are stated orally and recorded in open court following the close of the
evidence or appear in an opinion or memorandum of decision filed by the court. Findings
of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or

1 56 or any other motion except as provided in subdivision (c) of this rule. But an order
2 granting summary judgment shall set forth the undisputed material facts and legal
determinations on which the court granted summary judgment.

3 (b) Amendment. Upon a party's motion filed **not later than 10 days** after service of
4 written notice of entry of judgment, the court may amend its findings or make additional
5 findings and may amend the judgment accordingly. The motion may accompany a motion
6 for a new trial under Rule 59. When findings of fact are made in actions tried without a
7 jury, the sufficiency of the evidence supporting the findings may later be questioned
whether or not in the district court the party raising the question objected to the findings,
moved to amend them, or moved for partial findings.
(emphasis added).

8 NRCP 59, NEW TRIAL; AMENDMENTS OF JUDGMENTS, provides in relevant part
9 as follows:

10
11 (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment
12 shall be filed **no later than 10 days** after service of written notice of entry of the judgment.
(emphasis added).

13 As set forth herein, the Court entered its FFCLO on June 25, 2014 and May 13, 2015 for
14 the Supplement Order. Defendant failed to file a request for reconsideration, nor to amend, nor an
15 appeal of the Court's final orders regarding this case. Defendant cannot, after over a year since
16 this Court determined to award Plaintiff special damages, now claim that this Court erroneously
17 awarded the same as it "is not within one of *Sandy Valley's* or *Liu's* three limited exceptions for
18 awarding fees as special damages." *See* Defendant's Motion, page 7, 9:8-10.

19
20 On June 15, 2015, Defendant filed a "Judgment" which Plaintiffs have contested as
21 fictitious and wrongful; however, should Defendant want to amend this "Judgment" they should
22 have done so by June 29, 2015. Upon the June 15, 2015 filing of the Notice of Entry of Judgment,
23 Plaintiffs received notice thereof while Defendant's already had notice thereof, and the time for
24 the ten (10) day filings of any motions to alter or amend, and/or reconsider began to toll on June
25 15, 2015, with June 29, 2015 being the expiration thereof.
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Moreover, Defendant was well aware of the contents of the Judgment it drafted in May 2015, and therefore, should have had ample time to easily comply with the ten (10) day requirement. Defendant started that ten (10) judicial day rule by service of the Notice of Entry of Judgment period and filing on June 15, 2015. The last day to file any Rule 52 or Rule 59 motion was June 29, 2015. Plaintiffs filed their motion timely on June 29, 2015, while Defendant Pardee did not. It is that simple. See NRCP 54 and 58 and NRCP 6 as follows:

NRCP 54, Judgments; Attorney Fees provides in relevant part as follows:

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Involving Multiple Parties. When multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment, except that where the prayer is for damages in excess of \$10,000 the judgment shall be in such amount as the court shall determine. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

NRCP 58, Entry of Judgment provides as follows:

(a) Judgment. Subject to the provisions of Rule 54(b):

(1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the court shall sign the judgment and the judgment shall be filed by the clerk;

(2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form and sign the judgment, and the judgment shall be filed by the clerk. The court shall designate a party to serve notice of entry of the judgment on the other parties under subdivision (e).

(b) Judgment in Other Cases. Except as provided in subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and **filed with the clerk**.

1 (c) When Judgment Entered. The filing with the clerk of a judgment, signed by the
2 judge, or by the clerk, as the case may be, constitutes the entry of such judgment, and no
3 judgment shall be effective for any purpose until the entry of the same, as hereinbefore
4 provided. The entry of the judgment shall not be delayed for the taxing of costs.

5 (d) Judgment Roll. The judgment, as signed and filed, shall constitute the judgment roll.

6 (e) **Notice of Entry of Judgment. Within 10 days after entry of a judgment or an**
7 **order, the party designated by the court under subdivision (a) shall serve written**
8 **notice of such entry, together with a copy of the judgment or order,** upon each party
9 who is not in default for failure to appear and shall file the notice of entry with the clerk
10 of the court. Any other party, or the court in family law cases, may in addition serve a
11 notice of such entry. Service shall be made in the manner provided in Rule 5(b) for the
12 service of papers. Failure to serve notice of entry does not affect the validity of the
13 judgment, but the judgment may not be executed upon until such notice is served.
14 (emphasis added)

15 Should Defendant disingenuously argue that it had three (3) additional days for mailing
16 under NRCP 6(e), the intent and purpose of NRCP 6(e), was to allow three (3) days mailing for
17 service upon the recipient (Plaintiffs herein), and not to allow additional time for the drafter, party
18 who is in possession and who has actual notice, such as the Defendant as of June 15, 2015,
19 especially considering the Judgment reflects it was drafted in May, 2015. See Exhibit "1," page 3
20 of Judgment, line 13.

21 NRCP 6(e) provides as follows:

22 Additional Time After Service by Mail or Electronic Means. Whenever a party has the
23 right or is required to do some act or take some proceedings within a prescribed period
24 **after the service** of a notice or other paper, other than process, **upon the party** and the
25 notice or paper is **served upon the party** by mail or by electronic means, 3 days shall be
26 added to the prescribed period.

27 Moreover, the counterpart for NRCP (6) for the federal rules is also rule 6 whereby courts
28 have considered the purpose of the three (3) day additional period accordingly as follows:

Further support for the Court's chosen construction of these rules can be found by
considering the **purpose of Rule 6(d)**. By adding three additional days to the response
period of a party required to act following the receipt of a paper served by mail, **Rule 6(e)**
amounts to a legislative presumption that the party is not in receipt of the paper and
lacks notice for three days following the mailing of the paper. His response period
should be computed, as it otherwise would be, from the point of presumed receipt. Thus,

1 the length of the party's ten day response period should be computed, applying the less-
2 than-eleven-day provision of Rule 6(a), separately from the three day period allowed by
3 Rule 6(e). The mailing rule should provide three extra days, in addition to whatever period
the party would otherwise have, to reflect the presumed lapse in notice because of service
by mail.

4 *Nalty v. Nalty Tree Farm*, 654 F. Supp 1315, 9 Fed. R. Serv.3d 839 (S.D. Alabama 1987)

5 **B. Regardless, Defendant's Arguments Have NO Merit, Considering this**
6 **Court Has Previously Extensively Heard These Very Same Arguments**
7 **from Defendant and Disposed of the Same in Favor of Plaintiffs.**

8 The entire basis for Defendant's current wrongful motion to amend is that this Court did
9 not have the opportunity to review and apply the law from a Nevada Supreme Court, to wit, *Liu v.*
10 *Christopher Homes, LLC*, 103, Nev. Adv. Op. 17, 321 P.3d, 875 (2014), that was decided after
11 the trial concluded in this matter. First and foremost, Defendant has provided no authority
12 regarding applicability of case law determined after the closure of trial on this matter; that is, that
13 a subsequent ruling applies retroactively to this matter. Regardless, however, a mere perusal of
14 the FFCLO reveals that this Court did actually address and include the *Liu* case, as the basis for
15 the award of attorney's fees as special damages to Plaintiffs. *See* Exhibit "2," 14:24-27

17 After Defendant had the opportunity to and extensively argued *Sandy Valley* (Exhibits 4-
18 10), the Court specifically set forth in its conclusions of law under the FFCLO that the award of
19 attorney's fees and costs in the amount of \$135,500.00 as special damages was being awarded
20 because "[t]he above-referenced facts allow this Court to award reasonable attorney's fees and
21 costs as special damages. *See Liu v. Christopher Homes, LLC*, 103, Nev. Adv. Op. 17, 321 P.3d,
22 875 (2014); *Sandy Valley Assoc. v. Sky Ranch Owners Assoc.*, 117 Nev. 948, 35 P.3d 964 (2001)."
23 *Id.* (emphasis added). Thus, the Court considered all evidence, extensively litigated throughout
24 this case on the very issue of attorney's fees as special damages, and taking into account the legal
25 authority provided in **BOTH *Sandy Valley* and *Liu***, determined to award Plaintiffs these special
26
27
28