

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

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

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

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

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

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

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

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

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

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

4 *Id.*


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

13 **III. CONCLUSION**

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

20 DATED this 23rd day of April, 2013.

21 JIMMERSON HANSEN, P.C.

22 
23 JAMES J. JIMMERSON, ESQ.
24 Nevada State Bar No. 000264
25 LYNN M. HANSEN, ESQ.
26 Nevada State Bar No. 000244
27 JAMES M. JIMMERSON, ESQ.
28 Nevada State Bar No. 12599
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
Attorneys for Plaintiffs
JAMES WOLFRAM and WALT WILKES

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

CERTIFICATE OF SERVICE

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

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

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

 By receipt of copy as indicated below

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


An employee of JIMMERSON HANSEN, P.C.

Exhibit 1

Exhibit 1

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

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

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

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

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

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

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

Exhibit 2

Exhibit 2

JA010429

James M. Jimmerson, Esq.

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

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

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

Aaron,

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

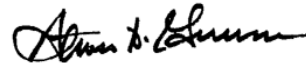
Now that we have a new trial date, would you and Pat want take discovery on certain things, including the damage issues discussed in the recent court papers? With five months between now and trial we have plenty of time to do any cleanup either side feels is necessary (even some expert discovery if you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

Thanks.

-Jim

EXHIBIT “15”

JA010431



CLERK OF THE COURT

OPPS

JIMMERSON HANSEN, P.C.
JAMES J. JIMMERSON, ESQ.
Nevada State Bar No. 000264
LYNN M. HANSEN, ESQ.
Nevada State Bar No. 000244
JAMES M. JIMMERSON, ESQ.
Nevada State Bar No. 12599
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
Telephone: (702) 388-7171
Facsimile: (702) 380-6406
jjj@jimmersonhansen.com
jmj@jimmersonhansen.com

Attorneys for Plaintiff

JAMES WOLFRAM and WALT WILKES

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM and WALT WILKES,)
)
Plaintiffs,)
)
v.)
)
PARDEE HOMES OF NEVADA,)
)
Defendant.)

Case No.: A-10-632338-C
Department No. IV

HEARING DATE: April 26, 2013
HEARING TIME: 8:30 a.m.

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE PLAINTIFFS' CLAIM FOR ATTORNEYS' FEES
AS AN ELEMENT OF DAMAGES (MIL #1)**

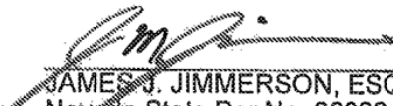
Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through their counsel of record, JAMES J. JIMMERSON, ESQ., LYNN M. HANSEN, ESQ., and JAMES M. JIMMERSON, ESQ. of the law firm of JIMMERSON HANSEN, P.C. hereby submits their Opposition to Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages (MIL #1). This Opposition is based on the pleadings and papers on file, the attached affidavit and exhibits, the Memorandum of

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

1 Points and Authorities attached hereto and arguments of counsel at the hearing of this
2 Motion.

3 DATED this 20th day of March, 2013.
4

5 JIMMERSON HANSEN, P.C.

6 
7 JAMES J. JIMMERSON, ESQ.
8 Nevada State Bar No. 000264
9 LYNN M. HANSEN, ESQ.
10 Nevada State Bar No. 000244
11 JAMES M. JIMMERSON, ESQ.
12 Nevada State Bar No. 012599
13 415 So. Sixth St., Ste. 100
14 Las Vegas, NV 89101
15 Attorneys for Plaintiffs
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO**
2 **DEFENDANT'S MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' CLAIM FOR**
3 **ATTORNEYS' FEES AS AN ELEMENT OF DAMAGES (MIL #1)**

4 **I. INTRODUCTION**

5 After the recent briefing and hearing on the parties' Motions for Summary
6 Judgment, the Court is familiar with the operative facts in this action. Accordingly, only
7 those facts which are relevant to the present motion in limine are provided below.

8 Plaintiffs' and Defendant's commission agreement concerning the notice to be
9 provided and commissions to be paid in connection with certain land transactions between
10 Pardee Homes of Nevada ("Pardee") and Coyote Springs Investment, LLC ("CSI") was
11 reduced to writing in a Commission Letter Agreement dated September 1, 2004. This
12 Commission Letter Agreement was signed by Jon Lash, James Wolfram, and Walt Wilkes.
13 See Exhibit 1, a true and correct copy of the Commission Letter Agreement attached
14 hereto. No other written agreements between Plaintiffs and Defendant have been
15 executed which serve to affect the September 1, 2004 Commission Letter Agreement. It is
16 Defendant's failure to comply with the terms of the Commission Letter Agreement which
17 caused Plaintiffs to institute this action.

18 Plaintiffs have stated claims for breach of contract, breach of the implied covenant
19 of good faith and fair dealing, and accounting. While it is apparent that Plaintiffs have not
20 been paid the commissions as owed to them according to the Option Property formula
21 stated in the Commission Letter Agreement and Pardee has attempted to unilaterally
22 reduce the amount of land Plaintiffs may receive a commission from, it is the effect of
23 Defendant's failure to notify and inform Plaintiffs of the transactions between Pardee and
24 CSI, as required by the Commission Letter Agreement, which is the subject of the present
25 Motion in Limine: Plaintiffs' claim for damages in the form the attorney's fees and costs
26 they have been forced to expend to acquire the documents owed to them under the
27 Commission Letter Agreement.

28 Nevada law permits for the recovery of attorney's fees as damages resulting from a
breach of contract when such fees are pleaded as special damages and are the natural

1 and proximate consequence of the breach. Such is the case for Plaintiffs. The
2 Commission Letter Agreement ensured that Plaintiffs would receive formal notice of the
3 sale of Option Property and would be kept reasonably informed as to all matters relating to
4 the amount and due dates of Plaintiffs' commission payments. Denial of this information
5 has forced Plaintiffs to seek counsel and file suit to acquire the power to compel the
6 production of documents from Pardee and to subpoena documents and records from third
7 parties—power granted only through the judicial process. Hence, the cost of acquiring
8 representation to institute and conduct such process is a natural and foreseeable harm to
9 Plaintiffs for which they are entitled to recoup as damages.¹

10 II. LEGAL ARGUMENT

11 A. Legal Standard for Motions in Limine

12 The Nevada Supreme Court has recognized that District Courts have "broad
13 discretion in determining the admissibility of evidence" both at trial and in deciding pre-trial
14 motions in limine. *Sheehan & Sheehan v. Nelson Malley and Co.*, 121 Nev. 481, 492, 117
15 P.3d 219, 226 (2005); *see also* Nev. R. Civ. P. 16(c)(3); EDCR 2.47. Indeed, "all relevant
16 evidence is admissible at trial unless otherwise excluded by law or the rules of evidence."
17 *FGA, Inc. v. Giglio*, 278 P.3d 490, 499, 128 Nev. Adv. Op. 26 (2012).

18 Likewise, it is an abuse of discretion for the Court to grant a motion in limine without
19 finding that the challenged evidence is inadmissible on all potential grounds. *See Id.*;
20 *State ex rel. Dept. of Highways v. Nevada Aggregates & Asphalt Co.*, 92 Nev. 370, 376,
21 551 P.2d 1096 (1976); *cf. Born v. Eisenman*, 114 Nev. 854, 962 P.2d 1227 (1998).
22 Further, the Court should deny a pre-trial motion in limine without a showing that mere
23 mention of the challenged evidence would be prejudicial to the moving party. *See FGA,*
24 *Inc.*, 278 P.3d at 399; *Leiper v. Margolis*, 111 Nev. 1012, 1014, 899 P.2d 574, 575 (1995);
25 *Sheehan*, 121 Nev. at 492; *see also Kelly v. New West Federal Savings*, 49 Cal. App. 4th

26
27 ¹ As the Court is aware, the Commission Letter Agreement contains an attorney's fees
28 provision, whereby the parties agreed that in the event a cause of action was filed to
enforce a party's rights under the Agreement, the prevailing party would be entitled to its
reasonable attorney's fees. *See Exhibit 1 at 2.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Finally, even if the Court is unsure as to the foreseeability of these damages, the
26 Court must defer its ruling on this issue because foreseeability of damages is generally "a
27 question of fact." *Valladares v. DMJ, Inc.*, 110 Nev. 1291, 1294, 885 P.2d 580, 582 (1994);
28

1 *Daniel v. Hilton Hotels*, 98 Nev. 113, 115, 642 P.2d 1086, 1087 (1982). Therefore, the
2 Court should grant Plaintiffs' Motion for Leave to File a Second Amended Complaint.

3 III. CONCLUSION

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

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

23 ///

24 ///


25 ///

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 386-7171 • Facsimile (702) 387-1157

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

4 DATED this 10th day of May, 2013.

5 JIMMERSON HANSEN, P.C.

6
7 
8 JAMES J. JIMMERSON, ESQ.
9 Nevada State Bar No. 000264
10 LYNN M. HANSEN, ESQ.
11 Nevada State Bar No. 000244
12 JAMES M. JIMMERSON, ESQ.
13 Nevada State Bar No. 12599
14 415 South Sixth Street, Suite 100
15 Las Vegas, Nevada 89101
16 Attorneys for Plaintiffs
17 JAMES WOLFRAM and WALT WILKES
18
19
20
21
22
23
24
25
26
27
28

JIMMERSON HANSEN, P.C.
415 South Sixth Street, Suite 100, Las Vegas, Nevada 89101
Telephone (702) 388-7171 - Facsimile (702) 387-1157

CERTIFICATE OF SERVICE

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

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

 By facsimile, pursuant to EDCR 7.26 (as amended)

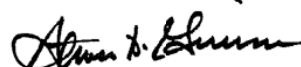
 By receipt of copy as indicated below

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


An employee of JIMMERSON HANSEN, P.C.

EXHIBIT “14”

JA010406



CLERK OF THE COURT

RPLY

JIMMERSON HANSEN, P.C.
JAMES J. JIMMERSON, ESQ.
Nevada State Bar No. 000264
LYNN M. HANSEN, ESQ.
Nevada State Bar No. 000244
JAMES M. JIMMERSON, ESQ.
Nevada State Bar No. 12599
415 South Sixth Street, Suite 100
Las Vegas, Nevada 89101
Telephone: (702) 388-7171
Facsimile: (702) 380-6406
jji@jimmersonhansen.com
jmj@jimmersonhansen.com
Attorneys for Plaintiffs
JAMES WOLFRAM and WALT WILKES

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES WOLFRAM and WALT WILKES,
Plaintiffs,
v.
PARDEE HOMES OF NEVADA,
Defendant.

Case No.: A-10-632338-C
Department No. IV

HEARING DATE: April 26, 2013
HEARING TIME: 8:30 a.m.

**PLAINTIFFS' REPLY IN FURTHER SUPPORT OF THEIR
MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

COME NOW, Plaintiffs, JAMES WOLFRAM and WALT WILKES, by and through
counsel of record, James J. Jimmerson, Lynn M. Hansen, Esq., and James M. Jimmerson,
Esq., of the Law Firm JIMMERSON HANSEN, P.C., and hereby files Plaintiffs' Reply in
Further Support of Their Motion for Leave to File a Second Amended Complaint. This
Reply is based upon the papers and pleadings on file in this case, the exhibits attached to

///

///

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

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

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

3 DATED this 23rd day of April, 2013.

4 JIMMERSON HANSEN, P.C.

5
6 
7 JAMES J. JIMMERSON, ESQ.

8 Nevada State Bar No. 000264

9 LYNN M. HANSEN, ESQ.

10 Nevada State Bar No. 000244

11 JAMES M. JIMMERSON, ESQ.

12 Nevada State Bar No. 12599

13 415 South Sixth Street, Suite 100

14 Las Vegas, Nevada 89101

15 Attorneys for Plaintiffs

16 JAMES WOLFRAM and WALT WILKES

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF**
2 **PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND AMENDED COMPLAINT**

3 **I. INTRODUCTION**

4 Plaintiffs brought this action after years of attempting to acquire documents owed to
5 them by Defendant Pardee Homes of Nevada ("Pardee") under the September 1, 2004
6 Commission Letter Agreement. Despite every effort to avoid litigation, Defendant's
7 insistence on providing Plaintiffs with none of the operative documents concerning the land
8 sales at Coyote Springs—effectively ensuring that Plaintiffs were not kept reasonably
9 informed as to all matters related to the amounts and due dates of their commissions—left
10 Plaintiffs no choice but to file suit, avail themselves of the tools of discovery, and ultimately
11 the power of the Court to compel an accounting to get the needed documents (and if
12 appropriate, any commissions owed to them). Despite these facts, and the pleading of
13 Plaintiffs' entitlement to attorney's fees as damages in the Initial and Amended Complaints,
14 Defendant has taken the position that the current operative pleading insufficiently pleads
15 attorney fee damages, making them unavailable without further amendment. Thus,
16 Plaintiffs submit this Motion for Leave to File a Second Amended Complaint for the Court's
17 consideration.

18 In their original moving brief, Plaintiffs James Wolfram and Walt Wilkes requested
19 that the Court grant leave for them to file a Second Amended Complaint in order to more
20 specifically plead their claims for damages. One of the principal amendments in the
21 proposed Second Amended Complaint was the further articulation of Plaintiffs' claims for
22 damages in the form of their attorney's fees incurred as a result of Defendant's wrongful
23 and improper conduct. As the Court is well aware, this issue has been briefed at length:
24 first in Defendant's Motion for Summary Judgment; then in Defendant's Motion in Limine to
25 Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages ("MIL #1); and
26 now in Plaintiffs' Motion for Leave to File a Second Amended Complaint.¹ Now is the
27 Court's opportunity to decide the issue once and for all after a full and thorough briefing.

28 ¹ Plaintiffs' Motion for Leave to File a Second Amended Complaint is cited herein as "Mot.
at ____." Defendant's Opposition to Plaintiffs' Motion for Leave to File a Second Amended

1 Plaintiffs' Motion for Leave to Amend is based on the text of Nevada Rule of Civil
2 Procedure 15(a)—that when justice so requires, leave to amend a pleading "shall be freely
3 given." N.R.C.P. 15(a). On this basis, and in the absence of any reason, such as undue
4 delay, bad faith, undue prejudice, or futility, justifying denial of the Motion, leave should be
5 freely granted to file the Second Amended Complaint. In further support of their Motion,
6 Plaintiffs incorporate by reference their position as stated in their Opposition to Defendant's
7 MIL #1 regarding the availability of attorney's fees as damages. Mot. at 2. While Plaintiffs
8 still maintain that the Amended Complaint, as pleaded, satisfies the requirements to claim
9 attorney's fees as damages, the Motion is brought in response to Defendant's claim to the
10 contrary at the hearing on the motions for summary judgment.

11 Defendant makes three arguments in its Opposition to the Motion: (1) that granting
12 the Motion would be prejudicial to Defendant since it has not taken discovery on the
13 damages at issue; (2) that such damages are not available to Plaintiffs under *Sandy Valley*
14 *Assoc. v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948, 35 P.3d 964 (2001) and its
15 progeny; and (3) that the proposed Second Amended Complaint fails to properly plead
16 attorney's fees as damages. However, none of these arguments pass muster.

17 Defendant's claim that the Second Amended Complaint would cause undue
18 prejudice is founded on the false premise that Defendant has taken advantage of all
19 possible discovery opportunities. In fact, the record reveals that Defendant has steadfastly
20 refused any additional discovery. From the offer of additional expert discovery at the
21 December 6, 2012 status check, to the most recent offer as of last week to permit
22 discovery into issues raised in this Motion as well as the motions in limine, Defendant has
23 not accepted any of the chances to further investigate the claims in question. Further,
24 Defendant has repeatedly requested continuances of trial while passing over such
25 discovery offers. Defendant cannot now have it both ways. It cannot take the position that
26

27 Complaint is cited herein as "Opp. at ____." Plaintiffs' Opposition to Defendant's Motion in
28 Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages (MIL #1)
is cited herein as "Opp. MIL #1 at ____."

1 the Motion should be denied because Defendant has not taken discovery on matters over
2 which it had the opportunity. The Court must not allow a party to bathe in its own
3 ignorance and later seek an advantage as a result of such willful blindness.

4 Nonetheless, Plaintiffs suggest the reopening of discovery so as to allow for any
5 cleanup on issues either side deems necessary. As the Court is aware, discovery is set to
6 be closed for over ten months until the start of trial. Reopening discovery now with over
7 four months until trial would neutralize any prejudice resulting from the proposed
8 amendment. It also would provide some relief to Plaintiffs, who were ordered a preferential
9 trial setting and yet have had to battle Defendant for their day in court.

10 Defendant's additional arguments concerning the availability of attorney fee
11 damages to Plaintiffs and the adequacy of their pleading in the proposed Second Amended
12 Complaint are just as faulty as Defendant's argument on the prejudicial effect of granting
13 the Motion. As was apparent at the hearing on the motions for summary judgment, if
14 Plaintiffs are successful in establishing that Defendant failed to provide them with the
15 necessary documents—documents only made available through the use of discovery tools
16 and the Court's power to compel an accounting—the natural and foreseeable consequence
17 of Defendant's wrongful actions is Plaintiffs' expenditure of attorney's fees. As such, the
18 fees are appropriately characterized as damages. Further, the proposed amendment
19 satisfies the pleading requirements of N.R.C.P. 9(g). Defendant's suggestion that the
20 absence of allegations containing the total amount of fees expended warrants denial of the
21 Motion is baseless. Defendant provides no caselaw in support of its argument, whereas
22 Plaintiffs follow the standard set forth in *Sandy Valley*. As such, and without any other
23 arguments in opposition to the Motion, the Court should grant the Motion for Leave to
24 Amend.

25 ///

26 ///

27 ///

1 II. LEGAL ARGUMENT

2 A. Defendant Implicitly Concedes that Justice Requires Granting the
3 Motion for Leave to Amend

4 The Motion established that leave to file a Second Amended Complaint should be
5 granted as justice so requires. Specifically, the Motion conclusively demonstrated that (1)
6 Plaintiff brought the Motion at Defendant's insistence; (2) the Motion was not brought in
7 bad faith or for the purposes of undue delay; and (3) upon establishing Defendant's liability,
8 Plaintiffs also would have established the existence of their damages. See Mot. at 2-4.
9 Defendant does not dispute these facts in its Opposition and thereby concedes them.
10 *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009). Defendant's
11 concessions require the Court to grant the Motion.

12 As was stated in the original moving brief, Plaintiffs requested leave to file a Second
13 Amended Complaint only after counsel for Defendant argued at the hearing on the motions
14 for summary judgment that the attorney's fees pled in the Amended Complaint were not
15 properly pled as special damages. Mot. at 1-2. When asked by the Court if Plaintiff must
16 "plead more" under *Sandy Valley*, Defendant's counsel replied, "You have to plead more
17 and you have to plead them as special damages as the portion of relief." *Id.* Despite
18 Plaintiffs' position that the Amended Complaint satisfied the *Sandy Valley* pleading
19 standard, the Motion was brought to address Defendant's concern that under the law,
20 Plaintiffs must "do more." *Id.* Defendant, in not disputing these facts, effectively concedes
21 them. *Ozawa*, 125 Nev. at 563. And, in so doing, Defendant cuts against its own
22 arguments on the alleged prejudice caused by the Motion. If the Court agrees that the
23 current operative pleading sufficiently puts Defendant on notice of Plaintiffs' claims for
24 attorney's fees, any prejudicial effect of the Motion is irrelevant since: (1) Defendant has
25 been on notice of Plaintiffs' damage claims since the commencement of the action; and (2)
26 the Motion is a product of Defendant's own wishes and doing.

27 Additionally, Defendant does not dispute that the Motion was not brought in bad
28 faith or for the purposes of delay. Mot. at 3. Instead, the only arguments forwarded by

1 Defendant in Opposition to the Motion are that the Second Amended Complaint would (1)
2 unduly prejudice Defendant; and (2) would be futile. Opp. at 2-3. The Court, therefore,
3 can limit its consideration of the Motion to these two concerns, prejudice and futility. If the
4 Court finds that the Second Amended Complaint would be neither futile, nor prejudicial, the
5 Court must grant the Motion. Mot. at 3 (citing *Stephens v. S. Nevada Music Co.*, 89 Nev.
6 104, 507 P.2d 138 (1973)).

7 Furthermore, it is undisputed that if Plaintiffs are successful in establishing
8 Defendant's liability for failing to properly inform them, they also succeed in establishing
9 that they have been harmed. Mot. at 4. This is significant because it is an implicit
10 acknowledgment that Plaintiffs' attorney's fees are properly characterized as damages and
11 not simply costs of litigation. Since filing suit was the only way for Plaintiffs to get access
12 to the tools of discovery and retrieve at least some of the documents owed to them before
13 trial, establishing that Defendant was liable for failing to produce documents to Plaintiffs
14 confirms that the legal expenses incurred to gain discovery and prosecute a claim for
15 accounting are one element of damages suffered by Plaintiffs.² The California Court of
16 Appeals in *Burch v. Argus Properties, Inc.*, 92 Cal. App. 3d 128, 132, 154 Cal Rptr. 485
17 (Cal. Ct. App. 1979), held the same, that the failure to account created the need to litigate
18 and warranted the award for attorney's fees. *Id.* ("Here Burch would have known the
19 \$5,000 advanced for costs was not to be returned and would not have needed to litigate
20 this issue if Argus had provided him with the quarterly accounting required under section
21 10146. The fees here were reasonable.").³ Consequently, Plaintiffs' attorney's fees should
22 be properly categorized as damages and not just costs of litigation. Therefore, justice
23 requires that the Motion be granted and that Plaintiffs be permitted leave to file a Second
24 Amended Complaint.

25
26 ² As Plaintiffs stated in their Opposition to MIL #1, Defendant did not produce the
27 agreements reflecting the purchases of Option Property at issue, despite numerous
28 Requests for Production for the same. Instead, it took a subpoena to third parties to
receive those records. See Opp. MIL #1 at 6-7.

³ *Burch* is cited in Plaintiffs' Opposition to MIL #1 at 7.

1 B. Leave to File the Second Amended Complaint does not Prejudice
2 Defendant Pardee

3 Defendant makes the specious argument that the Motion is "untimely" and therefore
4 "highly prejudicial" to Defendant, warranting its denial. Opp. at 5. However, this argument
5 does not survive scrutiny. Defendant has cited no Nevada caselaw in support of its
6 argument that a motion for leave to amend may be denied simply because it was filed after
7 the deadline. In fact, the jurisprudence cited by Defendant in its motion implicitly rejects
8 this position in holding that the Court has broad discretion in deciding the motion, even
9 when it is brought on the eve of trial—well after the scheduling order's deadline. See Opp.
10 at 4 (citing *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000) (denying motion
11 for leave to amend because defendant was unreasonably dilatory,⁴ and not for its failure to
12 be filed before the deadline)). A host of Nevada caselaw closely resembling the present
13 action supports granting the Motion.

14 Further, Defendant's argument that it would be prejudiced by the amendment since
15 it has not taken discovery on Plaintiffs' attorney's fees is equally hollow. Defendant's
16 appeal to its lack of discovery is particularly puzzling since Defendant has constantly
17 rejected offers to take discovery on this issue (and others). If taking discovery on these
18 matters were necessary to avoid what Defendant has repeatedly called an "ambush
19 attack," Defendant should not be able to hide behind its refusal to take that offered
20 discovery and argue that the amendment is prejudicial. Opp. at 4, 6. It would sanction a
21 grave injustice to permit a party to defeat a motion for leave to amend on the grounds that
22 the amendment would open up issues yet to be discovered, when all the while that party
23 rejected the opportunity to take such discovery. Such is the case with Defendant and its
24 position must be rejected.

25
26 ⁴ One of the acceptable reasons to deny a motion for leave to amend pleadings cited by
27 the Nevada Supreme Court in *Stephens v. S. Nevada Music Co.*, 89 Nev. 104, 507 P.2d
28 138 (1973). As went undisputed by Defendant, Plaintiffs were not dilatory in filing the
 Motion as it was filed three weeks after the Court's verbal order requiring the Motion. As
 such, *Kantor's* applicability is limited.

1 1. The Court has Discretion to Grant the Motion even if it was Filed After the
2 Deadline has Passed—Especially since the Current Operative Pleading
3 Properly Placed Defendant on Notice of Plaintiffs' Claims for Attorney's Fees

4 On the issue of timeliness, Defendant would have the Court deny the Motion
5 because "the deadline for all parties to seek leave to amend pleadings or add parties was
6 March 14, 2012," and "discovery closed on October 29, 2012." *Id.* at 5. However, this
7 does not bar the Motion for Leave to Amend. As the Defendant knows (and even states in
8 its Opposition), "the decision to grant or deny a motion to amend lies with the discretion of
9 the district court." *Id.* at 5. Even after a plaintiff closes its case-in-chief, the Court is well
10 within its discretion to grant leave to amend, especially where, as here, "the amendment
11 allowed by the court, and which was to the prayer of the complaint, introduced no new
12 allegations, made no additional parties, did not complicate the suit, nor increase the
13 expense of the litigation, nor did it make new issues of fact or encumber the record."⁵ See
14 *Miller v. Thompson*, 40 Nev. 35, 160 P. 775, 777 (1916).

15 Moreover, not only is the Court permitted to grant leave to amend after the deadline
16 has passed, but the Nevada Supreme Court has reversed a denial of such a motion when
17 the operative complaint sufficiently put Defendant on notice of the issues to be litigated.
18 See *Hall v. SSF, Inc.*, 112 Nev. 1384, 930 P.2d 94 (1996) (reversing district court's denial
19 of amendment of pleadings when allegations in the complaint were "so closely related" to
20 the issues litigated at trial that defendant was properly given notice of them). Where, as
21 here, the Complaint has put Defendant on notice of the attorney's fees to be claimed as
22 damages (pled in both the Initial and Amended Complaints), and has also supplied
23 Defendant with copies of redacted bills, the Court must conclude that the "timeliness" of the
24 proposed amendment is not a barrier to its filing—especially considering that Defendant
25 will not be prejudiced by the proposed Second Amended Complaint.

26 Additionally, Plaintiffs' suggested solution of permitting discovery into these issues
27 would be consistent with the scheduling rules set forth in Nevada Rule of Civil Procedure

28 ⁵ Since the issue of attorney's fees will be addressed either during trial or after the
conclusion of trial, new no issues, costs, or complications could be caused by granting
Plaintiffs' Motion.

1 16.1 and solve any timeliness problems. As the Court knows, N.R.C.P. 16.1(c)(6) provides
2 that the deadline for motions for leave to amend pleadings should be set no later than 90
3 days before the close of discovery. Further, without a court order to the contrary, motions
4 in limine should be filed no later than 45 days before trial. As applied to the present
5 situation, the Court may permit limited discovery for 90 days after the hearing on this
6 Motion set for April 26, 2013. That would set the close of discovery for July 25, 2013.
7 Likewise, motions in limine, if any were necessary, would be due by July 26, 2013, allowing
8 for full briefing before the August 19, 2013 calendar call. Any expert discovery Defendant
9 wanted to conduct could be easily completed within the first 45 days of reopened
10 discovery, while still permitting Plaintiffs to file a rebuttal to any expert disclosure they feel
11 necessary.

12 2. The Proposed Second Amended Complaint is not Unduly Prejudicial

13 The proposed Second Amended Complaint is not unduly prejudicial and justice
14 requires it to be allowed to be filed. As has been discussed above, Plaintiffs have put
15 Defendant on notice of their claims for attorney's fees since the filing of the Initial
16 Complaint and the Amended Complaint. As stated in Plaintiffs' Opposition to MIL #1:

17 Plaintiffs' Amended Complaint states three claims for relief: (1)
18 accounting; (2) breach of contract; and (3) breach of the
19 implied covenant of good faith and fair dealing. Under each of
20 these three claims for relief Plaintiffs specifically state an
21 entitlement to attorney's fees for that particular cause of action.
22 Under the claim for relief for accounting, the Amended
23 Complaint states, "Plaintiffs are also entitled to an award of
24 reasonable attorneys' fees and costs." See Amended
25 Complaint at ¶ 20, a true and correct copy of which is attached
26 hereto as Exhibit 2. Under the claim for relief for breach of
27 contract, the Amended Complaint states, "As a result of
28 Defendant's breach of contract, Plaintiffs have been forced to
bring this matter before the Court. Accordingly, Plaintiffs are
entitled to an award of reasonable attorneys' fees and costs."
Id. at ¶ 25. And under the third claim for relief breach of the
covenant of good faith and fair dealing, "As a direct and
proximate result of Defendant's breach of the covenant of good
faith and fair dealing, Plaintiffs have been forced to bring this
matter before the Court. Accordingly, Plaintiffs are entitled to
an award of reasonable attorneys' fees and costs." *Id.* at ¶ 30.

1 Finally, in the prayer for relief, the Amended Complaint states,
2 "WHEREFORE, Plaintiffs pray as follows:...4. For reasonable
attorney's fees." *Id.*

3 Opp. MIL #1 at 4-5. As such, Defendant was well aware that Plaintiffs were claiming their
4 attorney's fees as damages and thus, any further amendment to their Complaint would not
5 prejudice Pardee.

6 Additionally, Defendant is fully informed as to Plaintiffs' attorney's fees. Defendant
7 has been in possession of Plaintiffs' redacted attorney's fees for over six months and has
8 bills current as of February 2013 (further disclosures will include current billing statements).
9 But still, Defendant constantly tells the Court in its Opposition that it has not had the
10 opportunity to take discovery into these bills and that it has "no witnesses or adequate
11 defense to Plaintiffs' attempts to put forth their attorney's fees as an element of their
12 damages..." Opp. at 6. However, the Court must view this statement with substantial
13 skepticism for multiple reasons.

14 First, Defendant has outright rejected multiple opportunities to take the discovery it
15 now claims are critical to avoid an "unfair ambush attack." *Id.* As the Court will remember,
16 at the December 6, 2012 status check, counsel for Plaintiffs suggested the Court reopen
17 discovery for experts. However, this offer was refused by counsel for Defendant. The
18 exchange was as follows:

19 MR. JIMMERSON: And in that regard, I did want to ask, with
20 the delay of the trial by two months, are we now delaying or
21 slipping other dates, like disclosure of expert witnesses and
22 other items approximately the same time period?

23 MS. LUNDVALL: There would be no agreement, at least from
24 Pardee, that the extension of discovery would be – or the
25 discovery close, which is already closed, would be extended or
26 anything of that nature. The time frames for disclosure of
27 expert witnesses is long, long ago past. We would not agree.
28

1 See Exhibit 1, a true and correct copy of page 9 of the transcript from the December 6,
2 2012 status check attached hereto. If Defendant was concerned over not getting discovery
3 on the attorney's fees, it makes no sense to reject the suggestion of additional discovery.

4 But this is not the only example of Defendant not accepting an offer to allow
5 discovery on these issues. On Tuesday April 16, 2013, counsel for Plaintiffs emailed
6 counsel for Defendant, Pat Lundvall and Aaron Shipley, offering to agree to the taking of
7 discovery on this issue and others. See Exhibit 2, a true and correct copy of an email from
8 James M. Jimmerson Esq. to Aaron Shipley, Esq. and Pat Lundvall, Esq. on April 16, 2013
9 attached hereto. To date, counsel for Defendant has not yet responded to the offer.
10 Again, if the discovery is so important, it is baffling that such offers would go unaccepted.

11 Second, Defendant's Opposition to the Motion for Leave to Amend is the first time
12 that Defendant has claimed that it has been prejudiced by the disclosure of Plaintiffs'
13 attorney's fees information. Defendant did not make this argument in any of the following:
14 (1) the Reply in Support of its Motion for Summary Judgment; (2) the Opposition to
15 Plaintiffs' Countermotion for Partial Summary Judgment; (3) Defendant's Motion to
16 Continue Trial; or (4) Defendant's MIL #1. Considering that Defendant is asking the Court
17 to exclude evidence of Plaintiffs' attorney's fees as an element of damages, it is puzzling
18 that Pardee would not argue that Plaintiffs' disclosures were prejudicial. The only
19 conclusion the Court can draw from Defendant's conspicuous silence is that the proposed
20 Second Amended Complaint would not be unduly prejudicial and thus it must grant the
21 Motion.

22 Finally, if Defendant believes that it needs the discovery, Plaintiffs are still offering
23 the discovery Defendant seeks. The timeline suggested above would allow for any and all
24 discovery the parties may believe they need. It would also eliminate any prejudice from the
25 proposed Second Amended Complaint. Should the Court find such a solution attractive, it
26 would have Plaintiffs' full support, especially since otherwise discovery will have been
27 closed for over ten months once trial begins.
28

1 C. The Proposed Second Amended Complaint Satisfies the Pleading
2 Requirements under *Sandy Valley* and the Nevada Rules of Civil
3 Procedure

4 Plaintiffs' proposed Second Amended Complaint pleads the claims for attorney's
5 fees consistent with *Sandy Valley* and Nevada Rules of Civil Procedure 8 and 9. Defendant
6 counters this position by making a two-pronged argument that the proposed amendment is
7 futile under Nevada law. First, Defendant once again argues that Nevada law does not
8 permit Plaintiffs to claim their attorney's fees as damages, citing to *Sandy Valley* and
9 *Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007). Opp. at 6-9. Second, the
10 Opposition argues that the proposed amendment fails to plead special damages with the
11 requisite specificity and thus would be futile. *Id.* at 9-10. Both of these claims lack merit.

12 1. Plaintiffs' Claims for Attorney's Fees are Proper under *Sandy Valley* and its
13 Progeny

14 Plaintiffs' attorney's fees are compensable damages and are not simply costs of
15 litigation to be reimbursed in post-trial proceedings. As the Court knows, the Nevada
16 Supreme Court set forth the requirements for claiming attorney's fees as damages in
17 *Sandy Valley*. While the holding in *Sandy Valley* regarding the availability of attorney's
18 fees as damages for cases involving the removal of clouds upon title and slander of title
19 was clarified in *Horgan*, *Sandy Valley* still remains, as Defendant states, "the seminal case
20 on this particular issue." Opp. at 6. And it is the analysis in *Sandy Valley*, which confirms
21 the propriety of Plaintiff's damage claims.

22 *Sandy Valley*'s requirements for properly stating a claim for attorney's fees as
23 damages are straightforward: "[W]hen attorney fees are considered as an element of
24 damages, they must be the natural and proximate consequence of the injurious conduct."
25 *Sandy Valley*, 117 Nev. at 957. However, satisfying these requirements is not an easy
26 task. The court observed:

27 As a practical matter, attorney fees are rarely awarded as
28 damages simply because parties have a difficult time
demonstrating that the fees were proximately and necessarily
caused by the actions of the opposing party and that the fees
were a reasonably foreseeable consequence of the breach or
conduct. Because parties always know lawsuits are possible
when disputes arise, the mere fact that a party was forced to

1 file or defend a lawsuit is insufficient to support an award of
attorney fees as damages.

2 *Id.* This is why attorney's fees are awarded only in "limited circumstances" and why the
3 availability of attorney's fees as damages has been considered "a rather narrow exception
4 to the rule prohibiting attorney fees awards absent express authorization." Opp. at 7.

5 The Opposition is quick to cite to Nevada decisions confirming the limited
6 availability of the requested relief, but it is less than swift in explaining the basis for such
7 holdings—no doubt hoping that the Court would fail to notice that a motion for leave to
8 amend is not the ideal device to test the availability of attorney's fees as damages. Indeed,
9 *Sandy Valley* is clear that once a party properly pleads a claim for attorney's fees as
10 damages, a court may only deny such an award upon hearing evidence and rendering a
11 decision as to whether the fees were "proximately and necessarily caused by the actions of
12 the opposing party" and if "the fees were a reasonably foreseeable consequence of the
13 breach of conduct." *Sandy Valley*, 117 Nev. at 957. It is, in no uncertain terms, a fact-
14 intensive endeavor and not proper for the present Motion.⁶

15 However, Defendant mistakenly argues that the Motion should be denied because
16 Plaintiffs' damage claims can hardly be "considered a reasonably foreseeable and
17 proximate consequence of the Commission Agreement." Opp. at 8. In support, Defendant
18 erroneously states that (1) Plaintiffs concede that they have been paid all of the
19 commissions owed to them; and (2) that Plaintiffs only claim is for Defendant's failure to
20 produce documents "pertaining to option exercises that have never transpired." *Id.*
21 Neither of these claims is true. As to the alleged concession of commission payments, in
22 their Opposition to MIL #1, Plaintiffs state to the contrary, that, "it is apparent that Plaintiffs
23 have not been paid the commissions as owed to them according to the Option Property
24 formula stated in the Commission Letter Agreement..." Opp. MIL #1 at 1. And on the
25 issue of Plaintiffs' claims to records and documents concerning the sales of real property,

26
27 ⁶ This is one of the reasons why *Sandy Valley*, *Horgan*, *Reyburn*, and *Shuette* (the four
28 cases cited by Defendant in its Opposition) were all opinions on the propriety of the award
decided after trial, and were not cases testing the adequacy of damage claims in a motion
to dismiss.

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

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

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

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

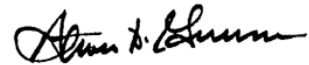
26 ⁸ Furthermore, the Court has already determined that there exists a genuine issue of
27 material fact as to whether Pardee purchased Option Property and breached the
28 Commission Letter Agreement. Defendant's appeal to the merits of the action when the
Court has ordered that they are in dispute is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

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

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

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

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



CLERK OF THE COURT

1 **NEOJ**
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*

DISTRICT COURT

CLARK COUNTY, NEVADA

13 JAMES WOLFRAM,
14 WALT WILKES

15 Plaintiffs,

16 vs.

17 PARDEE HOMES OF NEVADA,

18 Defendant.

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

**NOTICE OF ENTRY OF
ORDER ON FINDINGS OF
FACT AND CONCLUSIONS OF
LAW AND SUPPLEMENTAL
BRIEFING RE FUTURE
ACCOUNTING**

19 PLEASE TAKE NOTICE that an **ORDER ON FINDINGS OF FACT AND**
20 **CONCLUSIONS OF LAW AND SUPPLEMENTAL BRIEFING RE FUTURE**
21 **ACCOUNTING** was entered in the above-referenced case on the 20th day of April,
22 2015, a copy of which is attached hereto.

23 DATED this 13th day of May, 2014.

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
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

CERTIFICATE OF SERVICE

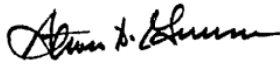
I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on this 13th day of May, 2015, I served a true and correct copy of the **NOTICE OF ENTRY OF ORDER ON FINDINGS OF FACT AND CONCLUSIONS OF LAW AND SUPPLEMENTAL BRIEFING RE FUTURE ACCOUNTING** via Wiznet electronic service as 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

334032.1

JA010375



CLERK OF THE COURT

1 **ORDR**
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*

DISTRICT COURT
CLARK COUNTY, NEVADA

10 JAMES WOLFRAM,
11 WALT WILKES

Plaintiffs,

vs.

14 PARDEE HOMES OF NEVADA,

Defendant.

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

**ORDER ON FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND
SUPPLEMENTAL BRIEFING RE
FUTURE ACCOUNTING**

17 AND RELATED CLAIMS

19 On October 23, 2013, the above-referenced matter came on for bench trial
20 before the Honorable Judge Kerry Earley. The Court, having reviewed the record,
21 testimony of witnesses, the documentary evidence, stipulations of counsel, the papers
22 submitted by the respective parties, and considered the arguments of counsel at trial in
23 this matter, entered Findings of Fact and Conclusions of Law (the "Decision") on June
24 25, 2014. That Decision is hereby incorporated into this Order.

25 In the Decision, the Court ordered both parties to provide the Court with
26 supplemental briefs detailing information the Defendant should provide to the Plaintiffs
27 consistent with the Court's Decision. The parties complied with the Court's order, as
28 the Plaintiffs submitted Plaintiffs' Accounting Brief and the Defendant submitted Pardee

 **McDONALD-CARANO-WILSON**
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
PO BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

1 Homes of Nevada's Supplemental Brief Regarding Future Accounting as well as a
2 Notice of Submission. On February 10, 2015, the Court issued a minute order
3 reflecting its decision on the supplemental briefing.

4 Now, having considered the parties' briefings, any arguments by counsel
5 presented in support of the same, and good cause appearing therefore, the Court
6 decides the submitted issues as follows:

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendant Pardee
8 Homes of Nevada or its successors in interest and/or assigns (hereinafter collectively
9 referred to as "Pardee") shall provide to Plaintiffs an affidavit or unsworn declaration in
10 lieu thereof pursuant to NRS 53.045 executed under penalty of perjury by a corporate
11 representative from Weyerhaeuser NR Company ("WNR") acknowledging and
12 confirming the representations contained in Pat Lundvall's letter dated August 5, 2014,
13 regarding the transactions which resulted in Pardee's rights and obligations under the
14 Commission Agreement being assigned/transferred to WNR.

15 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that
16 Pardee shall provide to Plaintiffs and their successors and/or assigns all future
17 amendments, if any, to the Amended and Restated Option Agreement dated March 28,
18 2005. The documents will be designated CONFIDENTIAL pursuant to the protective
19 order in the above-referenced matter.

20 IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that, in
21 compliance with the Court's Decision, Pardee provide the following to Plaintiffs in the
22 future to keep them reasonably informed pursuant to the Commission Agreement:

- 23 1. Within fourteen (14) days of the relevant event described below, Pardee shall
24 provide Plaintiffs with courtesy copies of the following:

- a. All publicly-recorded documents related to any transaction involving Pardee's purchase of Option Property¹ from CSI;
 - b. 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;
 - c. A parcel map which reflects the exact location of the related Option Property, if one is available;
 - d. Documents that reflect the purchase price of the Option Property, along with a breakdown of the calculation of commission owed pursuant to paragraph (iii) of the Commission Agreement; and
 - e. Pardee shall notify Plaintiffs which escrow company will handle any Option Property purchases.
2. If there is a purchase of Option Property, Pardee shall pay into escrow any commissions owed to Plaintiffs concurrently with Pardee's deposit of the Option Property Price.
 3. If the Option Agreement is terminated, Pardee shall provide notice thereof to Plaintiffs within fourteen (14) days of the effective date of the termination.
 4. Plaintiffs shall notify counsel for Pardee and WNR of the name and address of the person or entity that should receive notice of the foregoing information and documents.

DATED this 20th day of April, 2015.


DISTRICT COURT JUDGE
upk


¹ Any capitalized term in this Order referring to the Amended and Restated Option Agreement dated March 28, 2005 will have the same meaning as in the Amended and Restated Option Agreement or any amendments thereto.

McDONALD-CARANO-WILSON²

100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89505-2670
PHONE 775-788-2000 • FAX 775-788-2020

Submitted by:

McDONALD CARANO WILSON LLP



PAT LUNDVALL (NBSN #3761)

RORY T. KAY (NSB #12416)

2300 West Sahara Avenue, Suite 1200

Las Vegas, Nevada 89102

Attorneys for Pardee Homes of Nevada

Reviewed and approved by:

JIMMERSON HANSEN P.C.



JAMES J. JIMMERSON (NSB #00264)

LYNN M. HANSEN (NSB #00244)

BURAK S. AHMED (NSB #12547)

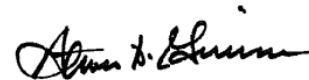
2300 West Sahara Avenue, Suite 1200

Las Vegas, Nevada 89102

Attorneys for Pardee Homes of Nevada

EXHIBIT “13”

JA010380



CLERK OF THE COURT

1 SUPP

2 JAMES J. JIMMERSON, ESQ.

3 Nevada Bar No.: 00264

4 LYNN M. HANSEN, ESQ.

5 Nevada Bar No.: 00244

6 JAMES M. JIMMERSON, ESQ.

7 Nevada Bar No.: 12599

8 JIMMERSON HANSEN, P.C.

9 415 South 6th Street, Suite 100

10 Las Vegas, Nevada 89101

11 Tel No.: (702) 388-7171

12 Fax No.: (702) 388-6406

13 lmh@jimmersonhansen.com

14 jmj@jimmersonhansen.com

15 Attorneys for Plaintiffs

16 DISTRICT COURT

17 CLARK COUNTY, NEVADA

18 JAMES WOLFRAM and
19 WALT WILKES,

20 Plaintiffs,

21 vs.

22 PARDEE HOMES OF NEVADA,

23 Defendant.

CASE NO.: A-10-632338-C

DEPT. NO.: IV

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

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

///


///

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

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

3 DATED this 10th day of May, 2013.

4 JIMMERSON HANSEN, P.C.

5
6 
7 JAMES J. JIMMERSON, ESQ.
8 Nevada State Bar No. 000264
9 LYNN M. HANSEN, ESQ.
10 Nevada State Bar No. 000244
11 JAMES M. JIMMERSON, ESQ.
12 Nevada State Bar No. 12599
13 415 South Sixth Street, Suite 100
14 Las Vegas, Nevada 89101
15 Attorneys for Plaintiffs
16 JAMES WOLFRAM and WALT WILKES
17
18
19
20
21
22
23
24
25
26
27
28

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

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

4 II. LEGAL ARGUMENT

5 A. Legal Standard

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

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

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

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

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

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

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

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

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

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

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

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

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

19 Attorney fees may be an element of damage in cases when a
20 plaintiff becomes involved in a third-party legal dispute as a
21 result of a breach of contract or tortious conduct by the
22 defendant. The fees incurred in defending or prosecuting the
23 third-party action could be damages in the proceeding between
24 the plaintiff and the defendant. This type of action could arise
25 from claims against title insurance or bonds and breaches of
26 duty to defend clauses in insurance or indemnity actions.

27 Attorney fees may also be awarded as damages in those cases
28 in which a party incurred the fees in recovering real or personal
property acquired through the wrongful conduct of the
defendant or in clarifying or removing a cloud upon the title to
property. Finally, actions for declaratory or injunctive relief may
involve claims for attorney fees as damages when the actions
were necessitated by the opposing party's bad faith conduct.

21 *Sandy Valley*, 117 Nev. at 956-958. A close reading of these four paragraphs confirms the
22 validity of Plaintiffs' position.

23 Nothing in *Sandy Valley* or its progeny suggests that the only actions qualifying for
24 attorney fee damages are limited to those specifically listed therein. First, *Sandy Valley* is
25 clear that the test governing the availability of such damages is whether the fees are the
26 natural and proximate consequence of Defendant's conduct. The Nevada Supreme Court
27 repeats itself no fewer than three times in enunciating this criteria, stating, "they must be
28 the natural and proximate consequence of the injurious conduct;" "the fees were

1 proximately and necessarily caused by the actions of the opposing party;" and "the fees
2 were a reasonably foreseeable consequence of the breach or conduct." *Id.* at 957.
3 Defendant's position ignores and effectively nullifies these clear and repeated holdings and
4 must therefore be rejected.

5 Second, *Sandy Valley*, in footnote 7, cites eleven Nevada decisions involving issues
6 relating to attorney's fees as an element of damages (and not fees considered pursuant to
7 agreement, rule, or statute). *Id.* at 955, n. 7. Out of these eleven cases, ten fall within the
8 scope of the examples listed in the body of *Sandy Valley* (that is they are suits for
9 injunctive/declaratory relief; for recovery of personal or real property; or for fees caused by
10 litigation with a third party, etc.). However, one case, *Works v. Kuhn*, 103 Nev. 65, 732
11 P.2d 1373 (1989), does not involve claims listed in *Sandy Valley* and the citation to *Works*
12 with approval further suggests that the court was not limiting the availability of attorney fee
13 damages to the causes of action it specifically identified. In *Works*, the court granted fees
14 "to defray the expenses and costs that respondents have incurred in retaining counsel to
15 represent them..." in an appeal concerning claims for breach of accord and satisfaction
16 and malicious prosecution. *Works*, 103 Nev. at 69.⁴ As the Court is surely aware, the two
17 types of claims in *Works* are not listed in the body of the opinion in *Sandy Valley*, yet the
18 *Sandy Valley* Court approved of the *Works* fee award as special damages. If the court in
19 *Sandy Valley* intended to restrict the causes of action qualifying for attorney fee damages,
20 it would not have cited *Works* with approval.

21 Third, the three Nevada cases citing or interpreting *Sandy Valley* on the issue of
22 attorney's fees as damages, *Horgan, Shuette v. Beazer Homes Holdings Corp.*, 121 Nev.
23 837, 124 P.3d 530 (2005), and *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev.*
24 *Co., Inc.*, 255 P.3d 268, 127 Nev. Adv. Op. 26 (2011), all support Plaintiffs' position. In
25 *Shuette*, the court reaffirmed the *Sandy Valley* test, stating that for attorney's fees to be

26
27 ⁴ While the court cites N.R.A.P. 38(b) for support for the fee award, the court in *Sandy*
28 *Valley* is clear that this was a case concerning fees as damages, and any language
suggesting that the award was made pursuant to agreement, rule or statute, is
disapproved.

1 awarded as damages, "claimants have the arduous task of proving [that the fees] were a
2 natural and proximate consequence of the injurious conduct." *Shuette*, 121 Nev. at 863.
3 In *Horgan*, the court reversed *Sandy Valley* on the limited issue of the availability of fees as
4 damages for claims for removing clouds of title. See *Horgan*, 123 Nev. at 586. The
5 *Horgan* Court held:

6 Accordingly, our statement in *Sandy Valley* that attorney fees
7 are available in a case "of clarifying or removing a cloud upon
8 the title to property" and similar statements in *Summa I* and
9 *Michelsen* inadvertently expanded the scope of real property
10 cases in which attorney fees are available as special damages.
11 Therefore, we retreat from these statements and now clarify
12 that attorney fees are only available as special damages in
13 slander of title actions and not simply when a litigant seeks to
14 remove a cloud upon title.

15 *Id.* (citations omitted). Contrary to what Defendant's counsel has argued, no suggestion is
16 made in *Horgan* that the general *Sandy Valley* criteria for attorney fee damages has been
17 limited to the examples of claims listed in *Sandy Valley*. This is confirmed by the *Reyburn*
18 decision in 2011 (which post-dates *Horgan* by four years). The court in *Reyburn* again
19 reaffirmed *Sandy Valley*'s test for the propriety of fees as damages, stating, "attorney fees
20 that are considered special damages are fees that are foreseeable arising from the breach
21 of contract or tortious conduct." *Reyburn*, 255 P.3d at 279, n. 11. If the *Horgan* Court did
22 in fact limit *Sandy Valley* as Defendant argues, that limitation should have been stated or
23 referenced in *Reyburn*; instead, the *Reyburn* Court paraphrased the *Sandy Valley* test as
24 being good law.

25 Fourth, Defendant in its Opposition to the Motion for Leave to File a Second
26 Amended Complaint has implicitly agreed with Plaintiffs that *Horgan* did not restrict *Sandy*
27 *Valley* to the types of claims listed therein. In Defendant's Opposition, counsel argues that
28 attorney's fees are available as damages in the following cases: "third-party actions
involving title insurance or bonds, insurance or indemnity actions, slander of title actions,
malicious prosecution, trademark infringement, or false imprisonment." Opp. at 7 (citing

1 *Horgan*, 123 Nev. at 587). The support for this statement comes from Justice Maupin's
2 concurrence in *Horgan*, stating:

3 I want to stress that the clarification of *Sandy Valley Associates*
4 *v. Sky Ranch Estates* does not preclude the prosecution of
5 claims for attorney fees as damages in other contexts; e.g., in
6 connection with actions for malicious prosecution, abuse of
process, wrongful attachment, trademark infringement, false
imprisonment or arrest.

7 *Horgan*, 123 Nev. at 587 (J. Maupin concurring).⁵ If Defendant believes that *Horgan* or
8 another decision limits *Sandy Valley*, it makes no sense to adopt the contrary position as
9 articulated by Justice Maupin in the Opposition to Plaintiffs' Motion. This admission by
10 Defendant in its primary opposition brief is compelling evidence that Plaintiffs' interpretation
11 of *Sandy Valley* and its progeny is correct and that as long as the proposed Second
12 Amended Complaint passes the general criteria for claiming attorney's fees as damages in
13 *Sandy Valley*, it is not futile.

14 **D. Plaintiffs' Cause of Action for Breach of the Implied Covenant of Good**
15 **Faith and Fair Dealing Appropriately Pleads Bad Faith and Therefore the**
16 **Proposed Second Amended Complaint Fits Within the Specific Examples**
of Cases in *Sandy Valley* for which Attorney's Fees may be Claimed as
Damages

17 As referenced above, if the Court is persuaded that Nevada law permits the
18 pleading of attorney's fees as damages so long as the *Sandy Valley* test is met, it need not
19 decide if Plaintiffs' proposed Second Amended Complaint fits within the specific examples
20 of claims in *Sandy Valley* for which attorney's fees are available as damages because the
21 Proposed Second Amended Complaint meets the *Sandy Valley* test. However, if the Court
22 prefers not to consider the boundaries of *Sandy Valley* before deciding whether the
23 proposed amendment fits neatly under one of the causes of action listed in that decision,
24 the following section explains in detail that the Second Amended Complaint does, in fact,

25
26
27 ⁵ Justice Maupin, one of the three Justices on the panel delivering the Per Curiam Opinion
28 in *Sandy Valley*, is confirming here, without disagreement from in the *Horgan* opinion, that
"*Sandy Valley* does not preclude the prosecution of claims for attorney fees as damages in
other contexts..." *Id.*

1 fall under at least one of the listed claims in *Sandy Valley* which are eligible for attorney fee
2 damages.

3 The crux of the dispute between Plaintiffs and Defendant is whether the claim for
4 the breach of the implied covenant of good faith and fair dealing adequately pleads
5 Defendant's bad faith. As discussed above, under *Sandy Valley*, "actions for declaratory or
6 injunctive relief may involve claims for attorney fees as damages when the actions were
7 necessitated by the opposing party's bad faith conduct." *Sandy Valley*, 117 Nev. at 958.
8 It was undisputed at the hearing that Plaintiffs' claim for an accounting was a claim for
9 injunctive relief (specifically mandatory injunctive relief). See *State ex rel. Delhi Tp. v.*
10 *Wilke*, 27 Ohio App. 3d 349, 351-352, 501 N.E. 2d 97, 99 (Ohio Ct. App. 1986) ("the
11 complaint was by its very terms an action for... a mandatory injunction enforcing an
12 accounting."); *Lichtenstein v. Anvan Co.*, 62 Ill. App. 3d 91, 378 N.E. 2d 1171 (Ill. App. Ct.
13 1978) (action for mandatory injunction requiring accounting). Therefore, the only matter at
14 issue is whether Plaintiffs have adequately pled bad faith in the proposed Second
15 Amended Complaint. And Plaintiffs have. Nevada law is clear that claims for breaches of
16 the implied covenant of good faith and fair dealing are "bad faith" claims no matter if they
17 are claims founded on contract principles or tort principles.

18 1. Under the Common Law, A Claim for Breach of the Covenant of Good
19 Faith and Fair Dealing is a Claim On a Party's Bad Faith Conduct

20 As the Court well knows, the implied covenant of good faith and fair dealing is a
21 fundamental concept of contract law.⁶ Under common law, "every contract imposes upon
22 each party a duty of good faith and fair dealing in its performance and its enforcement."
23 Restatement (Second) Contracts § 205 (2012). The duty of good faith and fair dealing
24 described in § 205 is defined by its opposite—that is, a party may not fulfill its duty of good
25

26 ⁶ E. Allan Farnsworth, Good Faith Performance and Commercial Reasonableness Under
27 the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 669 (1963) ("The inclusion of an
28 obligation of good faith performance in the Code revives an ancient, although largely
forgotten, principle.").

1 faith without also ensuring that its conduct does not involve bad faith.⁷ The Restatement
2 defines "good faith" as follows:

3 a. Meanings of "good faith." Good faith is defined in Uniform
4 Commercial Code § 1-201(19) as "honesty in fact in the
5 conduct or transaction concerned." "In the case of a merchant"
6 Uniform Commercial Code § 2-103(1)(b) provides that good
7 faith means "honesty in fact and the observance of reasonable
8 commercial standards of fair dealing in the trade." The phrase
9 "good faith" is used in a variety of contexts, and its meaning
10 varies somewhat with the context. Good faith performance or
11 enforcement of a contract emphasizes faithfulness to an
12 agreed common purpose and consistency with the justified
13 expectations of the other party; it excludes a variety of types of
14 conduct characterized as involving "bad faith" because they
15 violate community standards of decency, fairness or
16 reasonableness. The appropriate remedy for a breach of the
17 duty of good faith also varies with the circumstances.

18 *Id.*, cmt a. The Restatement further elaborates on the meaning of "Good Faith
19 Performance" when stating:

20 d. Good faith performance. Subterfuges and evasions violate
21 the obligation of good faith in performance even though the
22 actor believes his conduct to be justified. But the obligation
23 goes further: bad faith may be overt or may consist of inaction,
24 and fair dealing may require more than honesty. A complete
25 catalogue of types of bad faith is impossible, but the following
26 types are among those which have been recognized in judicial
27 decisions: evasion of the spirit of the bargain, lack of diligence
28 and slacking off, willful rendering of imperfect performance,
abuse of a power to specify terms, and interference with or
failure to cooperate in the other party's performance.

Id., cmt d.

Bernard Witkin's analysis of the implied covenant of good faith and fair dealing is
consistent with the Restatement. Witkin writes:

There is a implied in every contract a covenant by each party
not to do anything which will deprive the other parties thereto of
the benefits of the contract. This covenant not only imposes
upon each contracting party the duty to refrain from doing
anything which would render performance of the contract
impossible by any act of his own, but also the duty to do
everything that the contract presupposes that he will do to

⁷ And vice versa; noncompliance with the duty of good faith necessarily involves some
level of bad faith.

1 accomplish its purpose... If the cooperation of the other party is
2 necessary for successful performance of an obligation, a
3 promise to give that cooperation and not to do anything that
prevents realization of the fruits of performance will often be
implied.

4 Witkin 1 Summary of California Law (10th), Contracts § 798 (2010).

5 While the Court is surely familiar with the general principles governing the implied
6 covenant of good faith and fair dealing, it is important to carefully examine how these
7 treatises analyze and discuss compliance with and violation of the duty of good faith. Both
8 the Restatement and Witkin adopt the view that fulfillment of the implied covenant of good
9 faith and fair dealing does not lend itself to a middle ground. A party cannot just partly act
10 in good faith. For Witkin, the duty requires not only doing all affirmative acts to ensure the
11 purpose of the contract is accomplished but also refraining from doing anything "which will
12 deprive the other parties thereto of the benefits of the contract." *Id.* Similarly, under the
13 Restatement, fulfillment of the implied covenant of good faith and fair dealing "excludes"
14 conduct characterized as involving bad faith. Restatement (Second) Contracts § 205, cmt d
15 (2012). And bad faith may involve nothing more than inaction. *Id.* The mutually exclusive
16 nature of good faith and bad faith conduct is further recognized by Cornell Professor
17 Robert S. Summers. Professor Summers argues in his seminal article on the implied
18 covenant of good faith and fair dealing that good faith cannot be defined and may only be
19 understood by reference to "bad faith."⁸

20 These treatises and publications confirm what the Court so clearly recognized at the
21 hearing on Plaintiffs' Motion for Leave to File a Second Amended Complaint—the failure to
22 act in good faith necessarily implies conduct involving bad faith. Nevada caselaw supports
23 this position and adopts the Second Restatement as it pertains to the implied covenant of
24 good faith and fair dealing.

25
26 ⁸ Robert S. Summers, "Good Faith" in General Contract Law and the Sales Provision of the
27 Uniform Commercial Code, 54 Va. L. Rev. 195 (1968), "In contract law, taken as a whole,
28 good faith is an 'excluder.' It is a phrase without general meaning (or meanings) of its own
and serves to exclude a wide range of heterogeneous forms of bad faith." *Id.* at 201
(citation omitted).

2. The Nevada Supreme Court Consistently Holds that a Party Failing to Act in Good Faith Necessarily Implicates the Opposite: that the Party has Acted in Bad Faith

The Nevada Supreme Court has consistently interpreted the term "good faith" alongside its opposite, "bad faith," recognizing that there can be no compromise—either an individual acts in good faith, or he/she conducts themselves in bad faith. See *Hulse v. Sheriff, Clark County*, 88 Nev. 393, 398, 498 P.2d 1317, 1320 (1972) ("The term 'good faith' has been defined as honest, lawful intent, and as the opposite of fraud and bad faith."); *Land Resources Development v. Kaiser Aetna*, 100 Nev. 29, 33-34, 676 P.2d 235, 238 (1984) ("[Plaintiff] did not present a prima facie case of bad faith against [defendant] under any definition of the term. The evidence shows that throughout its negotiations with [plaintiff], [defendant] exhibited the utmost good faith."). In the context of a workman's compensation claim, the Nevada Supreme Court held that the failure to grant a claim without reasonable basis is an act of bad faith. In *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009, 823 P.2d 888, 891 (1991), the Nevada Supreme Court stated:

Bad faith, the converse of good faith, has been defined as "the absence of a reasonable basis for denying benefits and the defendant's knowledge or reckless disregard of the lack of a reasonable basis for denying the claim...[T]o act in bad faith, i.e. without a reasonable basis or with the knowledge of reckless disregard of the lack of reasonable basis in the processing or denial of claims.

Id. (citations omitted). And in the family law context, the Nevada Supreme Court has held that a party has a "good faith" reason to move when the move "is not designed to frustrate the visitation rights of the noncustodial parent." *Halbrook v. Halbrook*, 114 Nev. 1455, 1458, 971 P.2d 1262, 1264 (1998). The common thread between all of these decisions is the Nevada Supreme Court's consistent recognition that good faith is identified by the absence of bad faith and vice versa. Whether it is by reference to the opposite of the term under consideration ("good faith" or "bad faith"), or to the implications of certain behavior (denying workman's comp claims or frustrating the noncustodial parent's visitation), it is

1 clear that Nevada law does not recognize any middle ground between good faith and bad
2 faith—a party can only be in one of those two camps.

3 3. In Nevada, Allegations of a Party's Breach of the Implied Covenant of
4 Good Faith and Fair Dealing are the Equivalent of Allegations of a Party's
5 Bad Faith Conduct

6 In Nevada, allegations in support of a claim for breach of the implied covenant of
7 good faith and fair dealing have the same meaning and effect as allegations of the
8 opposite party's bad faith conduct. A number of Nevada Supreme Court cases confirm
9 this. For example, in *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043,
10 862 P.2d 1207 (1993), the court described the only way Defendant could have breached
11 the implied covenant of good faith and fair dealing is by engaging in bad faith actions.
12 Specifically the court stated, "It is apparent that Lewis would have had a great difficulty
13 exercising bad faith to the point of breaching the implied covenant of good faith and fair
14 dealing without the cooperation of others." *Id.* at 1047. Indeed, the court went so far as to
15 describe the implied covenant by stating "the duty not to act in bad faith or deal unfairly
16 thus becomes part of the contract..." *Id.* at 1046. In so describing the behavior necessary
17 to breach the implied covenant of good faith and fair dealing (bad faith conduct) and
18 converting the duty of good faith into the duty not to act in bad faith, the Nevada Supreme
19 Court equates acts necessary to breach the implied covenant with conduct involving bad
20 faith. By replacing the affirmative duty to act in good faith with its inverse, the duty not act
21 in bad faith, the Nevada Supreme Court effectively held that a breach of the covenant of
22 good faith and fair dealing requires, by definition, an exercise of bad faith, since the only
23 way to breach the inverse duty, the duty not to act in bad faith, is to engage in bad faith
24 conduct.

25 This holding by itself defeats Defendant's arguments and demonstrates that
26 Plaintiffs' cause of action for breach of the implied covenant of good faith and fair dealing is
27 the same as an allegation that Defendant acted in bad faith, therefore placing the proposed
28 amendment into a specific category of claims eligible for attorney fee damages as stated in
Sandy Valley. There are several additional decisions supporting this position.

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

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

26 *Id.*⁹ Between these five decisions, it is clear that Nevada law, for the purposes of pleading
27 a cause of action for breach of the duty to act in good faith, considers allegations in support
28

29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500
501
502
503
504
505
506
507
508
509
510
511
512
513
514
515
516
517
518
519
520
521
522
523
524
525
526
527
528
529
530
531
532
533
534
535
536
537
538
539
540
541
542
543
544
545
546
547
548
549
550
551
552
553
554
555
556
557
558
559
560
561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590
591
592
593
594
595
596
597
598
599
600
601
602
603
604
605
606
607
608
609
610
611
612
613
614
615
616
617
618
619
620
621
622
623
624
625
626
627
628
629
630
631
632
633
634
635
636
637
638
639
640
641
642
643
644
645
646
647
648
649
650
651
652
653
654
655
656
657
658
659
660
661
662
663
664
665
666
667
668
669
670
671
672
673
674
675
676
677
678
679
680
681
682
683
684
685
686
687
688
689
690
691
692
693
694
695
696
697
698
699
700
701
702
703
704
705
706
707
708
709
710
711
712
713
714
715
716
717
718
719
720
721
722
723
724
725
726
727
728
729
730
731
732
733
734
735
736
737
738
739
740
741
742
743
744
745
746
747
748
749
750
751
752
753
754
755
756
757
758
759
760
761
762
763
764
765
766
767
768
769
770
771
772
773
774
775
776
777
778
779
780
781
782
783
784
785
786
787
788
789
790
791
792
793
794
795
796
797
798
799
800
801
802
803
804
805
806
807
808
809
810
811
812
813
814
815
816
817
818
819
820
821
822
823
824
825
826
827
828
829
830
831
832
833
834
835
836
837
838
839
840
841
842
843
844
845
846
847
848
849
850
851
852
853
854
855
856
857
858
859
860
861
862
863
864
865
866
867
868
869
870
871
872
873
874
875
876
877
878
879
880
881
882
883
884
885
886
887
888
889
890
891
892
893
894
895
896
897
898
899
900
901
902
903
904
905
906
907
908
909
910
911
912
913
914
915
916
917
918
919
920
921
922
923
924
925
926
927
928
929
930
931
932
933
934
935
936
937
938
939
940
941
942
943
944
945
946
947
948
949
950
951
952
953
954
955
956
957
958
959
960
961
962
963
964
965
966
967
968
969
970
971
972
973
974
975
976
977
978
979
980
981
982
983
984
985
986
987
988
989
990
991
992
993
994
995
996
997
998
999
1000

⁹ Defendant may attempt to argue that somehow the Nevada Supreme Court's separation of the possibility of refraining from cooperation on the one hand, from acting in bad faith on the other, is evidence that the proposed amendment is futile. Specifically, Defendant may argue that because Plaintiffs' primary charge is that Defendant failed to provide them with documents, Defendant therefore only allegedly failed to cooperate with Plaintiffs, and thus

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 72371

Electronically Filed
~~Feb 28 2018~~ 02:03 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 66 OF 88

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

Attorneys for Appellant

Chronological Index to Joint Appendix

Date	Document Description	Volume	Labeled
12/29/2010	Complaint	1	JA000001- JA000006
01/14/2011	Amended Complaint	1	JA000007- JA000012
02/11/2011	Amended Summons	1	JA000013- JA000016
03/02/2011	Answer to Amended Complaint	1	JA000017- JA000023
10/25/2011	Transcript re Discovery Conference	1	JA000024- JA000027
11/08/2011	Scheduling Order	1	JA000028- JA000030
11/29/2011	Order Setting Civil Non-Jury Trial	1	JA000031- JA000032
12/15/2011	Stipulated Confidentiality Agreement and Protective Order	1	JA000033- JA000039
12/16/2011	Notice of Entry of Stipulated Confidentiality Agreement and Protective Order	1	JA000040- JA000048
08/27/2012	Transcript re Hearing	1	JA000049- JA000050
08/29/2012	Stipulation and Order to Extend Discovery Deadlines (First Request)	1	JA000051- JA000054
08/30/2012	Notice of Entry of Stipulation and Order to Extend Discovery Deadlines (First Request)	1	JA000055- JA000060
09/21/2012	Amended Order Setting Civil Non-Jury Trial	1	JA000061- JA000062

Date	Document Description	Volume	Labeled
10/24/2012	Defendant's Motion for Summary Judgment	1	JA000063- JA000082
10/24/2012	Appendix of Exhibits in Support of Defendant's Motion for Summary Judgment	1	JA000083- JA000206
10/24/2012	Declaration of Aaron D. Shipley in Support of Defendant's Motion for Summary Judgment	1	JA000207- JA000211
10/25/2012	Appendix of Exhibits in Support of Defendant's Motion for Summary Judgment – filed under seal	2	JA000212- JA000321
11/07/2012	Opposition to Defendant's Motion for Summary Judgment and Plaintiffs' Counter Motion for Partial Summary Judgment	2	JA000322- JA000351
11/09/2012	Appendix of Exhibits to Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Counter Motion for Summary Judgment – sections filed under seal	3-6	JA000352- JA001332
11/13/2012	Appendix of Exhibits to Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Counter Motion for Summary Judgment	7-12	JA001333- JA002053
11/29/2012	Defendant's Opposition to Plaintiff's Counter Motion for Partial Summary Judgment Re: Real Parties in Interest	13	JA002054- JA002065
12/06/2012	Transcript re Status Check	13	JA002066- JA002080
01/07/2013	Reply Brief in Support of Defendant's Motion for Summary Judgment	13	JA002081- JA002101

Date	Document Description	Volume	Labeled
01/17/2013	Plaintiffs' Reply in Further Support of Their Counter Motion for Partial Summary Judgment	13	JA002102- JA002144
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
03/05/2013	Transcript of Proceedings - March 5, 2013	14	JA002211- JA002350
03/14/2013	Order re Order Granting Plaintiffs Countermotion for Summary Judgment	14	JA002351- JA002353
03/15/2013	Notice of Entry of Order re Order Granting Plaintiffs Countermotion for Summary Judgment	14	JA002354- JA002358
03/20/2013	Plaintiffs Opposition to Defendant's Motion in Limine to Exclude Plaintiffs Claim for Attorney's Fees as an Element of Damages MIL 1	15	JA002359- JA002408
03/20/2013	Plaintiffs Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the form of compensation for time MIL 2	15	JA002409- JA002433
03/21/2013	Motion to File Second Amended Complaint	15	JA002434- JA002461
04/02/2013	Order re Order Denying Defendants Motion for Summary Judgment	16	JA002462- JA002464
04/03/2013	Notice of Entry of Order re Order Denying Defendants Motion for Summary Judgment	16	JA002465- JA002470

Date	Document Description	Volume	Labeled
04/08/2013	Defendant's Opposition to Plaintiffs' Motion for Leave to File a Second Amended Complaint	16	JA002471- JA002500
04/17/2013	Second Amended Order Setting Civil Non-Jury Trial	16	JA002501- JA002502
04/23/2013	Plaintiffs Reply in Further Support of Motion for Leave to File Second Amended Complaint	16	JA002503- JA002526
04/26/2013	Transcript re Hearing	16	JA002527- JA002626
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
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
05/30/2013	Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002659- JA002661
06/05/2013	Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002662- JA002664
06/05/2013	Notice of Entry of Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002665- JA002669
06/06/2013	Second Amended Complaint	16	JA002670- JA002677
07/03/2013	Answer to Second Amended Complaint and Counterclaim	16	JA002678- JA002687
07/09/2013	Transcript re Hearing	17	JA002688- JA002723

Date	Document Description	Volume	Labeled
07/15/2013	Plaintiffs Reply to Defendants Counterclaim	17	JA002724- JA002731
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
07/22/2013	Defendant's Motion for Partial Summary Judgment	17	JA002772- JA002786
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
07/23/2013	Transcript re Status Check	17	JA002809- JA002814
08/05/2013	Defendant Pardee Homes of Nevada's Response to Plaintiffs' Motions in Limine #1-5; And #20-25	17	JA002815- JA002829
08/06/2013	Plaintiffs Opposition to Defendants Motion for Partial Summary Judgment	17	JA002830- JA002857
09/16/2013	Reply in Support of Defendant's Motion for Partial Summary Judgment	17	JA002858- JA002864
09/16/2013	Reply in Support of Defendant's Motion in Limine to Exclude Plaintiff's Claim for Attorney's Fees As An Element of Damages	17	JA002865- JA002869
09/16/2013	Reply in Support of Defendant's Motion in Limine to Exclude Plaintiffs' Claim For Damages in the Form of Compensation for Time	17	JA002870- JA002874
09/23/2013	Transcript re Hearing	18	JA002875- JA002987

Date	Document Description	Volume	Labeled
09/27/2013	Plaintiffs Supplement to Their Opposition to Defendants Motion for Partial Summary Judgment	19-21	JA002988- JA003203
09/27/2013	Supplemental Brief in Support of Defendant's Motion for Partial Summary Judgment	21	JA003204- JA003209
10/23/2013	Order Denying Motion for Partial Summary Judgment	21	JA003210- JA003212
10/23/2013	Transcript re Trial	22	JA003213- JA003403
10/23/2013	Trial Exhibit A	23	JA003404- JA003544
10/23/2013	Trial Exhibit B – filed under seal	23	JA003545- JA003625
10/23/2013	Trial Exhibit C	23	JA003626- JA003628
10/23/2013	Trial Exhibit D	23	JA003629- JA003631
10/23/2013	Trial Exhibit E – filed under seal	23	JA003632- JA003634
10/23/2013	Trial Exhibit F	23	JA003635- JA003637
10/23/2013	Trial Exhibit G	23	JA003638
10/23/2013	Trial Exhibit H	23	JA003639- JA003640
10/23/2013	Trial Exhibit I	23	JA003641- JA003643

Date	Document Description	Volume	Labeled
10/23/2013	Trial Exhibit J – filed under seal	24	JA003644- JA003669
10/23/2013	Trial Exhibit K	24	JA003670- JA003674
10/23/2013	Trial Exhibit L	24	JA003675- JA003678
10/23/2013	Trial Exhibit M	24	JA003679- JA003680
10/23/2013	Trial Exhibit N	24	JA003681- JA003683
10/23/2013	Trial Exhibit O – filed under seal	25-26	JA003684- JA004083
10/23/2013	Trial Exhibit P	27	JA004084
10/23/2013	Trial Exhibit Q	27	JA004085
10/23/2013	Trial Exhibit R	27	JA004086- JA004089
10/23/2013	Trial Exhibit S	27	JA004090
10/23/2013	Trial Exhibit T	27	JA004091- JA004092
10/23/2013	Trial Exhibit U	27	JA004093
10/23/2013	Trial Exhibit V	27	JA004094
10/23/2013	Trial Exhibit W	27	JA004095- JA004096

Date	Document Description	Volume	Labeled
10/23/2013	Trial Exhibit X	27	JA004097
10/23/2013	Trial Exhibit Y	27	JA004098
10/23/2013	Trial Exhibit Z	27	JA004099- JA004100
10/23/2013	Trial Exhibit AA	27	JA004101- JA004102
10/23/2013	Trial Exhibit BB	27	JA004103
10/23/2013	Trial Exhibit CC	27	JA004104
10/23/2013	Trial Exhibit DD	27	JA004105
10/23/2013	Trial Exhibit EE	27	JA004106- JA004113
10/23/2013	Trial Exhibit FF	27	JA004114- JA004118
10/23/2013	Trial Exhibit GG	27	JA004119- JA004122
10/23/2013	Trial Exhibit HH	27	JA004123
10/23/2013	Trial Exhibit II	27	JA004124
10/23/2013	Trial Exhibit JJ	27	JA004125
10/23/2013	Trial Exhibit KK	27	JA004126- JA004167

Date	Document Description	Volume	Labeled
10/23/2013	Trial Exhibit LL	27	JA004168
10/23/2013	Trial Exhibit MM	27	JA004169
10/23/2013	Trial Exhibit NN	27	JA004170- JA004174
10/23/2013	Trial Exhibit OO	27	JA004175- JA004183
10/23/2013	Trial Exhibit PP	27	JA004184- JA004240
10/23/2013	Trial Exhibit QQ	27	JA004241- JA004243
10/23/2013	Trial Exhibit RR	27	JA004244- JA004248
10/23/2013	Trial Exhibit SS	27	JA004249- JA004255
10/23/2013	Trial Exhibit TT	27	JA004256- JA004262
10/23/2013	Trial Exhibit UU	27	JA004263- JA004288
10/23/2013	Trial Exhibit 1	27	JA004289- JA004292
10/23/2013	Trial Exhibit 6 – filed under seal	27	JA004293- JA004307
10/23/2013	Trial Exhibit 7 – filed under seal	27	JA004308- JA004310
10/23/2013	Trial Exhibit 8 – filed under seal	27	JA004311- JA004312

Date	Document Description	Volume	Labeled
10/23/2013	Trial Exhibit 9 – filed under seal	27	JA004313- JA004319
10/23/2013	Trial Exhibit 10 – filed under seal	27	JA004320- JA004329
10/23/2013	Trial Exhibit 11 – filed under seal	28	JA004330- JA004340
10/23/2013	Trial Exhibit 12 – filed under seal	28	JA004341- JA004360
10/23/2013	Trial Exhibit 13 – filed under seal	28	JA004361- JA004453
10/23/2013	Trial Exhibit 21	28	JA004454
10/23/2013	Trial Exhibit 25	28	JA004455- JA004462
10/24/2013	Transcript re Trial	29-30	JA004463- JA004790
10/24/2013	Trial Exhibit VV	31	JA004791
10/24/2013	Trial Exhibit 26	31	JA004792- JA004804
10/24/2013	Trial Exhibit 30	31	JA004805- JA004811
10/25/2013	Notice of Entry of Order Denying Motion for Partial Summary Judgment	31	JA004812- JA004817
10/25/2013	Plaintiffs Trial Brief Pursuant to EDCR 7.27	31	JA004818- JA004847
10/28/2013	Transcript re Trial – filed under seal	32-33	JA004848- JA005227

Date	Document Description	Volume	Labeled
10/28/2013	Trial Exhibit 15	34	JA005228- JA005232
10/28/2013	Trial Exhibit 18	34	JA005233- JA005235
10/28/2013	Trial Exhibit 19	34	JA005236- JA005237
10/28/2013	Trial Exhibit 20	34	JA005238- JA005254
10/28/2013	Trial Exhibit 23	34	JA005255- JA005260
10/28/2013	Trial Exhibit 24	34	JA005261- JA005263
10/29/2013	Transcript re Trial – filed under seal	35	JA005264- JA005493
10/29/2013	Trial Exhibit 28	36	JA005494- JA005497
10/29/2013	Trial Exhibit 29	36	JA005498- JA005511
10/30/2013	Transcript re Trial	37-38	JA005512- JA005815
10/30/2013	Trial Exhibit 23a	39	JA005816- JA005817
10/30/2013	Trial Exhibit 27	39	JA005818- JA005820
12/09/2013	Transcript re Trial – filed under seal	40-41	JA005821- JA006192
12/10/2013	Transcript re Trial	42-43	JA006193- JA006530

Date	Document Description	Volume	Labeled
12/10/2013	Trial Exhibit WW	43	JA006531- JA006532
12/12/2013	Transcript re Trial – filed under seal	44-45	JA006533- JA006878
12/12/2013	Trial Exhibit XX	46	JA006879- JA006935
12/12/2013	Trial Exhibit 39	46	JA006936- JA006948
12/12/2013	Trial Exhibit 40	46	JA006949- JA006950
12/12/2013	Trial Exhibit 41	46	JA006951- JA006952
12/13/2013	Transcript re Trial - Part 1	46	JA006953- JA007107
12/13/2013	Transcript re Trial - Part 2	47-48	JA007108- JA007384
12/13/2013	Trial Exhibit 31a	48	JA007385- JA007410
06/24/2014	Pardee's Motion to Expunge Lis Pendens – section filed under seal	48	JA007411- JA007456
06/25/2014	Findings of Fact, Conclusions of Law and Order	48	JA007457- JA007474
06/27/2014	Notice of Entry of Findings of Fact, Conclusions of Law and Order	48	JA007475- JA007494
07/14/2014	Opposition to Pardee's Motion to Expunge Lis Pendens	48	JA007495- JA007559
07/15/2014	Reply in Support of Pardee's Motion to Expunge Lis Pendens	48	JA007560- JA007570

Date	Document Description	Volume	Labeled
07/24/2014	Order Granting Motion to Expunge Lis Pendens	48	JA007571- JA007573
07/25/2014	Notice of Entry of Order Granting Motion to Expunge Lis Pendens	48	JA007574- JA007578
07/17/2014	Transcript re Hearing	49	JA007579- JA007629
07/31/2014	Transcript re Hearing	49	JA007630- JA007646
08/25/2014	Plaintiff's Accounting Brief Pursuant to the court's Order Entered on June 25, 2014	49	JA007647- JA007698
08/25/2014	Pardee Homes of Nevada's Supplemental Brief Regarding Future Accounting	49	JA007699- JA007707
05/13/2015	Findings of Fact and Conclusions of Law and Supplemental Briefing re Future Accounting	49	JA007708- JA007711
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
05/28/2015	Pardee's Motion for Attorney's Fees and Costs	49	JA007718- JA007734
05/28/2015	Appendix of Exhibits to Pardee's Motion for Attorney's Fees and Costs	50-51	JA007735- JA008150
06/15/2015	Judgment	52	JA008151- JA008153
06/15/2015	Notice of Entry of Judgment	52	JA008154- JA008158
06/19/2015	Plaintiffs, James Wolfram and Walt Wilkes' Memorandum of Costs and Disbursements	52	JA008159- JA008191

Date	Document Description	Volume	Labeled
06/24/2015	Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015	52	JA008192-JA008215
06/29/2015	Plaintiffs' Motion for Attorney's Fees and Costs	52-53	JA008216-JA008327
06/29/2015	Motion to Strike "Judgment", Entered June 15, 2015 Pursuant To NRCP. 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
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
06/30/2015	Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	57-58	JA008923-JA009109

Date	Document Description	Volume	Labeled
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
07/02/2015	Pardee Homes of Nevada's Motion to Amend Judgment	59	JA009207- JA009283
07/08/2015	Plaintiffs' Opposition to Pardee's Motion to Retax Costs	60-61	JA009284- JA009644
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

Date	Document Description	Volume	Labeled
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
07/08/2015	Pardee's Emergency Motion to Stay Execution of Judgment: and Ex Parte Order Shortening Time	62	JA009663- JA009710
07/08/2015	Pardee's Supplemental Briefing in Support of its Emergency Motion to Stay Execution of Judgment	62	JA009711- JA009733
07/10/2015	Transcript re Hearing	62	JA009734- JA009752
07/10/2015	Order on Pardee's Emergency Motion to Stay Execution of Judgment; and Ex Parte Order Shortening Time	62	JA009753- JA009754

Date	Document Description	Volume	Labeled
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
07/15/2015	Pardee Homes of Nevada's Opposition to Plaintiff's Motion for Attorney's Fees and Costs	62	JA009759- JA009771
07/15/2015	Appendix of Exhibits to Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	63	JA009772- JA009918
07/15/2015	Pardee Homes of Nevada's Consolidated Opposition To: (1) Plaintiff's Motion to Strike Judgment Entered on June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59; and (2) Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015	63	JA009919- JA009943
07/15/2015	Appendix of Exhibits to Pardee Homes of Nevada's Consolidated Opposition to: (1) Plaintiff's Motion to Strike Judgment Entered on June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59; and Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015	64	JA009944- JA010185
07/16/2015	Errata to Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	65	JA010186- JA010202
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

Date	Document Description	Volume	Labeled
07/24/2015	Plaintiffs' Motion for Reconsideration, Ex Parte (With Notice) of Application for Order Shortening Time Regarding Stay of Execution and Order Shortening Time Regarding Stay of Execution	67	JA010482- JA010522
07/24/2015	Declaration of John W. Muije, Esq. In Support of Motion for Reconsideration	67	JA010523- JA010581
08/10/2015	Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Reconsideration of the Order on Pardee's Emergency Motion to Stay Execution of Judgment	67	JA010582- JA010669
08/17/2015	Reply Points and Authorities in Support of Motion for Reconsideration	67	JA010670- JA010678
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
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion for Attorney's Fees and Costs	68	JA010680- JA010722
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion to Strike "Judgment" Entered June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59	68	JA010723- JA010767
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

Date	Document Description	Volume	Labeled
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
12/08/2015	Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	68	JA010866-JA010895
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
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
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
01/15/2016	Transcript re Hearing	70	JA010962-JA011167

Date	Document Description	Volume	Labeled
03/14/2016	Plaintiffs' Motion to Settle Two (2) Competing Judgments and Orders	70	JA011168- JA011210
03/16/2016	Release of Judgment	71	JA011211- JA011213
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
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
04/26/2016	Order from January 15, 2016 Hearings	71	JA011385- JA011388
05/16/2016	Judgment	71	JA011389- JA011391
05/17/2016	Notice of Entry of Judgment	71	JA011392- JA011396
05/23/2016	Plaintiffs' Memorandum of Costs and Disbursements	71	JA011397- JA011441
05/31/2016	Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	71	JA011442- JA011454
06/01/2016	Pardee Homes of Nevada's Motion to Amend Judgment	72	JA011455- JA011589
06/06/2016	Pardee's Motion for Attorney's Fees and Costs	72	JA011590- JA011614
06/06/2016	Appendix of Exhibits to Pardee Homes Motion for Attorney Fees and Costs - Volume 1	73-74	JA011615- JA011866

Date	Document Description	Volume	Labeled
06/06/2016	Appendix of Exhibits to Pardee Homes Motion for Attorney Fees and Costs - Volume 2	75-76	JA011867- JA012114
06/08/2016	Plaintiffs' Motion for Attorney's Fees and Costs	77	JA012115- JA012182
06/20/2016	Plaintiffs' Opposition to Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	77-79	JA012183- JA012624
06/21/2016	Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	80	JA012625- JA012812
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
06/27/2016	Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	82	JA013025- JA013170
06/30/2016	Pardee Homes of Nevada's Reply in Support of Motion for Attorney's Fees and Costs	82	JA013171- JA013182
06/30/2016	Pardee Homes of Nevada's Reply in Support of Motion to Amend Judgment; and Opposition to Plaintiffs' Countermotion for Attorney's Fees	82	JA013183- JA013196
07/01/2016	Pardee Homes of Nevada's Reply in Support of Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	82	JA013197- JA013204
08/02/2016	Plaintiffs' Reply in Support of Motion for Attorney's Fees and Costs	83-84	JA013205- JA013357

Date	Document Description	Volume	Labeled
08/02/2016	Plaintiffs' Reply in Support of Countermotion for Attorney's Fees and Costs	84-85	JA013358-JA013444
08/15/2016	Transcript re Hearing - August 15, 2016	86	JA013445-JA013565
09/12/2016	Plaintiffs' Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016	86	JA013566-JA013590
10/17/2016	Pardee's Supplemental Brief Regarding Pre- and Post-Judgment Interest Pursuant to the Court's Order	86	JA013591-JA013602
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
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
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion for Attorney's Fees and Costs	86	JA013619-JA013621
01/10/2017	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
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

Date	Document Description	Volume	Labeled
01/10/2017	Notice of Entry of Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion to Amend Judgment	86	JA013636- JA016342
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
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
01/12/2017	Order on Defendant's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	86	JA013649- JA013651
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
02/08/2017	Pardee Notice of Appeal	86	JA013657- JA013659
04/07/2017	Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders	86	JA013660- JA013668
04/07/2017	Appendix of Exhibits in Support of Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders, [Volume I]	87	JA013669- JA013914
04/07/2017	Appendix of Exhibits in Support of Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders, [Volume II]	88	JA013915- JA014065
04/27/2017	Plaintiffs' Response to Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014066- JA014068

Date	Document Description	Volume	Labeled
05/10/2017	Pardee's Reply in Support of Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014069- JA014071
05/12/2017	Plaintiffs' Opposition to Pardee's Motion Stay Execution of Judgment and Post-Judgment Orders	88	JA014072- JA014105
07/12/2007	Supplemental Order Regarding Plaintiffs' Entitlement to, and Calculation of, Prejudgment Interest	88	JA014106- JA014110
07/14/2017	Notice of Entry of Supplemental Order Regarding Plaintiffs' Entitlement to, and Calculation of, Prejudgment Interest	88	JA014111- JA014117
10/12/2017	Amended Judgment	88	JA014118- JA014129
10/13/2017	Notice of Entry of Amended Judgment	88	JA014130- JA014143
10/12/2017	Order Re: Defendant Pardee Homes of Nevada's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014144- JA014146
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
11/02/2017	Pardee Amended Notice of Appeal	88	JA014152- JA014154

Alphabetical Index to Joint Appendix

Date	Document Description	Volume	Labeled
01/14/2011	Amended Complaint	1	JA000007- JA000012
10/12/2017	Amended Judgment	88	JA014118- JA014129
09/21/2012	Amended Order Setting Civil Non-Jury Trial	1	JA000061- JA000062
02/11/2011	Amended Summons	1	JA000013- JA000016
03/02/2011	Answer to Amended Complaint	1	JA000017- JA000023
07/03/2013	Answer to Second Amended Complaint and Counterclaim	16	JA002678- JA002687
10/24/2012	Appendix of Exhibits in Support of Defendant's Motion for Summary Judgment	1	JA000083- JA000206
10/25/2012	Appendix of Exhibits in Support of Defendant's Motion for Summary Judgment – filed under seal	2	JA000212- JA000321
04/07/2017	Appendix of Exhibits in Support of Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders, [Volume I]	87	JA013669- JA013914
04/07/2017	Appendix of Exhibits in Support of Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders, [Volume II]	88	JA013915- JA014065
06/06/2016	Appendix of Exhibits to Pardee Homes Motion for Attorney Fees and Costs - Volume 1	73-74	JA011615- JA011866

Date	Document Description	Volume	Labeled
06/06/2016	Appendix of Exhibits to Pardee Homes Motion for Attorney Fees and Costs - Volume 2	75-76	JA011867- JA012114
07/15/2015	Appendix of Exhibits to Pardee Homes of Nevada's Consolidated Opposition to: (1) Plaintiff's Motion to Strike Judgment Entered on June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59; and Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015	64	JA009944- JA010185
07/15/2015	Appendix of Exhibits to Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	63	JA009772- JA009918
05/28/2015	Appendix of Exhibits to Pardee's Motion for Attorney's Fees and Costs	50-51	JA007735- JA008150
11/09/2012	Appendix of Exhibits to Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Counter Motion for Summary Judgment – sections filed under seal	3-6	JA000352- JA001332
11/13/2012	Appendix of Exhibits to Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiffs' Counter Motion for Summary Judgment	7-12	JA001333- JA002053
12/29/2010	Complaint	1	JA000001- JA000006
10/24/2012	Declaration of Aaron D. Shipley in Support of Defendant's Motion for Summary Judgment	1	JA000207- JA000211

Date	Document Description	Volume	Labeled
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

Date	Document Description	Volume	Labeled
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
06/15/2015	Judgment	52	JA008151- JA008153
05/16/2016	Judgment	71	JA011389- JA011391

Date	Document Description	Volume	Labeled
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
06/15/2015	Notice of Entry of Judgment	52	JA008154- JA008158
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

Date	Document Description	Volume	Labeled
01/10/2017	Notice of Entry of Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion to Amend Judgment	86	JA013636- JA016342
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

Date	Document Description	Volume	Labeled
03/15/2013	Notice of Entry of Order re Order Granting Plaintiffs Countermotion for Summary Judgment	14	JA002354-JA002358
10/13/2017	Notice of Entry of Order Re: Defendant Pardee Homes of Nevada's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014147-JA014151
12/16/2011	Notice of Entry of Stipulated Confidentiality Agreement and Protective Order	1	JA000040-JA000048
08/30/2012	Notice of Entry of Stipulation and Order to Extend Discovery Deadlines (First Request)	1	JA000055-JA000060
07/14/2017	Notice of Entry of Supplemental Order Regarding Plaintiffs' Entitlement to, and Calculation of, Prejudgment Interest	88	JA014111-JA014117
11/07/2012	Opposition to Defendant's Motion for Summary Judgment and Plaintiffs' Counter Motion for Partial Summary Judgment	2	JA000322-JA000351
07/14/2014	Opposition to Pardee's Motion to Expunge Lis Pendens	48	JA007495-JA007559
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Defendant's Motion for Attorney's Fees and Costs	86	JA013619-JA013621
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Defendants Motion to Amend Judgment	86	JA013613-JA013615
01/09/2017	Order and Judgment from August 15, 2016 Hearings Regarding Plaintiff's Motion for Attorney's Fees and Costs	86	JA013616-JA013618
10/23/2013	Order Denying Motion for Partial Summary Judgment	21	JA003210-JA003212

Date	Document Description	Volume	Labeled
04/26/2016	Order from January 15, 2016 Hearings	71	JA011385- JA011388
07/24/2014	Order Granting Motion to Expunge Lis Pendens	48	JA007571- JA007573
05/30/2013	Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002659- JA002661
06/05/2013	Order Granting Plaintiffs Motion for Leave to File a Second Amended Complaint	16	JA002662- JA002664
01/12/2017	Order on Defendant's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	86	JA013649- JA013651
07/10/2015	Order on Pardee's Emergency Motion to Stay Execution of Judgment; and Ex Parte Order Shortening Time	62	JA009753- JA009754
01/12/2017	Order on Plaintiffs' Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60	86	JA013643- JA013644
04/02/2013	Order re Order Denying Defendants Motion for Summary Judgment	16	JA002462- JA002464
03/14/2013	Order re Order Granting Plaintiffs Countermotion for Summary Judgment	14	JA002351- JA002353
10/12/2017	Order Re: Defendant Pardee Homes of Nevada's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014144- JA014146
11/29/2011	Order Setting Civil Non-Jury Trial	1	JA000031- JA000032
11/02/2017	Pardee Amended Notice of Appeal	88	JA014152- JA014154

Date	Document Description	Volume	Labeled
07/15/2015	Pardee Homes of Nevada's Consolidated Opposition To: (1) Plaintiff's Motion to Strike Judgment Entered on June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59; and (2) Plaintiffs' Motion Pursuant to NRCP 52(b) and 59 to Amend the Court's Judgment Entered on June 15, 2015	63	JA009919- JA009943
09/12/2015	Pardee Homes of Nevada's Consolidated Reply in Support of (1) Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015; and (2) Motion for Attorney's Fees and Costs	68	JA010812- JA010865
12/30/2015	Pardee Homes of Nevada's Consolidated Response to: (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiffs' Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees; and (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	69	JA010946- JA010953
06/01/2016	Pardee Homes of Nevada's Motion to Amend Judgment	72	JA011455- JA011589
07/02/2015	Pardee Homes of Nevada's Motion to Amend Judgment	59	JA009207- JA009283
06/27/2016	Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Attorney's Fees and Costs	82	JA013025- JA013170
07/15/2015	Pardee Homes of Nevada's Opposition to Plaintiff's Motion for Attorney's Fees and Costs	62	JA009759- JA009771

Date	Document Description	Volume	Labeled
08/10/2015	Pardee Homes of Nevada's Opposition to Plaintiffs' Motion for Reconsideration of the Order on Pardee's Emergency Motion to Stay Execution of Judgment	67	JA010582-JA010669
06/30/2016	Pardee Homes of Nevada's Reply in Support of Motion for Attorney's Fees and Costs	82	JA013171-JA013182
06/30/2016	Pardee Homes of Nevada's Reply in Support of Motion to Amend Judgment; and Opposition to Plaintiffs' Countermotion for Attorney's Fees	82	JA013183-JA013196
07/01/2016	Pardee Homes of Nevada's Reply in Support of Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	82	JA013197-JA013204
03/23/2016	Pardee Homes of Nevada's Response to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders	71	JA011214-JA011270
08/25/2014	Pardee Homes of Nevada's Supplemental Brief Regarding Future Accounting	49	JA007699-JA007707
02/08/2017	Pardee Notice of Appeal	86	JA013657-JA013659
07/08/2015	Pardee's Emergency Motion to Stay Execution of Judgment: and Ex Parte Order Shortening Time	62	JA009663-JA009710
06/06/2016	Pardee's Motion for Attorney's Fees and Costs	72	JA011590-JA011614
05/28/2015	Pardee's Motion for Attorney's Fees and Costs	49	JA007718-JA007734
06/24/2014	Pardee's Motion to Expunge Lis Pendens – section filed under seal	48	JA007411-JA007456

Date	Document Description	Volume	Labeled
06/24/2015	Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed June 19, 2015	52	JA008192- JA008215
05/31/2016	Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	71	JA011442- JA011454
04/07/2017	Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders	86	JA013660- JA013668
05/10/2017	Pardee's Reply in Support of Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014069- JA014071
10/17/2016	Pardee's Supplemental Brief Regarding Pre- and Post-Judgment Interest Pursuant to the Court's Order	86	JA013591- JA013602
07/08/2015	Pardee's Supplemental Briefing in Support of its Emergency Motion to Stay Execution of Judgment	62	JA009711- JA009733
08/25/2014	Plaintiff's Accounting Brief Pursuant to the court's Order Entered on June 25, 2014	49	JA007647- JA007698
09/12/2016	Plaintiffs' Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016	86	JA013566- JA013590
05/23/2016	Plaintiffs' Memorandum of Costs and Disbursements	71	JA011397- JA011441
06/08/2016	Plaintiffs' Motion for Attorney's Fees and Costs	77	JA012115- JA012182
06/29/2015	Plaintiffs' Motion for Attorney's Fees and Costs	52-53	JA008216- JA008327
07/24/2015	Plaintiffs' Motion for Reconsideration, Ex Parte (With Notice) of Application for Order Shortening Time Regarding Stay of Execution and Order Shortening Time Regarding Stay of Execution	67	JA010482- JA010522

Date	Document Description	Volume	Labeled
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

Date	Document Description	Volume	Labeled
03/20/2013	Plaintiffs Opposition to Defendant's Motion in Limine to Exclude Plaintiffs Claim for Attorney's Fees as an Element of Damages MIL 1	15	JA002359- JA002408
03/20/2013	Plaintiffs Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the form of compensation for time MIL 2	15	JA002409- JA002433
07/17/2015	Plaintiffs' Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees	65-67	JA010203- JA010481
06/30/2015	Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	57-58	JA008923- JA009109
06/21/2016	Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	80	JA012625- JA012812
05/12/2017	Plaintiffs' Opposition to Pardee's Motion Stay Execution of Judgment and Post-Judgment Orders	88	JA014072- JA014105
07/08/2015	Plaintiffs' Opposition to Pardee's Motion to Retax Costs	60-61	JA009284- JA009644
06/20/2016	Plaintiffs' Opposition to Pardee's Motion to Retax Plaintiffs' Memorandum of Costs Filed May 23, 2016	77-79	JA012183- JA012624
11/04/2016	Plaintiffs' Reply Brief in Support of Brief on Interest Pursuant to the Court's Order Entered on August 15, 2016	86	JA013603- JA013612
04/23/2013	Plaintiffs Reply in Further Support of Motion for Leave to File Second Amended Complaint	16	JA002503- JA002526

Date	Document Description	Volume	Labeled
01/17/2013	Plaintiffs' Reply in Further Support of Their Counter Motion for Partial Summary Judgment	13	JA002102- JA002144
08/02/2016	Plaintiffs' Reply in Support of Countermotion for Attorney's Fees and Costs	84-85	JA013358- JA013444
08/02/2016	Plaintiffs' Reply in Support of Motion for Attorney's Fees and Costs	83-84	JA013205- JA013357
01/11/2016	Plaintiffs' Reply to Defendants Consolidated Response to (1) Plaintiffs' Notice of Non-Reply and Non-Opposition to Plaintiff's Opposition to Pardee's Motion to Amend Judgment and Countermotion for Attorney's Fees And (2) Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	69	JA010954- JA010961
07/15/2013	Plaintiffs Reply to Defendants Counterclaim	17	JA002724- JA002731
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion for Attorney's Fees and Costs	68	JA010680- JA010722
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion Pursuant to NRCP 52(b) and NRCP 59 to Amend the Court's Judgment Entered on June 15, 2015	68	JA010768- JA010811
09/11/2015	Plaintiffs' Reply to Defendant's Opposition to Plaintiff's Motion to Strike "Judgment" Entered June 15, 2015 Pursuant to NRCP 52(b) and NRCP 59	68	JA010723- JA010767
04/20/2016	Plaintiffs' Reply to Defendant's Response and Supplement to Plaintiffs' Motion to Settle Two (2) Sets of Competing Judgments and Orders	71	JA011271- JA011384

Date	Document Description	Volume	Labeled
04/27/2017	Plaintiffs' Response to Pardee's Motion to Stay Execution of Judgment and Post-Judgment Orders	88	JA014066- JA014068
05/10/2013	Plaintiffs Supplement to Motion for Leave to File a Second Amended Complaint Pursuant to the Courts order on Hearing on April 26, 2013	16	JA002627- JA002651
12/08/2015	Plaintiffs' Supplement to Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	68	JA010866- JA010895
09/27/2013	Plaintiffs Supplement to Their Opposition to Defendants Motion for Partial Summary Judgment	19-21	JA002988- JA003203
07/22/2013	Plaintiffs Supplemental Opposition to Defendants Motion in Limine to Plaintiffs Claim for Damages in the Form of Compensation for Time MIL 2	17	JA002787- JA002808
10/25/2013	Plaintiffs Trial Brief Pursuant to EDCR 7.27	31	JA004818- JA004847
06/19/2015	Plaintiffs, James Wolfram and Walt Wilkes' Memorandum of Costs and Disbursements	52	JA008159- JA008191
03/16/2016	Release of Judgment	71	JA011211- JA011213
01/07/2013	Reply Brief in Support of Defendant's Motion for Summary Judgment	13	JA002081- JA002101
09/16/2013	Reply in Support of Defendant's Motion for Partial Summary Judgment	17	JA002858- JA002864
09/16/2013	Reply in Support of Defendant's Motion in Limine to Exclude Plaintiff's Claim for Attorney's Fees as An Element of Damages	17	JA002865- JA002869

Date	Document Description	Volume	Labeled
09/16/2013	Reply in Support of Defendant's Motion in Limine to Exclude Plaintiffs' Claim for Damages in the Form of Compensation for Time	17	JA002870- JA002874
07/15/2014	Reply in Support of Pardee's Motion to Expunge Lis Pendens	48	JA007560- JA007570
08/17/2015	Reply Points and Authorities in Support of Motion for Reconsideration	67	JA010670- JA010678
11/08/2011	Scheduling Order	1	JA000028- JA000030
06/06/2013	Second Amended Complaint	16	JA002670- JA002677
04/17/2013	Second Amended Order Setting Civil Non-Jury Trial	16	JA002501- JA002502
12/15/2011	Stipulated Confidentiality Agreement and Protective Order	1	JA000033- JA000039
08/29/2012	Stipulation and Order to Extend Discovery Deadlines (First Request)	1	JA000051- JA000054
06/30/2015	Supplement to Plaintiffs' Pending Motion for Attorney's Fees and Costs, Motion to Strike Judgment, Motion Pursuant to NRCP 52(b) and NRCP 59 to Amend the Court's Judgment, and Plaintiffs' Opposition to Pardee's Motion for Attorney's Fees and Costs	59	JA009110- JA009206
09/27/2013	Supplemental Brief in Support of Defendant's Motion for Partial Summary Judgment	21	JA003204- JA003209
07/12/2007	Supplemental Order Regarding Plaintiffs' Entitlement to, and Calculation of, Prejudgment Interest	88	JA014106- JA014110

Date	Document Description	Volume	Labeled
03/05/2013	Transcript of Proceedings - March 5, 2013	14	JA002211- JA002350
10/25/2011	Transcript re Discovery Conference	1	JA000024- JA000027
08/27/2012	Transcript re Hearing	1	JA000049- JA000050
04/26/2013	Transcript re Hearing	16	JA002527- JA002626
07/09/2013	Transcript re Hearing	17	JA002688- JA002723
09/23/2013	Transcript re Hearing	18	JA002875- JA002987
07/17/2014	Transcript re Hearing	49	JA007579- JA007629
07/31/2014	Transcript re Hearing	49	JA007630- JA007646
07/10/2015	Transcript re Hearing	62	JA009734- JA009752
01/15/2016	Transcript re Hearing	70	JA010962- JA011167
08/15/2016	Transcript re Hearing - August 15, 2016	86	JA013445- JA013565
12/06/2012	Transcript re Status Check	13	JA002066- JA002080
07/23/2013	Transcript re Status Check	17	JA002809- JA002814
10/23/2013	Transcript re Trial	22	JA003213- JA003403

Date	Document Description	Volume	Labeled
10/24/2013	Transcript re Trial	29-30	JA004463- JA004790
10/28/2013	Transcript re Trial – filed under seal	32-33	JA004848- JA005227
10/29/2013	Transcript re Trial – filed under seal	35	JA005264- JA005493
10/30/2013	Transcript re Trial	37-38	JA005512- JA005815
12/09/2013	Transcript re Trial – filed under seal	40-41	JA005821- JA006192
12/10/2013	Transcript re Trial	42-43	JA006193- JA006530
12/12/2013	Transcript re Trial – filed under seal	44-45	JA006533- JA006878
12/13/2013	Transcript re Trial - Part 1	46	JA006953- JA007107
12/13/2013	Transcript re Trial - Part 2	47-48	JA007108- JA007384
10/23/2013	Trial Exhibit A	23	JA003404- JA003544
10/23/2013	Trial Exhibit B – filed under seal	23	JA003545- JA003625
10/23/2013	Trial Exhibit C	23	JA003626- JA003628
10/23/2013	Trial Exhibit D	23	JA003629- JA003631
10/23/2013	Trial Exhibit E – filed under seal	23	JA003632- JA003634

Date	Document Description	Volume	Labeled
10/23/2013	Trial Exhibit F	23	JA003635- JA003637
10/23/2013	Trial Exhibit G	23	JA003638
10/23/2013	Trial Exhibit H	23	JA003639- JA003640
10/23/2013	Trial Exhibit I	23	JA003641- JA003643
10/23/2013	Trial Exhibit J – filed under seal	24	JA003644- JA003669
10/23/2013	Trial Exhibit K	24	JA003670- JA003674
10/23/2013	Trial Exhibit L	24	JA003675- JA003678
10/23/2013	Trial Exhibit M	24	JA003679- JA003680
10/23/2013	Trial Exhibit N	24	JA003681- JA003683
10/23/2013	Trial Exhibit O – filed under seal	25-26	JA003684- JA004083
10/23/2013	Trial Exhibit P	27	JA004084
10/23/2013	Trial Exhibit Q	27	JA004085
10/23/2013	Trial Exhibit R	27	JA004086- JA004089
10/23/2013	Trial Exhibit S	27	JA004090

Date	Document Description	Volume	Labeled
10/23/2013	Trial Exhibit T	27	JA004091- JA004092
10/23/2013	Trial Exhibit U	27	JA004093
10/23/2013	Trial Exhibit V	27	JA004094
10/23/2013	Trial Exhibit W	27	JA004095- JA004096
10/23/2013	Trial Exhibit X	27	JA004097
10/23/2013	Trial Exhibit Y	27	JA004098
10/23/2013	Trial Exhibit Z	27	JA004099- JA004100
10/23/2013	Trial Exhibit 1	27	JA004289- JA004292
10/23/2013	Trial Exhibit 10 – filed under seal	27	JA004320- JA004329
10/23/2013	Trial Exhibit 11 – filed under seal	28	JA004330- JA004340
10/23/2013	Trial Exhibit 12 – filed under seal	28	JA004341- JA004360
10/23/2013	Trial Exhibit 13 – filed under seal	28	JA004361- JA004453
10/28/2013	Trial Exhibit 15	34	JA005228- JA005232
10/28/2013	Trial Exhibit 18	34	JA005233- JA005235

Date	Document Description	Volume	Labeled
10/28/2013	Trial Exhibit 19	34	JA005236- JA005237
10/28/2013	Trial Exhibit 20	34	JA005238- JA005254
10/23/2013	Trial Exhibit 21	28	JA004454
10/28/2013	Trial Exhibit 23	34	JA005255- JA005260
10/30/2013	Trial Exhibit 23a	39	JA005816- JA005817
10/28/2013	Trial Exhibit 24	34	JA005261- JA005263
10/23/2013	Trial Exhibit 25	28	JA004455- JA004462
10/24/2013	Trial Exhibit 26	31	JA004792- JA004804
10/30/2013	Trial Exhibit 27	39	JA005818- JA005820
10/29/2013	Trial Exhibit 28	36	JA005494- JA005497
10/29/2013	Trial Exhibit 29	36	JA005498- JA005511
10/24/2013	Trial Exhibit 30	31	JA004805- JA004811
12/13/2013	Trial Exhibit 31a	48	JA007385- JA007410
12/12/2013	Trial Exhibit 39	46	JA006936- JA006948

Date	Document Description	Volume	Labeled
12/12/2013	Trial Exhibit 40	46	JA006949- JA006950
12/12/2013	Trial Exhibit 41	46	JA006951- JA006952
10/23/2013	Trial Exhibit 6 – filed under seal	27	JA004293- JA004307
10/23/2013	Trial Exhibit 7 – filed under seal	27	JA004308- JA004310
10/23/2013	Trial Exhibit 8 – filed under seal	27	JA004311- JA004312
10/23/2013	Trial Exhibit 9 – filed under seal	27	JA004313- JA004319
10/23/2013	Trial Exhibit AA	27	JA004101- JA004102
10/23/2013	Trial Exhibit BB	27	JA004103
10/23/2013	Trial Exhibit CC	27	JA004104
10/23/2013	Trial Exhibit DD	27	JA004105
10/23/2013	Trial Exhibit EE	27	JA004106- JA004113
10/23/2013	Trial Exhibit FF	27	JA004114- JA004118
10/23/2013	Trial Exhibit GG	27	JA004119- JA004122
10/23/2013	Trial Exhibit HH	27	JA004123

Date	Document Description	Volume	Labeled
10/23/2013	Trial Exhibit II	27	JA004124
10/23/2013	Trial Exhibit JJ	27	JA004125
10/23/2013	Trial Exhibit KK	27	JA004126- JA004167
10/23/2013	Trial Exhibit LL	27	JA004168
10/23/2013	Trial Exhibit MM	27	JA004169
10/23/2013	Trial Exhibit NN	27	JA004170- JA004174
10/23/2013	Trial Exhibit OO	27	JA004175- JA004183
10/23/2013	Trial Exhibit PP	27	JA004184- JA004240
10/23/2013	Trial Exhibit QQ	27	JA004241- JA004243
10/23/2013	Trial Exhibit RR	27	JA004244- JA004248
10/23/2013	Trial Exhibit SS	27	JA004249- JA004255
10/23/2013	Trial Exhibit TT	27	JA004256- JA004262
10/23/2013	Trial Exhibit UU	27	JA004263- JA004288
10/24/2013	Trial Exhibit VV	31	JA004791

Date	Document Description	Volume	Labeled
12/10/2013	Trial Exhibit WW	43	JA006531- JA006532
12/12/2013	Trial Exhibit XX	46	JA006879- JA006935

Dated this 28th day of February, 2018.

McDONALD CARANO LLP

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

Attorneys for Appellant

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

ASSIGNMENT

Reference is made to the December 20, 2010 Assignment by Jerry Masini, owner/broker of Award Realty and made on behalf of Award Realty, a copy of which is attached hereto as Exhibit A. I, Peter J. Dingerson, owner/broker of D&W Real Estate LLC, on behalf of D&W Real Estate LLC, hereby assign to James F. Wolfram 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 D&W Real Estate LLC has any rights, title or interest in the same.

Dated: December 3, 2012

D&W REAL ESTATE, LLC

By: 
PETER J. DINGERSON
OWNER/BROKER

GHS\Gen. Assignment agr.

PLTF10494

JA010328

EXHIBIT "A"

EXHIBIT "A"

PLTF10495

JA010329

Sent 27/02/2013 - - to p17/17

FROM :

FROM NO. :

Oct. 26 2012 02:57PM P2

December 20, 2010

I, Jerry Masini, Owner/Broker of Award Realty, on behalf of Award Realty, hereby assign to James F. Wolfman and/or D & W Real Estate LLC, Peter Dingerson, broker, all rights, title, and interest in that certain Commission Agreement (Commission Letter) dated September 1, 2004 between Award Realty and Perdue Homes.

December 20, 2010

By: Jerry Masini, Owner/Broker
Award Realty


Jerry Masini

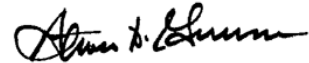
PLTF10486

PLTF10496

JA010330

EXHIBIT “6”

JA010331



CLERK OF THE COURT

RIS
PAT LUNDVALL (NSBN 3761)
AARON D. SHIPLEY (NSBN 8258)
McDONALD CARANO WILSON LLP
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102
(702) 873-4100
(702) 873-9966 Facsimile
lundvall@mcdonaldcarano.com
ashipley@mcdonaldcarano.com
Attorneys for Defendant
Pardee Homes of Nevada

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,
WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,

Defendant.

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

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

(MIL #1)

Hearing Date: September 23, 2013
Hearing Time: 8:30 a.m.

AND RELATED CLAIMS

Plaintiffs' Opposition ("Opposition") to defendant Pardee Homes of Nevada's ("Pardee") Motion in Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages (MIL #1) ("Motion") fails because under Nevada law attorneys' fees cannot be recovered as an element of damages in this breach of contract case.

Plaintiff's claim that they are entitled to attorneys' fees as an element of their damages is based on an alleged breach of the Commission Agreement. Plaintiffs claim that Pardee failed to provide requested information to Plaintiffs -- information Pardee contends had nothing to do with any commissions earned by Plaintiffs -- which forced

1 Plaintiffs to seek counsel and file suit. The problem with this premise is that while it
2 accurately describes the allegations of a typical breach of contract case, they are not
3 allegations involving the special limited circumstances described by the Nevada
4 Supreme Court which may warrant a claim for attorneys' fees as an element of
5 damages, rather than as a cost of litigation. Because this is a straight forward breach
6 of contract case, Plaintiffs should be barred from claiming and presenting evidence of
7 their attorneys' fees as an element of their alleged damages at trial.

8 In Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc., the seminal case
9 on this particular issue, the Nevada Supreme Court discussed the difference between
10 attorneys' fees as a cost of litigation and attorneys' fees as an element of damages.
11 See id., 117 Nev. at 955, 35 P.3d at 968-969. The court acknowledged that attorneys'
12 fees cannot be recovered as a cost of litigation unless authorized by agreement,
13 statute, or rule. See id., 117 Nev. at 956, 35 P.3d at 969 (internal citation omitted). "As
14 an **exception to the general rule**, a district court may award attorney fees as special
15 damages in **limited circumstances**." Horgan v. Felton, 123 Nev. 577, 583, 170 P.3d
16 982, 986 (2007) (emphasis added).

17 The Nevada Supreme court has clarified that attorneys' fees may be awarded as
18 special damages in only a narrow handful of circumstances, such as: third-party actions
19 involving title insurance or bonds, insurance or indemnity actions, slander of title
20 actions, malicious prosecution, trademark infringement, or false imprisonment. See
21 Sandy Valley, 117 Nev. at 957-58, 35 P.3d at 970; see also Horgan, 123 Nev. at 586-
22 87, 170 P.3d at 988-89; see also Reyburn Lawn & Landscape Designers, Inc. v. Plaster
23 Dev. Co., Inc., 127 Nev. Adv. Op. 26, ---, 255 P.3d 268, 279 n. 11 (Jun. 2, 2011).

24 As the Court is aware, this case involves a written contract which contains a
25 provision whereby the prevailing party may seek an award of its attorneys' fees. In
26 other words, the parties expressly agreed upon the circumstances under which
27 attorneys fees can be recovered. Therefore, unless this case fits a narrow exception to
28

1 the general rule, attorneys' fees may be sought as a cost of litigation at the conclusion
2 of trial through post-trial motion practice.

3 Plaintiffs argue that Nevada law allows attorneys' fees as special damages in
4 this case because "Plaintiffs were only able to get the documents and information they
5 were entitled to once they filed suit and were granted the tools of discovery to get some
6 of those records." See Opposition, at 8:18-21. Plaintiffs cite to the Sandy Valley and
7 Horgan decisions to support this position. This is a crude stretching of Nevada law. In
8 interpreting Sandy Valley, the Horgan decision is very careful to limit, not expand, the
9 types of cases that would warrant attorneys' fees as special damages. For example, an
10 action to quiet or clarify title does not rise to the level to warrant attorneys' fees as
11 damages. Horgan, 123 Nev. at 587, 170 P.2d at 988. Rather, attorneys' fees are
12 available only in slander of title cases. Id., 123 Nev. at 587, 170 P.2d at 988. As
13 quoted by Plaintiffs in the Opposition, the Horgan decision makes it clear that in order
14 to support the proposition that attorneys' fees are available as special damages, there
15 must be elements of "intentional malicious acts" and "calculated action" on the part of a
16 defendant that forced the plaintiff into litigation. 123 Nev. at 585-86, 170 P.2d at 987-88
17 (internal quotation omitted); see also Plaintiffs' Opposition, at 8:3-10.

18 Plaintiffs cannot prove, nor have they even alleged, that Pardee acted
19 intentionally or maliciously to hide information and documents from Plaintiffs. The
20 evidence in this case shows that Plaintiffs were provided with information and
21 commission payments until every dollar of the commissions owed to them under the
22 Commission Agreement was paid. Then, when Plaintiffs began inquiring about other
23 takedowns, Pardee explained to them (on multiple occasions) that no such exercise of
24 Option Property had occurred. Pardee believed it was acting within its contractual right
25 to do so. There has been no evidence produced in this case that shows that Pardee
26 acted in a calculated, intentional, or malicious manner when dealing with Plaintiffs. The
27 timely commission payments and multiple communications regarding the status of the
28 project indicate the opposite. Therefore, this is not the type of case that warrants

 **MCDONALD-CARANO-WILSON²**
100 WEST LIBERTY STREET, 10th FLOOR • RENO, NEVADA 89501
P.O. BOX 2070 • RENO, NEVADA 89509-1070
PHONE 775-786-2000 • FAX 775-786-2020

1 attorneys' fees as special damages. Rather, the attorneys' fees provision in the
2 Commission Agreement allows for attorneys' fees and costs to the prevailing party,
3 which is a determination that out of necessity will be made post trial, not during the trial.
4 In sum, the Court should grant Pardee's Motion.

5 DATED this 16th day of September, 2013.

6 McDONALD CARANO WILSON LLP

7 /s/ Pat Lundvall

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*

McDONALD-CARANO-WILSON
100 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89509-1670
PHONE 775-788-2000 • FAX 775-788-2028

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 16th day of September, 2013, I served a true and correct copy of the foregoing **REPLY IN SUPPORT OF 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 Merrill
An Employee of McDonald Carano Wilson LLP

284380

EXHIBIT “7”

JA010337

[Skip to Main Content](#) [Logout](#) [My Account](#) [Search Menu](#) [New District Civil/Criminal](#)
[Search Refine](#) [Search Close](#)

Location : District Court Civil/Criminal Help

REGISTER OF ACTIONS
CASE NO. A-10-632338-C

**James Wolfram, Plaintiff(s) vs. Pardee Homes of Nevada,
Defendant(s)**

www

Case Type: **Breach of Contract**
 Subtype: **Other**
 Date Filed: **12/29/2010**
 Location: **Department 4**
 Reference Case Number: **A632338**

PARTY INFORMATION

Counter Claimant **Pardee Homes of Nevada**

Lead Attorneys
Patricia K. Lundvall
Retained
702-873-4100(W)

Counter Defendant Wilkes, Walt

**James Joseph
Jimmerson, ESQ**
Retained
702-388-7171(W)

Counter Defendant **Wolfram, James**

**James Joseph
Jimmerson, ESQ**
Retained
702-388-7171(W)

Defendant Pardee Homes of Nevada

Patricia K. Lundvall
Retained
702-873-4100(W)

Plaintiff Limbocker-Wilkes, Angela L.

James Joseph
Jimmerson, ESQ
Retained
702-388-7171(W)

Plaintiff Wilkes, Walt

**James Joseph
Jimmerson, ESQ**
Retained
702-388-7171(W)

Plaintiff Wolfram, James

**James Joseph
Jimmerson, ESQ**
Retained
702-388-7171(W)

EVENTS & ORDERS OF THE COURT

04/26/2013 **Motion for Leave (8:30 AM)** (Judicial Officer Earley, Kerry)
04/26/2013, 05/15/2013
Plaintiffs Motion for Leave to file a Second Amended Complaint

Minutes

04/26/2013 8:30 AM

- Mr. Jirmmerson indicated the requested amendments addressed Plaintiff's claims for special damages, specifically claims for attorney's fees. Furthermore, Mr. Jirmmerson argued in support of the Motion, stating that the facts as pled established the necessity for attorney's fees under the provisions of Sandy

7/7/2015

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=8787301&HearingID=169195126&SingleViewMode=Minutes>

Valley. Ms. Lundvall argued in opposition, stating that the claims for attorney's fees as special damages were futile, as they were not recoverable. Additionally, Ms. Lundvall argued issues of prejudice against her clients, and the undue delay of bringing forth the claims. COURT Found there was no undue delay and no prejudice to the Defendant in bringing the claims for special damages. COURT ORDERED Motion CONTINUED to the Chamber's Calendar for a written decision; Counsel to provide supplemental briefing by May 10, 2013 on the issue of futility under the Motion for Leave to Amend. FURTHER ORDERED, Discovery reopened for the limited purpose of obtaining information as to whether the attorney's fees and costs incurred by James J. Jimmerson's firm were special damages, and whether Plaintiffs incurred individual time and effort damages.

04/26/2013 8:30 AM

05/15/2013 3:00 AM

05/23/2013 8:30 AM

08/19/2013 8:30 AM

Parties Present

[Return to Register of Actions](#)

EXHIBIT “8”

A-10-632338-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Breach of Contract

COURT MINUTES

May 16, 2013

A-10-632338-C

James Wolfram, Plaintiff(s)

vs.

Pardee Homes of Nevada, Defendant(s)

May 16, 2013

3:00 AM

Minute Order

MINUTE ORDER
RE: PLAINTIFFS'
MOTION FOR
LEAVE TO FILE A
SECOND
AMENDED
COMPLAINT

HEARD BY: Earley, Kerry

COURTROOM:

COURT CLERK: Louisa Garcia

JOURNAL ENTRIES

- This matter was heard on April 26, 2013, after extensive oral argument by counsel for Plaintiffs and Defendant, the Court granted both parties leave to file supplemental briefs. The matter was subsequently placed on the Chamber Calendar of Department IV on May 15, 2013.

Upon review of the papers and pleadings on file in this matter, including Plaintiff's Supplement to Motion for Leave to File a Second Amended Complaint and Defendants' Supplemental Brief in support of its Opposition to Plaintiff's Motion for Leave to File a Second Amended Complaint, the Court finds as follows:

First, the Court notes that in the absence of any apparent reason involving undue delay, bad faith or dilatory motive on behalf of Plaintiffs, the leave to amend should be freely given. *Stephens v. Southern Nevada Music Co.*, 89 Nev. 104 (1973). The Court finds no such reasons to be present in the instant case. Further, the Court ordered at the court hearing on April 26, 2013 that discovery is to be reopened for the limited purpose of Defendant obtaining information regarding any alleged attorney's fees as special damages as well as any alleged time and effort damages incurred by Plaintiffs. The Court granted Defendant the opportunity to conduct the aforementioned discovery to avoid any prejudice to Defendant.

PRINT DATE: 05/16/2013

Page 1 of 2

Minutes Date:

May 16, 2013

JA010341

Second, the Court addressed the issue of whether Plaintiff's proposed amendment was futile because Plaintiff's request for attorney's fees as special damages is not viable pursuant to *Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc.*, 117 Nev. 948 (2001).

The Sandy Valley case is the seminal case regarding the issue of whether attorney's fees may be considered as an element of special damages or as a cost of litigation. The Nevada Supreme Court held attorney's fees may be considered an element of special damages in those rare cases when they were reasonably foreseeable and the natural and proximate consequence of the injurious conduct. 117 Nev at 957. The above referenced general criteria in the Sandy Valley case allows the Court to determine in a specific case if a Plaintiff's damages could include attorney's fees as special damages. The Sandy Valley case and its progeny discuss specific types of claims that allow attorney's fees as special damages. However, even if a Plaintiff's claim does not fall under all of the specific types of claims cited in those cases, the general criteria in Sandy Valley is still determinative of whether a case is eligible for attorney's fees as special damages.

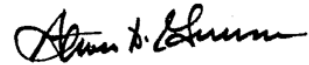
Based upon the foregoing, the Court does not find that the Plaintiff's Motion for Leave to File a Second Amended Complaint should be denied on the basis that the amendment sought is futile under Nevada law. Whether Plaintiffs during the trial of this matter provide evidence to fit the narrow circumstances of Sandy Valley and its progeny will be decided by the Court at the appropriate time.

Therefore, the Court GRANTS Plaintiff's Motion for Leave to File a Second Amended Complaint. Counsel for Plaintiffs is to prepare a proposed order and provide a copy to Defendant's counsel for approval as to form and content.

CLERK'S NOTE: A copy of this minute order distributed to the following parties via facsimile: James M. Jimmerson, Esq. and Patricia Lundvall, Esq. (LG 5/16/13)

EXHIBIT “9”

JA010343



CLERK OF THE COURT

1 **SB**
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*

DISTRICT COURT
CLARK COUNTY, NEVADA

10 JAMES WOLFRAM,
11 WALT WILKES

12 Plaintiffs,

13 vs.

14 PARDEE HOMES OF NEVADA,
15 Defendant.

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

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

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

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

27 ///

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

2 McDONALD CARANO WILSON LLP

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

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. LEGAL ARGUMENT**

12 **A. Legal Standard.**

13 As set forth in Pardee's Opposition, granting a party leave to amend under
14 NRCP 15(a) is not appropriate when the amendment would be futile. See Reddy v.
15 Litton Industries, Inc., 912 F.2d 291, 296-97 (9th Cir. 1990). Futility occurs when the
16 proposed amendment is frivolous or attempts to advance a claim that is legally
17 insufficient. See Allum v. Valley Bank of Nevada, 109 Nev. 280, 287, 849 P.2d 297,
18 302 (1993) (citation omitted) ("It is not an abuse of discretion to deny leave to amend
19 when any proposed amendment would be futile."). If the proposed amendment could
20 not withstand a motion to dismiss, then the amendment should be denied as futile. See
21 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and
22 Procedure Civ. 2d §1487 (2006). In this case, Plaintiffs' request for attorneys' fees as
23 special damages is insufficient under Nevada law and would not withstand a motion to
24 dismiss. Therefore, the Motion should be deemed futile and denied with prejudice.

25
26
27
28
///

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

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

13 As set forth in the Opposition, this case does not fit any of the narrow
14 circumstances contemplated by the Nevada Supreme Court allowing a party to recover
15 its attorneys' fees as special damages. In Horgan v. Felton, the court specifically
16 clarified that "[a]s an **exception to the general rule**, a district court may award attorney
17 fees as special damages in **limited circumstances**." 123 Nev. 577, 583, 170 P.3d
18 982, 986 (2007) (emphasis added). Plaintiffs here contend the limited circumstances
19 that apply to their case is they could not get all of the documents they wanted to confirm
20 they were not entitled to additional commissions. See Plaintiffs' Opposition to
21 Defendants Motion for Summary Judgment, 17:8-13. ("The essential piece of
22 information missing from the letter is the confirmation that the other transactions
23 between [Pardee and Coyote Springs Investment LLC] were not subject to the Option
24
25
26
27
28

¹ Pardee disagrees vehemently with that contention.

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

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


16 A review of the proposed Second Amended Complaint reveals that it is void of
17 any allegations that Pardee engaged in intentional, malicious, calculated or bad faith
18 behavior directed toward Plaintiffs. The proposed Second Amended Complaint
19 generically alleges that Pardee “failed to act in good faith and to the best of its ability,
20 and also failed to deal fairly with Plaintiffs, thereby breaching its duties to so conduct
21 itself and injuring Plaintiffs’ rights to conduct its business and its ability to receive the
22 benefits of the Commission Letter.” See proposed Second Amended Complaint, at ¶
23 30, a copy of which is attached to Plaintiffs’ Motion as Exhibit 1. Plaintiffs argued at the
24 April 26, 2013, hearing that their cause of action for breach of the covenant of good
25

26
27 ² Pardee continues to be perplexed by Plaintiffs’ position. By their argument Plaintiffs concede they were
28 not entitled to any commission from the other transactions between Pardee and CSI, but they only
wanted to be told or confirm that they were not entitled to further commissions. Such an argument is
obviously circular: Pardee allegedly breached a duty to inform by not informing Plaintiffs about a
transaction in which they were not entitled to commission?

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

4 In order to properly allege a contractual breach of the implied covenant of good
5 faith and fair dealing, the claimant must show that: (1) plaintiff and defendant were
6 parties to the contract; (2) the defendant owed a duty of good faith to the plaintiff; (3)
7 the defendant breached that duty by performing in a manner that was unfaithful to the
8 purpose of the contract; and (4) the plaintiff's justified expectations were thus denied.
9 See Perry v. Jordan, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995); Hilton Hotels Corp.
10 v. Butch Lewis Prod. Inc., 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991) ("Hilton I").
11 None of these elements (as pled by Plaintiffs) involve or concern intentional, malicious,
12 calculated or bad faith conduct. Moreover, these elements are drastically different than
13 the elements required to establish a claim for bad faith.

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

 McDONALD-CARANO-WILSON
400 WEST LIBERTY STREET, 12TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2070 • RENO, NEVADA 89509-7670
PHONE 775-786-2000 • FAX 775-786-2020

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

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

11 McDONALD CARANO WILSON LLP

12
13 /s/ Aaron D. Shipley
14 Pat Lundvall (#3761)
15 Aaron D. Shipley (#8258)
16 2300 West Sahara Avenue, Suite 1000
17 Las Vegas, Nevada 89102
18 *Attorneys for Defendant Pardee Homes of*
19 *Nevada*
20
21
22
23
24
25
26

27
28 ³ Pardee has limited this brief to the single issue requested by the Court. Pardee continues to advance
all other reasons why Plaintiffs' motion should be denied.

McDONALD-CARANO-WILSON

300 WEST LIBERTY STREET, 10TH FLOOR • RENO, NEVADA 89501
P.O. BOX 2670 • RENO, NEVADA 89509
PHONE 775-788-2003 • FAX 775-788-1000

CERTIFICATE OF SERVICE

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

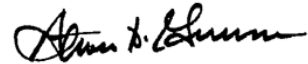
James J. Jimmerson
Lynn M. Hansen
James M. Jimmerson
JIMMERSON, HANSEN, P.C.
415 S. Sixth Street, Ste 100
Las Vegas, NV 89101
Attorney for Plaintiffs

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

278280.2

EXHIBIT “10”

JA010351



CLERK OF THE COURT

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

DISTRICT COURT
CLARK COUNTY, NEVADA

11 JAMES WOLFRAM AND WALT WIKES)
12)
13 Plaintiffs,
14 vs.)
15 PARDEE HOMES OF NEVADA,
16 Defendant.)


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

NOTICE OF ENTRY OF ORDER

18 PLEASE TAKE NOTICE that an Order Granting Plaintiffs' Motion for Leave to File
19 Second Amended Complaint on Hearing of April 26, 2013 was entered in the above-entitled
20 matter on the 5th day of June, 2013, a file-stamped copy of which is attached hereto.

21 Dated this 5th day of June, 2013.

JIMMERSON HANSEN, P.C.

23
24 
25 JAMES J. JIMMERSON, ESQ.
26 Nevada Bar No. 000264
27 LYNN M. HANSEN, ESQ.
28 Nevada Bar No. 0244
JAMES M. JIMMERSON, ESQ.
Nevada Bar No. 12599
Attorneys for Plaintiffs
James Wolfram & Walt Wilkes

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

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 here by certify that service of a true correct copy of NOTICE OF ENTRY OF ORDER 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 (as amended)
- ☐ By receipt of copy as indicated below

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


An Employee of JIMMERSON HANSEN, P.C.

ORIGINAL

Electronically Filed
06/05/2013 02:28:47 PM


CLERK OF THE COURT

ORDR

JAMES J. JIMMERSON, ESQ.
Nevada Bar No.: 00264
LYNN M. HANSEN, ESQ.
Nevada Bar No.: 00244
JAMES M. JIMMERSON, ESQ.
Nevada Bar No.: 12599
JIMMERSON HANSEN, P.C.
415 South 6th Street, Suite 100
Las Vegas, Nevada 89101
Tel No.: (702) 388-7171;
Fax No.: (702) 388-6406
lmh@jimmersonhansen.com
jmj@jimmersonhansen.com
Attorneys for Plaintiffs

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JAMES WOLFRAM and
WALT WILKES,

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,

Defendant.

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

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

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

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

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

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

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

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

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

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

3 Dated 4 this day of May, 2013.

4 *John*

5 *Kerry S. Embury*
6 DISTRICT COURT JUDGE *RE*

6 Respectfully Submitted:

7 JIMMERSON HANSEN, P.C.

8 *[Signature]*
9 JAMES J. JIMMERSON, ESQ.

10 Nevada Bar No.: 00264

11 LYNN M. HANSEN, ESQ.

12 Nevada Bar No.: 00244

13 JAMES M. JIMMERSON, ESQ.

14 Nevada Bar No.: 12599

15 415 South 6th Street, Suite 100

16 Las Vegas, Nevada 89101

17 Attorneys for Plaintiffs

18 *James Wolfram and Walt Wilkes*

19 Reviewed as to form and content:

20 McDONALD CARANO WILSON, LLP

21 *[Signature]*
22 PAT LUNDVALL, ESQ.

23 Nevada Bar No.: 3761

24 AARON D. SHIPLEY, ESQ.

25 Nevada Bar No.: 8258

26 2300 W. Sahara Avenue, Suite 1000

27 Las Vegas, Nevada 89102

28 Attorneys for Defendant

Pardee Homes of Nevada

EXHIBIT “11”

JA010357

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,

PLAINTIFF,

VS.

PARDEE HOMES OF NEVADA,

DEFENDANT.

CASE NO. A-10-632338-C

 COPY

TRANSCRIPT
OF
TRIAL PROCEEDINGS
VOLUME I

BEFORE THE HONORABLE KERRY L. EARLEY

DISTRICT COURT JUDGE

HELD ON FRIDAY, DECEMBER 13, 2013

AT 8:30 A.M.

APPEARANCES:

For the Plaintiff: JAMES J. JIMMERSON, ESQ.
JAMES M. JIMMERSON, ESQ.

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

Reported by: Loree Murray, CCR No. 426

Loree Murray, CCR #426
District Court IV

JA010358

I N D E X

PLAINTIFFS'

PAGE

KLIF ANDREWS,

Cross-Examination by Ms. Lundvall	3
Redirect Examination by Mr. J.J. Jimmerson	43
Recross-Examination by Ms. Lundvall	94

JAMES J. JIMMERSON,

Direct Examination by Mr. J.J. Jimmerson	98
Cross-Examination by Ms. Lundvall	108, 117

EXHIBITS

IDENTIFIED

ADMITTED

PLAINTIFFS'

31	Copy of Billing Records	101	105
----	-------------------------	-----	-----

1 MS. LUNDVALL: No further questions, your
2 Honor.

3 MR. J.J. JIMMERSON: And I don't have
4 anything, Judge. Thank you.

5 THE COURT: Okay, thank you very much,
6 Mr. Andrews.

7 THE WITNESS: Thank you.

8 Here's your pen back.

9 THE COURT: Okay.

10 MR. J.M. JIMMERSON: Your Honor, can we take
11 our morning break?

12 THE COURT: Yes. I was ready for it too, but
13 I wanted to make sure if we could get him out of here,
14 we would not hold him up.

15 MR. J.M. JIMMERSON: Thank you.

16 (Brief recess.)

17 THE COURT: All right, do we have another
18 witness, or where are we?

19 MR. J.M. JIMMERSON: Yes, your Honor. We're
20 gonna call James J. Jimmerson to the stand.

21 THE COURT: I understand. Are you gonna --

22 MR. J.J. JIMMERSON: He's wanted to do this.

23 THE COURT: I was gonna say how long have you
24 waited to --

25 MR. J.J. JIMMERSON: 62 years.

1 MR. J.M. JIMMERSON: Pat, I'm calling in all
2 favors for the scope objections to be waived for five
3 minutes myself.

4 JAMES J. JIMMERSON,
5 having been duly sworn to tell the truth, the whole
6 truth, and nothing but the truth, was examined and
7 testified as follows:

8 THE CLERK: For the record, please state your
9 first and last name.

10 THE WITNESS: James J. Jimmerson,
11 J-i-m-m-e-r-s-o-n.

12 THE CLERK: Thank you.

13 THE COURT: He's gonna do some housekeeping.
14 Let's go.

15 THE WITNESS: Go ahead, Jim.

16 DIRECT EXAMINATION

17 BY MR. J.M. JIMMERSON:

18 Q. I don't know what to call him, Mr. Jimmerson?

19 A. There you go, that's about as good as it's
20 ever been.

21 Q. What's your current occupation?

22 A. An attorney at law.

23 Q. And how are you employed as an employee?

24 A. The firm Jimmerson Hansen, A Professional
25 Corporation, employs me. I'm the president and

1 secretary.

2 Q. And how long have you been at Jimmerson
3 Hansen?

4 A. 1983 or '84.

5 Q. And how long have you been practicing law?

6 A. 37 years.

7 Q. And give us a brief history of some of your
8 career highlights, awards, etc.

9 MS. LUNDVALL: You know, your Honor.

10 THE COURT: We'll stipulate.

11 MS. LUNDVALL: Is this gonna be relevant.

12 THE COURT: I'll stipulate for foundation.

13 Just, why don't you just do his qualifications for
14 saying what the hourly rate was, his knowledge on that.

15 Isn't that the substance basically?

16 THE WITNESS: Totally.

17 MR. J.M. JIMMERSON: Exactly.

18 THE COURT: I'm sure Ms. Lundvall will
19 stipulate he's qualified to practice law, he has the
20 experience to do what he does, but do what you want.

21 THE WITNESS: All right.

22 THE COURT: I want to hear your highlights.

23 THE WITNESS: I don't want to tell them to
24 you. I'm just kidding, that's fine.

25 THE COURT: I think I've watched them.

1 OBY MR. J.M. JIMMERSON:

2 Q. I'll withdraw the question, Mr. Jimmerson.

3 What is your hourly rate you charged in this
4 matter?

5 A. \$550.

6 Q. Are you familiar with the market rate
7 generally for this type of litigation in Las Vegas?

8 A. Yes.

9 Q. And for your level of experience and
10 expertise, is this above market? Below market? At
11 market?

12 A. I think it's probably at market. It might be
13 a little lower. I've seen where other civil litigation
14 firms now are in the 6- to 800 an hour range.

15 Q. Okay. Do you supervise associates and other
16 staff in the course of this matter?

17 A. I did. I do.

18 Q. And do you believe, are they attached to an
19 hourly rate as well?

20 A. They are.

21 Q. And how do you assign that hourly rate?

22 A. I evaluate their length of experience as
23 lawyers, their skill irrespective of length of service,
24 their efficiency, if they're able to accomplish a great
25 deal in a shorter period of time, as opposed to taking

1 a lot of hours to accomplish what we think might take a
2 little shorter time.

3 So I look at their qualifications, I look at
4 their efficiency, I look at their dedication. And
5 there are factors under both Supreme Court Rule 1.5 and
6 a case many years ago in 1969 called Brunsell versus
7 Golden Gate National Bank that gives guidance to the
8 Court. There's also, in the family law world, a case
9 called Love versus Love, but between those sources.

10 There are some common factors that lawyers
11 and the Court look to toward setting reasonable fees
12 that are reasonably and necessarily incurred.

13 Q. And did you apply those factors as you set
14 your rates as it pertains to this case?

15 A. I do.

16 Q. And can you please flip to Exhibit 31A?

17 MS. LUNDVALL: Your Honor, all I have is 31.
18 Maybe counsel can give me a 31A.

19 THE COURT: Here's what I have as 31A.

20 Am I right?

21 MR. J.M. JIMMERSON: Yes, yes, your Honor.

22 Are we all on 31A now?

23 THE WITNESS: I will tell you the book
24 doesn't distinguish, Mr. Jimmerson, between 31 or 31A.

25 THE COURT: We were supposed to do this

1 insert over the pink.

2 THE WITNESS: We have the pink.

3 THE COURT: Do you have this?

4 THE WITNESS: Yes, ma'am, I do.

5 THE COURT: This is what I have.

6 MR. J.M. JIMMERSON: Yes, that's, that's 31A.

7 We did basically a substitute.

8 THE COURT: We did a substitute, so we need
9 the highlight in green.

10 Do you have it?

11 THE CLERK: I'll give him my copy here.

12 THE COURT: That book may not have it. We'll
13 give you the copy in the Court's exhibits. Okay, all
14 right. We can fix that.

15 Kristin said it must have happened when she
16 wasn't here.

17 MS. LUNDVALL: I agree, your Honor.

18 THE COURT: We'll stipulate.

19 BY MR. J.M. JIMMERSON:

20 Q. Mr. Jimmerson, what is that exhibit?

21 A. It is marked as Exhibit 31A. It is a portion
22 of the billings to Mr. Wolfram and Mr. Wilkes, pursuant
23 to our written fee agreements, for work that began in
24 November of 2010 through roughly mid June of 2013, that
25 focuses upon the work we did in this case prosecuting

1 the three claims in the complaint filed December of
2 2010.

3 Q. Is it a true and accurate copy of those
4 records?

5 A. I believe it is.

6 Q. Okay.

7 A. I personally reviewed this, obviously, before
8 I came here today.

9 Q. All right. Is that the bill that you would
10 send to Mr. Wolfram or Mr. Wilkes?

11 A. Yes, it has been sent --

12 Q. Okay.

13 A. -- to each of them.

14 Q. I can see there's highlights on that. Can
15 you, were those highlights part of the original bill
16 sent to the client, or were they added later?

17 A. No. They were added later.

18 Q. Why were they added later?

19 A. Well, we were trying to present, as part of
20 the plaintiffs' case in chief, the damages that would
21 speak to a couple of elements. One would be --

22 MS. LUNDVALL: Your Honor, I don't think this
23 witness is entitled to argue to the Court.

24 THE WITNESS: I'm not.

25 MS. LUNDVALL: I think he's entitled to

1 describe what the highlights are.

2 THE COURT: Explain the purpose of the
3 highlights.

4 MS. LUNDVALL: Thank you.

5 THE WITNESS: The purposes of the highlights
6 is to allocate the work that we believe is the totality
7 of work that is directed to the first claim for relief
8 from seeking an accounting from Pardee Homes of Nevada,
9 Inc.

10 BY MR. J.M. JIMMERSON:

11 Q. Are there highlights pertaining to other two
12 claims for relief?

13 A. The first claim for relief, I apologize. The
14 first claim for relief for accounting, the second claim
15 for relief is for the breach of the implied covenant of
16 good faith and fair dealing, and the third claim is
17 breach of contract for failure to keep them reasonably
18 informed.

19 MS. LUNDVALL: Your Honor, I'm going to move
20 to strike the last objection [sic]. The complaint is
21 itself -- the last piece of testimony. The complaint
22 itself would identify the specificity of the
23 allegations.

24 THE COURT: It would. I just want to orient,
25 because obviously they've broken it up, so for our

1 purposes, that's what you're doing.

2 THE WITNESS: And for the record, the
3 complaint is Exhibit O at trial.

4 Go ahead.

5 MR. J.M. JIMMERSON: I would like to move
6 this into evidence as Exhibit 31A.

7 THE COURT: Any objection, Ms. Lundvall?

8 MS. LUNDVALL: Your Honor, our objection
9 would be based upon relevance, but I believe that the
10 Court has already dealt with this issue, so there would
11 be a conditional admission.

12 THE COURT: I'm gonna go ahead and admit it.
13 You have your record on the issue.

14 MS. LUNDVALL: I do. Thank you.

15 THE COURT: You're not waiving anything by --

16 MS. LUNDVALL: Thank you, your Honor.

17 THE COURT: It's admitted. 31A is admitted.

18 BY MR. J.M. JIMMERSON:

19 Q. Have you come to a conclusion as to a
20 calculation of attorney fee damages as it pertains to
21 the accounting claim?

22 A. Yes.

23 Q. Okay. And how did you arrive at that
24 conclusion? What was the formula you applied?

25 A. I focused upon the task undertaken and

1 whether it had a direct relationship to accounting and
2 work needed to process our claim for accounting, "our
3 claim," meaning Mr. Wolfram and Mr. Wilkes. I, for
4 those specific tasks, I assigned a 100 percent charge.
5 If I charged \$250 for that day's entry, I would charge
6 a hundred percent for that. That is in yellow.

7 In addition, I added to that one third of the
8 unyellowed amount, which I call the white entries, just
9 simply black and white entries, because of the three
10 counts, we just associated one third for the accounting
11 counts of those unyellowed numbers, and the total is a
12 little over \$135,000 between the entire period of
13 November 2010 through June, the middle of June 2011,
14 which would put it essentially before we began the
15 trial.

16 Go ahead.

17 Q. Mr. Jimmerson, do you see that there is a set
18 of pink or purple highlights?

19 A. I do.

20 Q. Okay. And what do those apply to?

21 A. Those are specifically the breach of the
22 implied covenant of good faith and fair dealing and
23 breach of contract regarding failure to provide, to
24 keep the clients reasonably informed. On subpoenas and
25 custodians of records depositions, and a finite pinpointed

1 effort for those matters only totaling 7,600 and
2 change, but \$7,600.

3 Q. Okay. Do you believe that --

4 A. And let me add, the \$7,600 is part of the
5 135,000, it's not to be added on.

6 THE COURT: Okay. So the pink highlighted
7 ones are not to be added on, they've already been
8 assigned?

9 THE WITNESS: They were \$7,600 for purposes
10 of what we felt we had to do to obtain this information
11 under Counts 2 and 3, but they're part of the 135,000.
12 We aren't seeking a ago duplication.

13 THE COURT: That's what the highlights are?

14 THE WITNESS: That's correct.

15 BY MR. J.M. JIMMERSON:

16 Q. Have you supervised or been a participant in
17 the work since the drafting of the complaint in this
18 matter?

19 A. Yes.

20 Q. And has that supervision or participation
21 been continued to the present?

22 A. It has.

23 Q. Do you believe that these charges are a fair
24 and, fair and reasonable in light of the factors that
25 you discussed?

1 A. I do.

2 Q. Do you believe Mr. Wolfram and Mr. Wilkes
3 have received fair value for the charges?

4 A. I do.

5 MR. J.M. JIMMERSON: That's all I have, your
6 Honor.

7 THE COURT: Okay. I need to understand --
8 why don't you do cross-examination. I'm sorry.

9 CROSS-EXAMINATION

10 BY MS. LUNDVALL:

11 Q. Let me see if I can't understand your
12 testimony. Anything in yellow, you're asking for in
13 total; is that correct?

14 A. Yes. As aimed for the accounting claims,
15 Ms. Lundvall.

16 Q. Anything in black and white, you are dividing
17 that by three and asking for that?

18 A. That's right, as part of the accounting
19 claim.

20 Q. And anything in purple, that you're not
21 asking for?

22 A. No. Purple is what I call the breach of
23 contract for the keep reasonably informed information
24 and breach the implied covenant.

25 THE COURT: It's just for subpoenas, depositions,

1 A. I do.

2 Q. Do you believe Mr. Wolfram and Mr. Wilkes
3 have received fair value for the charges?

4 A. I do.

5 MR. J.M. JIMMERSON: That's all I have, your
6 Honor.

7 THE COURT: Okay. I need to understand --
8 why don't you do cross-examination. I'm sorry.

9 CROSS-EXAMINATION

10 BY MS. LUNDVALL:

11 Q. Let me see if I can't understand your
12 testimony. Anything in yellow, you're asking for in
13 total; is that correct?

14 A. Yes. As aimed for the accounting claims,
15 Ms. Lundvall.

16 Q. Anything in black and white, you are dividing
17 that by three and asking for that?

18 A. That's right, as part of the accounting
19 claim.

20 Q. And anything in purple, that you're not
21 asking for?

22 A. No. Purple is what I call the breach of
23 contract for the keep reasonably informed information
24 and breach the implied covenant.

25 THE COURT: It's just for subpoenas, depos,

EXHIBIT “12”

JA010373