

IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 72371

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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

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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.

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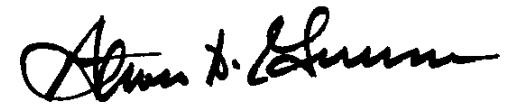
Attorneys for Appellant

CERTIFICATE OF SERVICE

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

/s/ Beau Nelson

An Employee of McDonald Carano LLP



CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,
WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,
Defendant.

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

**PARDEE HOMES OF NEVADA'S
MOTION TO AMEND JUDGMENT**

Date:
Time:

AND RELATED CLAIMS

Pursuant to NRCP 52(b) and 59(e), defendant Pardee Homes of Nevada ("Pardee") moves the Court to amend its findings and judgment in this case. NRCP 52(b) and 59(e) permit a party to move the trial court to amend its factual findings, make additional findings, or amend the final judgment to correct legal or factual errors. Amendment is required here for two reasons.

First, the Nevada Supreme Court has held, and recently clarified its prior pronouncements, that attorney's fees are available as special damages only in three very specific circumstances. None of those specific circumstances apply to this breach of contract case. Consequently Pardee respectfully requests that the Court amend its

1 findings and judgment to eliminate Plaintiffs Walt Wilkes and James Wolfram's
2 (collectively "Plaintiffs") award of special damages for certain of their attorney's fees.

3 Second, in striking the first judgment entered June 3, 2015 and instead entering
4 a second judgment on May 11, 2016, the Court has omitted language reflecting
5 Plaintiffs' failure to recover any additional claimed commissions from Pardee, which
6 was the case's most substantial issue. Specifically, Plaintiffs claimed that Pardee
7 purchased "Option Property" during the project and thus owed them additional
8 commissions pursuant to the Commission Agreement in this case. This theory
9 constituted over 90% of the trial in this case, as Plaintiffs continually questioned
10 witnesses about this Option Property and Pardee's purchases during the development.
11 The Court entirely rejected this theory, finding that Pardee did not owe Plaintiffs any
12 additional commissions related to any breach of the Commission Agreement.
13 Language noting Pardee's successful defense on this issue should be expressly
14 included in the judgment entered on May 11, 2016 because without it, the judgment
15 does not conform to the Court's previous rulings in this case nor does it accurately
16 reflect the litigation's outcome.


17 This Motion is based on NRCP 52 and 59, the pleadings and papers on file, the
18 attached Memorandum of Points and Authorities, and any oral argument the Court may
19 entertain at the hearing of this Motion.

20 DATED this 1st day of June, 2016.

21
22 McDONALD CARANO WILSON LLP

23 /s/ Rory Kay
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NOTICE OF MOTION

TO: All Parties and Their Counsel of Record:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing **PARDEE HOMES OF NEVADA'S MOTION TO AMEND JUDGMENT** for hearing before the above-entitled Court on the 06 day of JULY, 2016 at the hour of 9:00A in Department IV of the above-entitled Court, or as soon thereafter as counsel can be heard.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 I. **RELEVANT FACTS.**

3 A. Plaintiffs and Pardee Become Involved in the Coyote Springs Project.

4 This dispute arose from Pardee's and Plaintiffs' involvement in the Coyote
5 Springs Project (the "Project"), a 43,000 acre development in Lincoln and Clark
6 Counties. See Findings of Fact and Conclusions of Law at 2:9-12, on file with the
7 Court. As licensed real estate brokers, Plaintiffs began tracking the Project in 2002,
8 and shortly thereafter, they contacted Jon Lash, Pardee's executive responsible for
9 land acquisition, to see if he was interested in purchasing land and/or developing
10 homes on the Project. See *id.* at 1:27-2:18. Lash agreed to allow Plaintiffs to represent
11 Pardee as a potential purchaser, and the Plaintiffs arranged an introductory meeting
12 between Pardee and Harvey Whittemore to discuss Pardee's interest in the Project.¹
13 See *id.* at ¶ 8.

14 After the initial meeting, Pardee and CSI informed Plaintiffs that their services
15 were no longer needed because Pardee and CSI could negotiate the land sales
16 between themselves. See *id.* at 2:24-3:8. Accordingly, Plaintiff and Pardee began
17 negotiating the Plaintiffs' broker commissions related to the Project and Plaintiffs'
18 introduction of Whittemore and Lash. See *id.* at 4:9-16.

19 B. Plaintiffs and Pardee Execute the Commission Agreement.

20 The end result of those negotiations was a Commission Agreement, which
21 Pardee and James Wolfram executed on September 2, 2004 and Walt Wilkes executed
22 on September 6, 2004. See *id.* at ¶ 16. The Commission Agreement sets forth the
23 parties' rights concerning Pardee's land purchases on the Project. See *generally*
24 Commission Agreement Dated September 1, 2004, attached as Exhibit A.

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27
28 ¹ Whittemore was the founder and owner of Coyote Springs Investment, LLC
 ("CSI"), the entity that owned the Project's land at the time of this introductory meeting.

1 The Commission Agreement expressly addressed attorney's fees should the
2 parties resort to litigation to enforce their rights under the contract:

3 **In the event either party brings an action to enforce its rights under**
4 **this Agreement, the prevailing party shall be awarded reasonable**
5 **attorneys' fees and costs.**

6 *Id.* at p .2 (emphasis added).

7 The Commission Agreement included a merger clause, noting that "all oral
8 statements, representations, and negotiations" were merged into the Commission
9 Agreement, and also a provision prohibiting modification unless in writing signed by all
10 parties. *Id.*

11 C. Pardee Purchases Certain Lands and Pays the Plaintiffs' Commissions
12 Pursuant to the Commission Agreement, but the Plaintiffs Demand More.

13 Soon after the parties executed the Commission Agreement, Pardee purchased
14 relevant land from CSI that was covered by the Commission Agreement. See Findings
15 of Fact and Conclusion of Law at 8:6-9. Pursuant to the Commission Agreement,
16 Pardee paid the Plaintiffs \$2,632,000.00 in commissions based upon the purchases.
17 See *id.* at 8:19-20. These were the only commissions due under the Commission
18 Agreement, and Pardee has made no other purchases from CSI that would require
19 them to pay Plaintiffs any commissions under the Commission Agreement. See *id.* at
20 8:21-9:10 and 10:25-11:3.

21 Nevertheless, Plaintiffs insisted that they were due additional commissions from
22 Pardee and filed the current case on December 29, 2010. See Complaint, on file with
23 the Court. The Plaintiffs claimed that Pardee owed them over \$1.9 million in damages,
24 including \$1.8 million in purportedly lost commissions, \$146,000 in attorney's fees, and
25 \$6,400 in time and effort expended related to the accounting cause of action. See
26 Plaintiffs' Thirteenth Supplement to NRCP 16.1 Disclosure of Witnesses and
27 Documents at 10:17-11:9, attached as Exhibit B.² Plaintiffs argued that Pardee

28 ² Notably, Plaintiffs served this supplemental disclosure on the last day of trial.

1 “reclassif[ied] the land” originally labeled Option Property and that doing so “robbed
2 Plaintiffs of their opportunity to be paid these commissions” pursuant to the
3 Commission Agreement. *Id.* at 11:2-4.

4 D. During Trial, Plaintiffs Spend the Majority of Their Time Pursuing This
5 Theory of Additional Commissions Due and Owing.

6 At trial, Plaintiffs spent numerous hours questioning witnesses about Plaintiffs’
7 commissions under the Commission Agreement and Pardee’s purported reclassification
8 of land on the project. For example, Plaintiffs’ counsel immediately began questioning
9 Plaintiff James Wolfram about how he earned commissions and how Pardee was to
10 pay him those commissions based on its purchased Option Property. See October 23,
11 2013 Transcript (“10/23 Trans.”) at 75:9-76:20 and 88:16-24, attached as Exhibit C.
12 Wolfram testified that it was not “fair” that Pardee and Coyote Springs Investment, LLC
13 (“CSI”) reclassified certain land on the project, which purportedly influenced and
14 reduced Plaintiffs’ commissions. See *id.* at 95:3-17. During this questioning, Plaintiffs’
15 counsel offered parcel maps as demonstrative exhibits to allegedly show how Pardee
16 and CSI reclassified land on the project, and Wolfram stated that Plaintiffs were “most
17 certainly” entitled to additional commissions because of this reclassification. See *id.* at
18 125:11-151:17; see also October 24, 2013 Transcript (“10/24 Trans.”) at 249:25-250:1,
19 attached as Exhibit D.

20 Plaintiff Walt Wilkes also testified that Plaintiffs “were entitled to other, more
21 commissions” and that their “understanding [was] we were going to get the whole
22 commission” had Pardee and CSI not purportedly reclassified land. October 30, 2013
23 Transcript (“10/30 Trans.”) at 98:19-20 and 100:3-4, attached as Exhibit E. Wilkes
24 stated that Pardee “tried to take the extra money from [Plaintiffs]” and that Pardee and
25 CSI went “outside of [the boundaries]” in reclassifying certain land. *Id.* at 102:16-18
26 and 136:1-8.

27 Plaintiffs also heavily questioned CSI’s founder and former principal, Harvey
28 Whittemore, about the purported reclassification of Option Property on the project.

Whittemore testified that he believed the case was about “past due brokerage commissions” because it was the “impression that [he] took from [his] deposition” due to Plaintiffs’ counsel’s questioning. Exh. D, 10/24 Trans. at 10:12-15. During that same day at trial, Plaintiffs’ counsel spent almost the entire day asking numerous questions about reclassification of land on the project and the contractual definition of Option Property. *See generally id.* at 35:14-216:13. Whittemore testified that Pardee and CSI had not conspired to deny Plaintiffs any commissions by reclassifying certain land on the project, but rather that the parties needed “the greatest degree of flexibility to allow the parties to ultimately get the best plan” for the entire project. *Id.* at 83:21-84:4.

Plaintiffs’ counsel’s opening and closing arguments similarly focused on Plaintiffs’ claims to additional commissions on the project. Counsel opened by stating that the case largely “hinge[d]” on whether Pardee’s purchases were considered Purchase Property or Option Property, and that the evidence would “show that [Pardee’s] commission payments were inaccurate, [and] were not properly calculated.” Exh. C., 10/23 Trans. at 14:8-15:1 and 20:3-4. Counsel’s closing argument again focused on this purported reclassification, as he claimed that “it is . . . a breach of contract to think that [Pardee] can adversely affect [Plaintiffs’] rights to a commission by making a later deal between the parties that would change defined terms and entitlement to money.” December 13, 2013 Transcript (“12/13 Trans.”) at 153:1-8, attached as Exhibit F. Counsel claimed that he was suggesting to the Court “the legal principle that . . . [Pardee] cannot adversely affect the rights of [Plaintiffs] to a commission.” *Id.* at 153:17-154:10.

At all stages of trial, Plaintiffs focused almost exclusively on their purported entitlement to additional commissions from Pardee.

E. After Trial, the Court Awards Plaintiffs Certain of Their Attorney’s Fees as Special Damages But Rejects Their Claim to Lost Commissions.

After a multiple-week bench trial, the Court entirely rejected Plaintiffs’ claim to additional commissions but did find that Plaintiffs were entitled to an accounting and

1 also certain of their attorney’s fees as special damages. See *generally* Findings of Fact
2 and Conclusions of Law, on file with the Court. Although the Court explained that
3 “Pardee as of the present time does not owe any commission to Plaintiffs . . .,” it
4 awarded Plaintiffs their “reasonable attorney’s fees and costs as special damages” for
5 Pardee’s breach of the Commission Agreement *Id.* at 9:2-4 and 14:23-25; see also
6 Judgment Entered June 3, 2015 (the “Original Judgment”) at 2:24-3:2, on file with the
7 Court.

8 In the Original Judgment, which the Court entered on June 3, 2015, the Court
9 expressly noted that Pardee had not “breached the Commission Agreement in such a
10 way as to deny Plaintiffs any future commissions, and Pardee has paid all commissions
11 due and owing under the Commission Agreement.” Original Judgment at 2:20-23.
12 Thus, the Court entered judgment “against Plaintiffs and for Pardee as to Plaintiffs’
13 claim for \$1,800,000 in damages related to lost future commissions under the
14 Commission Agreement.” *Id.* at 2:19-20.

15 After Plaintiffs moved the Court to set aside the Original Judgment, the Court
16 struck that judgment and instead entered another judgment on May 16, 2016. See
17 Judgment Entered May 16, 2016 (the “Second Judgment”), on file with the Court.
18 Although the Second Judgment incorporates the Court’s previous finding that Plaintiffs
19 were not entitled to additional commissions, the Second Judgment does not expressly
20 include any language reflecting Pardee’s successful defense of this issue. Instead, the
21 Second Judgment only explains that Plaintiffs succeeded on their causes of action for
22 breach of contract and breach of the implied covenant of good faith and fair dealing. *Id.*
23 at 2:6-13. The Second Judgment awards Plaintiffs \$6,000 in consequential damages
24 from this breach and also awards Plaintiffs \$135,500 in special damages for “attorney’s
25 fees and costs” associated with the same. *Id.* at 2:11-13.

26 ///
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28 ///

II. ARGUMENT.

A. Legal Standard.

NRCP 52(b) permits the trial court to “amend its findings or make additional findings and [] amend the judgment accordingly.” NRCP 59(e) allows the trial court to “alter or amend the judgment.” Normally, parties seek relief under Rules 52 or 59 “after a bench trial or where summary judgment has been granted.” *Gutierrez v. Ashcroft*, 289 F. Supp. 2d 555, 561 (D.N.J. 2003). These alterations and amendments are most often appropriate to correct manifest legal or factual errors, present newly discovered evidence, prevent manifest injustice or to notify the court of an intervening change in controlling law. *See Stevo Design, Inc. v. SBR Marketing, Ltd.*, 919 F. Supp. 2d 1112, 1117 (D. Nev. Jan. 25, 2013); *see also Allstate Insurance Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011).

B. The Court Erred in Awarding Plaintiffs’ Attorney’s Fees as Special Damages, And There Have Been Changes To Controlling Law.

Generally, a litigant may not recover attorney’s fees “absent authority under a statute, rule or contract.” *Liu v. Christopher Homes, LLC*, 130 Nev. Adv. Op. 17, 321 P.3d 875, 878 (Mar. 27, 2014). A narrow exception to this general rule exists that permits a court to award attorney’s fees “as special damages in limited circumstances.” *Id.* The Nevada Supreme Court has identified only three limited circumstances that permit a trial court to award attorney’s fees as special damages:

- (1) When a plaintiff becomes involved in a third-party legal dispute because of the defendant’s breach of contract or separate tortious conduct;
- (2) When a plaintiff incurs fees in recovering real or personal property that the defendant acquired through wrongful conduct; or
- (3) When a plaintiff seeks declaratory or injunctive relief necessitated by the opposing party’s bad faith conduct.

See Sandy Valley Assoc. v. Sky Ranch Estates Owners Ass’n, 117 Nev. 948, 957-58, 35 P.2d 964, 970 (2001); *see also Liu*, 130 Nev. Adv. Op. 17, 321 P.3d at 880.

1 In a breach of contract case that does not involve a third-party legal dispute, the
2 plaintiff is not entitled to attorney's fees as special damages because "parties always
3 know that lawsuits are possible when disputes arise" and so "the mere fact that a party
4 was forced to file or defend a lawsuit is insufficient to support an award of attorney fees
5 as damages." See *Sandy Valley Assoc.*, 117 Nev. at 957, 35 P.2d at 969-70.
6 Moreover, allowing attorney's fees as special damages in a routine breach of contract
7 case would contravene the Nevada Supreme Court's statement that "attorney fees are
8 rarely awarded as damages." See *id.* If courts awarded attorney fees as special
9 damages in routine breach of contract cases, the "narrow exception" will swallow the
10 general rule that attorney's fees are only recoverable under statute, rule or contract.

11 Additionally, the Nevada Supreme Court's approach reflects the common
12 damages theory from other jurisdictions, in which attorney's fees established by
13 contractual language are not considered special damages. "Special damages are
14 those which are unusual given the type of claim, and thus might surprise the opponent
15 if not specifically pleaded." *Fleet Bus. Cred. V. Krapohl Ford Lincoln Mercury Co.*, 735
16 N.W.2d 644, 648 (Mich. App. Ct. 2007); see also *McNaughton v. Charleston Charter*
17 *School for Math and Science, Inc.*, 768 S.E.2d 389, 396 (S.C. Jan. 28, 2015) ("Where a
18 plaintiff seeks special damages in addition to general damages, he must plead and
19 prove the special damages to avoid surprise.") Thus, "attorney fees, when specified by
20 the contract language, are not special damages." *Fleet Bus. Cred.*, 735 N.W.2d at 649.
21 This is true because there is no element of surprise when the contract itself calls for
22 attorney's fees in the event of a breach.

- 23 1. Plaintiffs have not proven that any of *Sandy Valley's* or *Liu's*
24 exceptions apply.

25 In this matter, it was legally erroneous for the Court to award Plaintiffs' certain
26 attorney's fees as special damages, and the judgment should be amended to eliminate
27 the award of attorney's fees. This is a standard breach of contract case where Plaintiffs
28 alleged that Pardee breached the Commission Agreement by failing to pay them

1 commissions owed and keep them reasonably informed of Pardee's purchases on the
2 Project. See Findings of Fact and Conclusions of Law at 11:10-15:3. Plaintiffs did not
3 identify any of the three limited circumstances noted in *Sandy Valley* and *Liu* that would
4 permit them to recover attorney's fees as special damages. See generally Plaintiffs'
5 Second Amended Complaint, on file with the Court. This is not an action for recovery of
6 real or personal property. The Plaintiffs have not alleged that they are involved in a
7 third-party dispute because of Pardee's purported breach of the Commission
8 Agreement. Nor did the Plaintiffs seek declaratory or injunctive relief because of any
9 bad faith conduct; instead, Plaintiffs only alleged breach of contract, breach of the
10 implied duty of good faith and fair dealing, and an equitable cause of action for
11 accounting.

12 Understandably, the Court did not have the benefit of the *Liu v. Christopher*
13 *Homes, LLC* case when it initially ruled upon the Plaintiffs' request for certain attorney's
14 fees as special damages.³ A copy of that decision is attached as Exhibit G. *Liu* is the
15 Nevada Supreme Court's most recent statement on attorney's fees as special
16 damages, and the opinion noted that there was "confusion over *Sandy Valley's* and
17 *Horgan's* effect on the law regarding the recovery of attorney fees as special damages."
18 130 Nev. Adv. Op. 17, 321 P.3d at 877. In removing that confusion, the *Liu* court noted
19 that "a party to a contract may recover, **as special damages**, the attorney fees that
20 arise from another party's breach of the contract" only when the breach "causes the
21 former party to incur attorney fees in a legal dispute brought by a third party." *Id.* at 880
22 (emphasis added). Thus, the Nevada Supreme Court did not hold that attorney's fees
23

24 ³ As the Court may recall, Pardee filed a motion to exclude the Plaintiffs' claim for
25 certain attorneys' fees as special damages on March 1, 2013. See Defendant's Motion
26 in Limine to Exclude Plaintiffs' Claim for Attorneys' Fees as an Element of Damages,
attached as Exhibit H. The Court heard that motion on April 16, 2013.

27 However, the Nevada Supreme Court did not decide *Liu* until almost a year later,
28 on March 27, 2014. Thus, the Court could not benefit from *Liu's* protracted discussion
of the three narrow circumstances permitting an award of attorney's fees as special
damages.

1 as special damages were available in routine breach of contract cases. Instead, they
2 are only available when the breach places the non-breaching party in a legal dispute
3 brought by a third party. No such third-party action is present in this matter. Thus *Liu*
4 clarifies that Plaintiffs cannot recover certain of their attorney's fees as special
5 damages.

6 Accordingly, without any of *Sandy Valley's* special circumstances and given the
7 additional clarification that *Liu* provided and which the Court was not able to rely upon
8 for its initial ruling, Plaintiffs are not entitled to their attorney's fees as special damages
9 under Nevada's narrow exception to the general rule that attorney's fees arise from
10 contract, statute or rule. And because the Court awarded Plaintiffs their attorney's fees
11 as special damages because of Pardee's alleged breach, the judgment must be
12 amended to comply with *Sandy Valley* and *Liu* by eliminating the award of Plaintiffs'
13 attorney's fees as special damages.

14 2. Because the parties' addressed attorney's fees in the Commission
15 Agreement, they are not unusual and therefore cannot be special
16 damages.

17 Moreover, the Plaintiffs' attorney's fees cannot be special damages because
18 they were specifically addressed in the Commission Agreement's plain language. See
19 Commission Agreement, Exhibit A, at p. 2. Thus, the attorney's fees were not "unusual
20 given the [breach of contract] claim" asserted by Plaintiffs. See *Fleet Bus. Cred.*, 735
21 N.W.2d at 648. As the Nevada Supreme Court clarified in *Sandy Valley*, "parties
22 always know that lawsuits are possible when disputes arise" and so damages are not
23 "special" unless they provide some element of surprise requiring specific pleading. See
24 *Sandy Valley Assoc.*, 117 Nev. at 957, 35 P.2d at 969-70. Because the Commission
25 Agreement specifically included the attorney's fees provision, there was no need for
26 Plaintiffs to specifically plead them to avoid surprising Pardee and thus the fees cannot
27 be special damages.

28 ///

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1 C. The Court Erred in Deleting Language in the Second Judgment Indicating
2 Pardee's Successful Defense of Plaintiffs' Claims to Additional
3 Commissions.

4 As discussed above, Plaintiffs' claims to additional commissions because
5 Pardee purportedly reclassified Option Property on the project was the case's most
6 substantial issue. Plaintiffs devoted over 90% of the trial to this issue, continually
7 questioning witnesses about Plaintiffs' commissions pursuant to the Commission
8 Agreement and Pardee's purported reclassification of land. See Part I(D), *supra*.
9 Harvey Whittemore, a third party to the litigation, testified at trial that he believed the
10 case was about Plaintiffs' commissions because Plaintiffs' counsel repeatedly asked
11 him at his deposition about reclassification of the land and the definition of Option
12 Property and Purchase Property. *Id.* The issue was the central part of Plaintiffs'
13 counsel's opening and closing statements, as counsel repeatedly told the Court that the
14 case was about Pardee's unfair act of denying Plaintiffs' commissions and that the
15 evidence would conclusively establish that Plaintiffs were owed additional commissions
16 from Pardee. *Id.* After trial, however, the Court entirely rejected Plaintiffs' flawed and
17 predominant theory that they were entitled to additional commissions. *Id.*

18 Accordingly, the Second Judgment must accurately reflect the Court's finding on
19 this matter, as Nevada has long recognized that a judgment must conform to the
20 evidence actually offered at trial. See, e.g., *Finnegan v. Ulmer*, 31 Nev. 523, 104 P. 17,
21 18 (1909) (noting a party may move the trial court to revise the judgment when the
22 evidence does not sufficiently justify the verdict or other decision); see also *Bream v.*
23 *Nevada Motor Co.*, 51 Nev. 100, 269 P. 606, 607 (1928) (explaining that evidence must
24 support the judgment); *Cardan Overseas, Ltd. v. Harris*, 92 Nev. 62, 64-65, 544 P.2d
25 1202, 1204 (1976) (modifying a judgment "to conform to the evidence which is
26 nonconflicting"). Absent language showing that Pardee prevailed on the issue of
27 additional commissions, the Second Judgment does not conform with the evidence
28 offered at trial and the Court's post-trial conclusion that Pardee did not owe Plaintiffs'
any additional commissions. Consequently, the Court should amend the Second

Judgment by re-inserting the language from the Original Judgment, in which it expressly stated that Pardee had not breached the Commission Agreement in such a way as to deny Plaintiffs any future commissions, and that Pardee has paid all commissions due and owing under the Commission Agreement.

III. CONCLUSION.

NRCP 52 and 59 provide the Court with the ability to amend its factual findings, conclusions of law, and judgment when legal errors have occurred. In this matter, the Court erroneously awarded Plaintiffs their attorney's fees as special damages despite this being a routine breach of contract case that is not within one of *Sandy Valley's* or *Liu's* three limited exceptions for awarding fees as special damages. The Court also incorrectly deleted language from the Original Judgment explaining that Pardee successfully defended against Plaintiffs' claims to additional commissions, which was the case's most substantial issue. Therefore Pardee respectfully requests that the Court amend its judgment to eliminate the award of Plaintiffs' attorney's fees as special damages. Pardee also asks that the Court re-insert language clarifying that Pardee prevailed on Plaintiffs' claims to additional commissions.

DATED this 1st day of June, 2016.

MCDONALD CARANO WILSON LLP

/s/ Rory Kay

Pat Lundvall (NSBN 3761)

Rory T. Kay (NSBN 12416)

2300 West Sahara Avenue, Suite 1200

Las Vegas, Nevada 89102

(702) 873-4100

(702) 873-9966 Facsimile

Attorneys for Defendant Pardee Homes of Nevada

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 1st day of June, 2016, I served a true and correct copy of the foregoing **PARDEE HOMES OF NEVADA'S MOTION TO AMEND JUDGMENT** via e-service through Wiznet as utilized in the 8th Judicial District on the following:

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

Attorney for Plaintiffs

Via U.S.Mail:

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

Co-counsel for Plaintiffs

/s/ Michelle Wade
An Employee of McDonald Carano Wilson LLP

327641

EXHIBIT A



JOH E. LASH
Sr. Vice President
(310) 475-3525 ext. 251
(310) 446-1295

September 1, 2004

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

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

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

Gentlemen:

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

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

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

PH 000135

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

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

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

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

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

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

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

\\calix\dfs1\l\users\data\Lawson\l\my documents\Land Acq - JEL\Letters\2004 Letters\Wilkes_04.09.02.doc

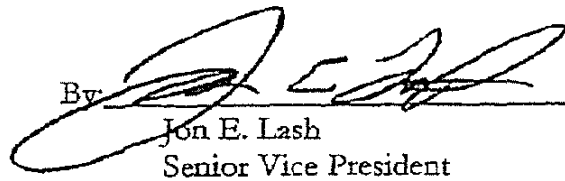
PH 000136

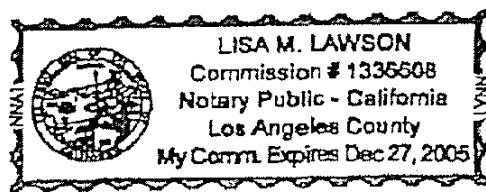
Mr. Walt Wilkes
Mr. Jim Wolfram
September 1, 2004
Page 3

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

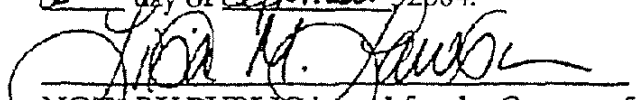
Sincerely,

PARDEE HOMES OF NEVADA,
a Nevada corporation

By: 
Jon E. Lash
Senior Vice President

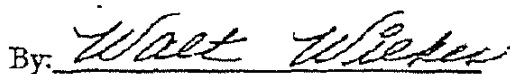


SUBSCRIBED and SWORN to before me this
2nd day of September, 2004.

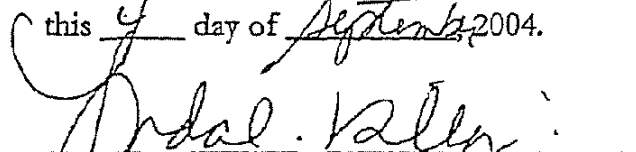

NOTARY PUBLIC in and for the County of
Los Angeles, State of California

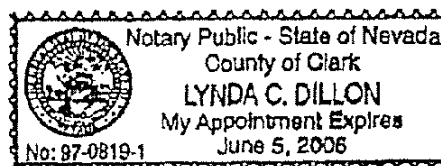
Agreed to and accepted:

GENERAL REALTY GROUP, INC.

By: 
Walt Wilkes

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


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



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PH 000137

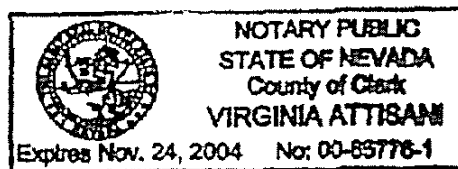
Mr. Walt Wilkes
Mr. Jim Wolfram
September 1, 2004
Page 4

AWARD REALTY GROUP

By: *Jim Wolfram*
Jim Wolfram

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

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



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PH 000138

EXHIBIT B

SUPP

JAMES J. JIMMERSON, ESQ.

Nevada Bar No. 000264

LYNN M. HANSEN, ESQ.

Nevada Bar No. 0244

JAMES M. JIMMERSON, ESQ.

Nevada Bar No. 12599

JIMMERSON HANSEN, P.C.

415 So. Sixth St., Ste. 100

Las Vegas, NV 89101

Tel No.: (702) 388-7171; Fax No.: (702) 380-6406

jjj@jimmersonhansen.com

lmh@jimmersonhansen.com

jmj@jimmersonhansen.com

Attorney for Plaintiffs

James Wolfram and Walt Wilkes

DISTRICT COURT

CLARK COUNTY, NEVADA

JAMES WOLFRAM AND WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,

Defendant.

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

**PLAINTIFFS' THIRTEENTH SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF
WITNESSES AND DOCUMENTS**

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

///

///

///

I.

WITNESSES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 15. James J. Jimmerson, Esq.
28 C/O JIMMERSON HANSEN, PC
415 South Sixth Street #100
Las Vegas, Nevada 89101

Mr. Jimmerson is a principal of Jimmerson Hansen, P.C and is expected to testify
regarding Plaintiffs' attorney's fees and costs.

16. Klif Andrews
Pardee Homes of Nevada
650 White Drive, Suite 100
Las Vegas, Nevada 89119

1 Mr. Andrews is the President of Pardee Homes of Nevada and is expected to
2 testify about facts and circumstances about the case. Specifically he is expected to
3 testify concerning all production of residential property at Coyote Springs.

4
5 17. Chelsea Peltier
6 Slater Hanifan Group
7 5740 S. Arville, Suite #216
8 Las Vegas, Nevada 89118

9 Ms. Peltier is an employee of Slater Hanifan Group and is expected to testify
10 and is expected to testify about facts and circumstances about the case. Specifically
11 she is expected to testify concerning all production of residential property at Coyote
12 Springs.

13 18. Jerry Slater
14 Slater Hanifan Group
15 5740 S. Arville, Suite #216
16 Las Vegas, Nevada 89118

17 Mr. Slater is a principal of Slater Hanifan Group and is expected to testify and
18 is expected to testify about facts and circumstances about the case. Specifically he is
19 expected to testify concerning all production of residential property at Coyote
20 Springs.

21 19. Kenneth Hanifan
22 Slater Hanifan Group
23 5740 S. Arville, Suite #216
24 Las Vegas, Nevada 89118

25 Mr. Hanifan is a principal of Slater Hanifan Group and is expected to testify
26 and is expected to testify about facts and circumstances about the case. Specifically
27 he is expected to testify concerning all production of residential property at Coyote
28 Springs.

29 20. Jim Rizzi
30 Pardee Homes of Nevada
31 650 White Drive, Suite 100
32 Las Vegas, Nevada 89119

1
2 **Mr. Rizzi is an employee of Pardee Homes and is expected to testify and is**
3 **expected to testify about facts and circumstances about the case. Specifically he is**
4 **expected to testify concerning all production of residential property at Coyote**
5 **Springs.**

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

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

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

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

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

13 **II.**

14 **DOCUMENTS**

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

- 17 1. Any and all written agreements between the Parties;
- 18 2. Any and all documents evidencing damages to the Plaintiffs;
- 19 3. Any and all correspondence between the Parties;
- 20 4. Any and all appropriate Custodian of Record documents;
- 21 5. Any and all pleadings in this matter;

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

- 25 1. Option Agreement for the Purpose of Real Property and Joint Escrow Instructions
dated May 2004 (Bates No. PLTF0001-0080);
- 26 2. Amended and Restated Option Agreement for the Purchase of Real Property and
Joint Escrow Instructions dated March 28, 2005, (Bates No. PLTF0081-0152);
- 27 3. Two Assignments of Real Estate Commission and Personal Certification
28 Agreement (Bates No. PLTF0153-0157A)
4. Letter dated September 2, 2004 from Pardee Homes to Mr. Walt Walkes

- 1 regarding the attached Commission letter dated September 1, 2004, (Bates No. PLTF0158-0162);
- 2
- 3 5. Amendment No. 2 to Option Agreement for the Purchase of Real Property and Joint Escrow Instructions, (Bates No. PLTF0163-0174);
- 4 6. Letter dated April 6, 2009 from Pardee Homes to Mr. Jim Wolfram, (Bates No. PLTF0175-0179);
- 5 7. Letter dated April 23, 2009 from James J. Jimmerson, Esq., to Jim Stringer, Esq., (Bates No. PLTF0180-0187);
- 6 8. Letter dated May 19, 2011 from James J. Jimmerson, Esq., to Jim Stringer, Esq., (Bates No. PLTF0188-0191);
- 7
- 8 9. Letter dated July 10, 2009 from Charles E. Curtis to James J. Jimmerson, Esq., (Bates No. PLTF0192-0193);
- 9 10. Letter dated August 26, 2009 from James J. Jimmerson, Esq., to Charles E. Curtis, (Bates No. PLTF0194-0196);
- 10 11. Letter dated November 24, 2009 from Jon E. Lash to Mr. Jim Wolfram, (Bates No. PLTF0197-0202);
- 11 12. Letter dated April 21, 2010 from Jim Wolfram to Mr. Jon Lash, (Bates No. PLTF0203-0205);
- 12 13. Letter dated May 17, 2010 from James J. Jimmerson, Esq., to Mr. John E. Lash, (Bates No. PLTF0206-0209);
- 13 14. Letter dated June 14, 2010 from Charles E. Curtis to James J. Jimmerson, Esq., (Bates No. PLTF0210-0211);
- 14 15. Bates Nos. PLTF0212-0244 are the duplicative documents produced in Plaintiffs' Initial 16.1 Disclosure of Documents and Witnesses.
- 15 16. Documents produced by Stewart Title in response to Plaintiffs' Subpoena Duces Tecum on CD, (Bates No. PLTF0245-PLTF1423);
- 16 17. Documents produced by Chicago Title in response to Plaintiffs' Subpoena Duces Tecum on CD, (Bates No. PLTF1424-PLTF10414);
- 17 18. Documents produced by Coyote Springs Investments in response to Plaintiff's Duces Tecum on CD, (Bates No. CSI_Wolfram 000014 - CSI_Wolfram0003004), attached hereto;
- 18 19. Coyote Springs Investment, LLC's Privilege Log, (Bates No. PLTF10415 - PLTF10417), attached hereto;
- 19 20. Affidavit of Custodian of Records, (Bates No. PLTF10418-PLTF10419); attached hereto;
- 20 21. Non-Party Coyote Springs Investments, LLC's Supplement and Amended Objection and Response to Plaintiff's Subpoena Duces Tecum, (Bates PLTF10420-PLTF10424, attached hereto.
- 21 22. Chicago Title Company's previously bates stamped documents no. PLTF 1424
- 22

- 1 through PLTF 10414 (on bottom right of documents bates stamped) and rebated
2 as bates nos: Cht 00001 through Cht 08998 (on bottom left of documents bates
3 stamped), including the Custodian of Records Subpoena to Chicago Title
4 Company including the executed Certificate of Custodian of Records bates
5 stamped as Cht 08997.
- 6 23. Stewart Title Company's previously bates stamped documents no. PLTF 0245
7 through PLTF 1423 and rebated as bates nos: Stwt 0001 through 1202.
8 Documents Stwt 0699 and Stwt 0731 are copy coversheets and were
9 inadvertently bates stamped.
- 10 24. Copy of Plat Map recorded in the Clark County Recorder's Office in Book 138,
11 page 51, bates PLTF 10427 through PLTF 10438.
- 12 25. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 116,
13 page 35, bates PLTF 10439 through PLTF 10440.
- 14 26. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 117,
15 page 18, bates PLTF 10441 through PLTF 10443.
- 16 27. Copy of Plat Map recorded in the Clark County Recorder's Office in Book 140,
17 page 57, bates PLTF 10444 through PLTF 10456.
- 18 28. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 113,
19 page 55, bates PLTF 10457 through PLTF 10462.
- 20 29. Copy of Parcel Map recorded in the Clark County Recorder's Office in File 98,
21 page 57, bates PLTF 10463 through PLTF 10468.
- 22 30. Copy of redacted billing sheets representing attorney's fees charged by
23 Jimmerson Hansen, P.C. from November 3, 2010 through October 19, 2012,
24 bates PLTF 10469 through PLTF 10481.
- 25 31. Affidavit of Peter J. Dingerson, bates PLTF 10482 through PLTF 10484.
- 26 32. Assignment of Rights, Title and Interest from Jay Dana on behalf of General
27 Realty Group Inc. to Walt Wilkes, dated January 11, 2011, bates PLTF 10485.
- 28 33. Assignment of Rights, Title and Interest from Jerry Masini on behalf of Award
29 Realty to James Wolfram, dated December 20, 2010, bates PLTF 10486.
- 30 34. Letter from Jeffrey King, M.D. dated November 1, 2011 regarding the health of
31 Walt Wilkes, bates PLTF 10487.
- 32 35. Affidavit of Jerry Masini, bates PLTF 10488 through PLTF 10490.
- 33 36. Assignment signed by Mark Carmen dated December 3, 2012 along with Exhibit
34 A signed by Jay Dana dated January 11, 2011, attached hereto as bates PLTF
35 10491 through PLTF 10493; and
- 36 37. Assignment signed by Peter J. Dingerson dated December 20, 2012 along with
37 Exhibit A signed by Jerry Masini dated December 20, 2010, attached hereto as
38 bates PLTF 10494 through PLTF 10496.
- 39 38. Copy of redacted billing sheets representing attorney's fees charged by
40 Jimmerson Hansen, P.C. from October 24, 2012 through February 21, 2013,
41 bates PLTF 10497 through PLTF 10499.

- 1 39. Copy of redacted costs representing costs expended by Jimmerson Hansen, P.C.
2 from December 29, 2010 through February 4, 2013 bates PLTF 10500 through
3 PLTF 10505.
- 4 40. Copy of redacted billing sheets representing attorney's fees charged by
5 Jimmerson Hansen, P.C. from February 21, 2013 through March 29, 2013, bates
6 PLTF 10506 through PLTF 10508.
- 7 41. Copy of redacted costs representing costs expended by Jimmerson Hansen, P.C.
8 from February 27, 2013 through March 13, 2013 bates PLTF 10509 through
9 10510.
- 10 42. Copy of redacted billing sheets representing attorney's fees charged by
11 Jimmerson Hansen, P.C. from April 1, 2013 through April 18, 2013, bates PLTF
12 10511 through PLTF 10512.
- 13 43. Color copy of the map as edited by James Wolfram, attached hereto as bates
14 PLTF 10513.
- 15 44. Color copy the original map from Jon Lash to James Wolfram of the entire site,
16 attached hereto as bates PLTF 10514.
- 17 45. Three (3) color copies of maps from James Wolfram to Jon Lash, originally
18 produced by your office on April 21, 2010, attached hereto as bates PLTF 10515-
19 10517; and
- 20 46. A further detailed computation of the attorney fee damages is found at Exhibit "1"
21 attached hereto. Exhibit "1" is a collection of the previously produced attorney's
22 fees with the highlighted sections representing the line items which were
23 aggregated at 100% plus the non-highlighted line items which were aggregated
24 at 33.3% to equal \$102,160.00. The pink highlighted line items represent those
25 damages for a breach of contract and breach of the implied covenant of good
26 faith and fair dealing claims, which total \$7,602.50.
- 27 47. Emails dated from September 2008 between Nevada Title and Plaintiffs with their
28 attachments (commercial sales and parcels designated for the upcoming BLM
land action from Nevada Tile), attached hereto as bates PLTF 10518-10527.
48. Computation of attorneys fees and billing from April 22, 2013 through May 21,
2013, attached hereto as bates PLTF 10528 through 10530.
49. Computation of attorneys fees and billing from May 20, 2013 through June 20,
2013, attached hereto as bates PLTF 10531 through 10533.
50. Documents regarding Coyote Springs Major Plan dated 8/4/2008, previously
produced as Bates Nos. CNTY00001-CNTY00543.
51. Documents regarding Coyote Springs Major Plan dated May 5, 2006,
previously produced as Bates Nos. CNTY00542-00898.
52. Documents regarding Coyote Springs Major Plan dated 6/2002, previously
produced as Bates Nos. CNTY00899-CNTY01193.
53. Documents regarding Coyote Springs Development Agreement dated
6/16/2004, previously produced as Bates Nos. CNTY01194-CNTY01262.
54. Documents regarding Coyote Springs Development Agreement dated

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

15 ||| III.

17 Plaintiffs calculate their damages to be in excess of **\$1,930,000.00** associated with the
18 Defendant's breach of contract and the Defendant's failure to faithfully meet their obligations
19 to the Plaintiffs.

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

1 conduct in failing to appropriately discharge its duties under the Commission Letter Agreement
2 has robbed Plaintiffs of this opportunity to be paid these commissions. Pardee's actions have
3 served to reclassify the land originally labeled
4 1, 2004 Commission Letter Agreement. As stated in the Agreement, "In the event, either party
5 brings an action to enforce its rights under this Agreement, the prevailing party shall be
6 awarded reasonable attorneys' fees and costs." Plaintiffs in bringing this suit expect to be the
7 prevailing party and, as such, are entitled to their reasonable attorney's fees as damages for
8 Defendant's breach of contract, breach of the covenant of good faith and fair dealing, and for
9 compelling the accounting due to Plaintiffs.

10 As stated by the Court in its most recent minute order, Plaintiffs' claims for attorney fee
11 damages are governed by *Sandy Valley Assoc. v. Sky Ranch Estates Owners Assoc.*, 117
12 Nev. 948 (2001). Pursuant to *Sandy Valley*, Plaintiffs calculate their attorney fee damages as
13 follows: all fees and costs incurred for filing the complaint, prosecuting the claim for accounting,
14 and seeking documents owed to Plaintiffs under the September 1, 2004 Commission Letter
15 Agreement (for the breach of contract and breach of the covenant of good faith and fair dealing
16 claims) plus one-third of the fees and costs incurred for the prosecution of all of the claims (as
17 one of the three claims is for an accounting for which all of Plaintiffs' fees are damages).
18 Exempt from the damages are fees in connection with the prosecution of the breach of contract
19 and breach of the implied covenant of good faith and fair dealing claims, specifically not in
20 furtherance of the recovery of documents. To date, Plaintiffs' attorney fee damages are greater
21 than or equal to: **\$135,486.87**. Specifically, Plaintiffs' attorney fee damages for the accounting
22 claim equal or exceed **\$135,486.87**; for the claim for the breach of contract equal or exceed
23 \$7,602.50; and for the claim for the breach of the implied covenant of good faith and fair
24 dealing claims equal or exceed \$7,602.50.

25 Finally, Plaintiffs must be compensated for the time and effort expended attempting to
26 discover from public records what information was owed to them under the Commission Letter
27 Agreement. Specifically, Plaintiffs spent at least 80 hours in attempting to acquire this
28 information. At a fair hourly rate of \$80.00 per hour, Plaintiffs' damages equal or exceed
\$6,400.00 for their time.

1 Discovery is still ongoing therefore the Plaintiffs reserve the right to amend and
2 supplement this response as the investigation and discovery in this case proceeds.

3 Dated this 11th day of December, 2013.

4 JIMMERSON HANSEN, P.C.

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

I hereby certify that service of a true and correct copy of PLAINTIFFS' THIRTEENTH SUPPLEMENT TO NRCP 16.1 DISCLOSURE OF WITNESSES AND DOCUMENTS was made on the 11th day of December , 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 electronic service through the E-filing system

By facsimile, pursuant to EDCR 7.26

By receipt of copy as indicated below

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

/s/ Stephanie Spilotro
An Employee of JIMMERSON HANSEN, P.C.

EXHIBIT C

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM, et al.,
Plaintiffs,
vs.
PARDEE HOMES OF NEVADA,
Defendant.

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

REPORTER'S TRANSCRIPT OF BENCH TRIAL
BEFORE THE HON. KERRY L. EARLEY, DISTRICT COURT JUDGE

On Wednesday, October 23, 2013

At 8:30 a.m.

APPEARANCES:

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

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

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

1 not come from anyone else. Plaintiffs had tried to
2 receive it from Pardee. Plaintiffs had gone to
3 Coyote Springs. Plaintiffs had gone to Chicago Title.
4 Plaintiffs had gone to the Clark County Recorder's
5 Office, to zoning and planning, to the other public
6 offices to find what was happening in the development of
7 Coyote Springs as it pertained to their commissions.

8 This case will largely hinge on was the
9 property purchased Purchase Property or was it Option
10 Property? This is because the Commission Letter
11 Agreement establishes two separate formulas, two
12 separate mechanisms for calculating how the
13 commission -- how much the plaintiffs are entitled to
14 for commission.

15 Under the Purchase Property formula, they are
16 entitled to a percentage of the Purchase Property Price.
17 There is no benefit or additional commission for
18 additional acreage being purchased if there is no
19 corresponding increase in price.

20 Conversely, the Commission Letter Agreement
21 specifies that the formula for commissions for Option
22 Property is dictated by acreage. It is a set flat rate
23 per acre, and you find out the number of acres and that
24 is the commission.

25 The evidence will show in this case that Pardee

1 purchased both Purchase Property and Option Property.
2 We know this by referring to the Option Agreement which
3 defines those critical terms. For Purchase Property,
4 the portion of the entire site consisting of Parcel 1 as
5 shown on Parcel Map 98-57 recorded July 21, 2000 in
6 Book 20000721, as Document 01332, Official Records,
7 Clark County, Nevada.

8 Option Property, the remaining portion of the
9 entire site which is or becomes designated for
10 single-family detached production residential use as
11 described below, the Option Property. And as the Option
12 Agreement further describes, that as described below
13 refers to production residential property, which is
14 defined -- which includes, quote, without limitation,
15 all single-family detached production residential lots,
16 which shall include lots on which custom homes are
17 constructed by buyer, all land for roadways, utilities,
18 government facilities, including schools and parks,
19 which school and park sites are subject to the
20 provisions of 7(c) below, open space required or
21 designated for the benefit of the residential
22 development pursuant to the master plan, a habitat
23 conservation plan, or development agreement, drainage
24 ways or other use associated with or resulting from the
25 development of Purchase Property and each option parcel

1 breached its duties under the September 1, 2004
2 Commission Letter Agreement.

3 The evidence will show that the commission
4 payments were inaccurate, were not properly calculated.
5 The evidence will show that in addition to improperly
6 calculating these commissions, Pardee -- and this is the
7 most important part of the case -- failed to keep
8 plaintiffs reasonably informed as to all matters related
9 to the amount and due date of their commissions.

10 You will hear evidence that in order to be
11 reasonably informed as to these pieces of information,
12 that Pardee had to provide evidence, had to provide
13 information, had to provide records allowing plaintiffs
14 to check, to verify that they had received the
15 appropriate commission payment at the appropriate time.

16 You will hear evidence that without that
17 information, the information that did not allow them to
18 do that, was no information at all. You will hear that
19 effectively plaintiffs were forced to trust Pardee and
20 could not check and make sure that they had received the
21 appropriate commission payments.

22 Now, these breaches are important not simply
23 because it's on a piece of paper between two parties.
24 It's important because of the magnitude of this
25 transaction. You will hear evidence that the Option

1 First it came from Stewart Title and then later
2 it became Chicago Title. It had escrow numbers. It had
3 name of the title company. It had percentage of the
4 commission to be paid, to whom, and how it was going to
5 be split then between the plaintiffs. All of that is
6 found within each Exhibit A.

7 You are also going to find each commission
8 check that was received by the plaintiffs. That too
9 contained the amount of their commission, the escrow
10 number, the payee, the payor, along with a memo
11 explaining how that amount was determined.

12 There came a circumstance across the course
13 then of when Pardee was paying these monthly payments to
14 the plaintiffs that they were overpaid. We learned of
15 that and we sent them a letter telling them that, in
16 fact, that they had been overpaid and how that
17 overpayment was going to be taken into account, in other
18 words, how we were going to catch up that overpayment
19 that was given to them.

20 As part of that letter, we also told them --
21 and we're now like into 2007, into the 2007 time frame.
22 The relationship between Pardee and the relationship
23 between CSI moved on, and the parties had additional
24 negotiations, and they had additional negotiations for
25 other properties. And we told them that we had

1 agent?

2 A. 1974.

3 Q. And where were you in 1974?

4 A. Here in Las Vegas.

5 Q. How long were you employed as a real estate
6 agent?

7 A. Until -- until I retired. I mean, I retired
8 probably seven or eight years ago.

9 Q. As a real estate agent, how did you earn money?

10 A. I earned money by bringing people together on
11 different purchases, and I got paid a commission for
12 doing that work.

13 Q. And how would you receive this commission?

14 A. Well, you have to be the procuring cause, and
15 you have to have ready, willing, and able people to be
16 buyers. And then you draw up a commission agreement.
17 And if the real estate closes, then you get a
18 commission.

19 Q. When, if ever, would you receive a commission
20 if the land transaction did not close?

21 A. Wow. I don't think that's ever happened to me.
22 That would be rare.

23 Q. Why wouldn't you receive a commission if the
24 land didn't close?

25 A. I didn't earn it.

1 Q. In your experience, is it normal that a real
2 estate agent only receives a commission when a land
3 transaction closes?

4 A. When a transaction closes, that's when you get
5 a commission.

6 Q. What would a normal commission be in your line
7 of work?

8 A. Well, in land, which is mostly what I worked
9 in, it's usually one to ten percent. Ten percent is
10 usually the highest. I'm not saying it can't go above
11 that. There are people that go -- there's usury above
12 there and all that, but normally it's one to ten
13 percent, and you sort of negotiate out what the
14 commission is going to be.

15 Q. And how would that negotiation proceed?

16 A. Well, you'd have to sit down with the seller or
17 the buyer, the one that's paying the commission. You
18 have to sit down and come to some kind of a fair
19 agreement, what both parties thought was a fair
20 agreement.

21 Q. After you had negotiated the commission and
22 entered into a commission agreement, what would you do
23 to ensure that you received the proper commission
24 payment?

25 A. Do you mean -- restate that.

1 entered into evidence as Plaintiffs' 1, is that the
2 agreement contemplated by this sentence?

3 A. Yes.

4 Q. Now, it says here --

5 MS. LUNDVALL: Your Honor, I'm going to object
6 to that question and that answer and ask for it to be
7 stricken. This gentleman was not a party to this
8 agreement and, therefore, he doesn't know what was
9 contemplated.

10 THE COURT: Why don't you just rephrase the
11 question? Ask is it his understanding, if you would ask
12 it that way.

13 MS. LUNDVALL: Thank you, Your Honor.

14 THE COURT: You're welcome. Sustained, but
15 just ask it a different way.

16 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, what is
17 your understanding as to the relationship between your
18 Commission Agreement and this sentence in the Option
19 Agreement?

20 A. My understanding is just what it says here,
21 they would pay a finder's fee to General Realty Group,
22 Walt Wilkes, and Award Realty Group, Jim Wolfram,
23 pursuant to a separate agreement, that they would pay me
24 a commission and they would pay Walt a commission.

25 Q. Was there a separate agreement executed?

1 MS. LUNDVALL: We will do that at the first
2 break. I see that we're pretty close.
3 THE COURT: We'll go ahead forward assuming
4 what Mr. Jimmerson is saying is true, but you can
5 certainly look at it.
6 MR. J.M. JIMMERSON: I certainly hope so.
7 THE COURT: I do too.
8 MR. J.M. JIMMERSON: I'll wait for Your Honor.
9 THE COURT: I'll unroll mine. I really do want
10 to follow. Okay. I got it.
11 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, what is
12 this a parcel map of?
13 A. To me, this is the parcel map of my original
14 Commission Agreement. This is the -- Parcel 1 is the
15 Purchase Property.
16 Q. And what is the parcel map number there on the
17 bottom left-hand -- bottom right-hand portion?
18 A. File 98, page 57.
19 Q. Is the same file and page referenced in the
20 Option Agreement --
21 A. Yes.
22 Q. -- as Purchase Property?
23 A. Yes.
24 MR. J.M. JIMMERSON: Your Honor, I'd now like
25 to move for the admission of this evidence as

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1 Plaintiffs' Exhibit 25.
2 THE COURT: Any objection?
3 MS. LUNDVALL: Your Honor, number one, based on
4 his testimony, he's already testified that the Purchase
5 Property Price was the calculation upon which his
6 commission was based upon and acreage wasn't important
7 to him. So it's hard for me to understand what
8 relevance this particular map has.
9 THE COURT: Because he said for him to
10 determine whether he was getting the actual commission
11 for outside, he wanted to -- he wanted to know what was
12 in Parcel 1. That's what his understanding was of what
13 the Purchase Property was.
14 So it's very relevant because for him it was
15 his understanding of the Commission Letter. And I
16 think that Parcel 1, as in Exhibit 25 he's identified,
17 is what his understanding was is what was covered by
18 Purchase Property. Everything else was option.
19 THE WITNESS: Option.
20 THE COURT: So I do find the relevance of his
21 understanding of what this is, because that's what he
22 was making his determination of as to his understanding.
23 So --
24 MS. LUNDVALL: I understand the Court's --
25 THE COURT: Truth or not, I do feel it is

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1 relevant.
2 MS. LUNDVALL: I understand the Court's ruling
3 on this, recognizing that, in fact, there is going to be
4 testimony from the actual parties to the agreement as to
5 what this was supposed to constitute.
6 THE COURT: I absolutely understand that. I
7 understand this is his understanding, and I know we're
8 all here because there was different understandings. I
9 fully appreciate that. That's why we're all here.
10 But I'm going to go ahead and admit Plaintiffs'
11 Exhibit 25. There's several pages. Are they marked?
12 MR. J.M. JIMMERSON: They do have sheet
13 numbers.
14 THE COURT: For your record, we'll do -- the
15 sheet numbers are Plaintiffs' 10463 through 10468, so we
16 make sure we have the complete exhibit. All right.
17 MS. LUNDVALL: 10463?
18 THE COURT: I'm using the PLTF Bates stamp
19 number on the bottom.
20 MS. LUNDVALL: Thank you, Your Honor. My
21 apologies.
22 THE COURT: I'll tell you, I do more by Bates
23 stamp. So if I refer to exhibits, I use the Bates
24 stamps. When it's Plaintiffs' 25, I use the Bates
25 stamps so we know we have the complete. That's easier

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1 for me to follow.
2 MR. J.M. JIMMERSON: I will endeavor to use
3 those Bates stamps.
4 THE COURT: I'm sorry. It's years of doing it.
5 I want you to have a clear record.
6 MR. J.M. JIMMERSON: Actually, I'm going to put
7 this demonstrative so I'm following along with
8 Mr. Wolfram.
9 Q. Mr. Wolfram, please flip to Sheet 2, which is
10 the Bates stamp PLTF 10464. Are you there?
11 A. Where it shows Parcel 1, 3605.22 acres?
12 Q. Are you seeing the Lincoln-Clark County line?
13 A. Yes, I am.
14 Q. Okay. Looking at Sheets 2, 3 and 4, the 464,
15 465 and 466, if you were to put them on top of each
16 other, would you get a map that looks something like
17 this?
18 A. Yes.
19 Q. If you were to look at the first page of this
20 exhibit, PLTF 10463, does that indicate how the sheets
21 are supposed to be constructed to reveal what the shape
22 of the parcel is?
23 A. Yes.
24 Q. Is the shape of the parcel similar to this
25 parallelogram-like structure?

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1 A. It's similar to it, yeah. I've gotta use my
2 other glasses.
3 THE COURT: That's fine. Whatever glasses you
4 need.
5 THE WITNESS: That's a long way over.
6 MR. J.M. JIMMERSON: I'll move it up.
7 Q. Mr. Wolfram, looking at your sheet, it's going
8 to be closer in front of you, are you able to read this
9 map and determine the width from the westernmost portion
10 of the Parcel 1 to the easternmost portion of Parcel 1
11 along the Lincoln-Clark County line?
12 A. Yeah. If I added up the numbers at the top, it
13 tells you from dot to dot how many feet it is. If those
14 are all added up, it would give you the distance.
15 MR. J.M. JIMMERSON: Okay. Your Honor, I have
16 it calculated. I would like to add it up, unless we can
17 stipulate to the math.
18 THE COURT: I can't do it in my head. I don't
19 know about you, Counsel.
20 MR. J.M. JIMMERSON: I've already calculated
21 it.
22 THE COURT: We can verify your calculation.
23 Tell us which figures you are giving him. I'd like to
24 follow.
25 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, we'll

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1 start from the western portion of this sheet here. See
2 this square here?
3 MS. LUNDVALL: Maybe the question would be from
4 Mr. Wolfram's perspective, if he is going to be the
5 proponent of this exhibit, to find out which numbers
6 that he would add up.
7 THE COURT: I thought that was what you were
8 asking.
9 MS. LUNDVALL: That's not the question that's
10 being posed.
11 THE COURT: Why don't we do this: Tell us how,
12 looking at this is exhibit -- we're looking at 10464?
13 MR. J.M. JIMMERSON: Yes.
14 THE COURT: I see. They are on top of each
15 other. Okay.
16 Looking at 10464, do you see that represented
17 in the demonstrative exhibit?
18 THE WITNESS: It's up at the top.
19 THE COURT: How would you -- what figures would
20 you -- tell us where the most westerly point is on the
21 Lincoln County line to the most easterly portion.
22 THE WITNESS: I can do it off here or I can do
23 it up there.
24 THE COURT: Just so we can follow.
25 MR. J.M. JIMMERSON: I think she wants you to

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1 point here.
2 THE WITNESS: Coming across here.
3 THE COURT: So you are starting on where the
4 first dark circle is?
5 THE WITNESS: Yes. And it gives you footages.
6 From here to here is 1398.35. From here to here is
7 1796.84. From this dot to this dot is 861.24. From
8 here to the next dot is 2662.52. And then we go to the
9 next one, which is 1277.97. If you add those all up,
10 you got your distance.
11 THE COURT: So you are going from the black --
12 from where I circled to where I circled?
13 THE WITNESS: Right.
14 THE COURT: I just want to make sure I'm
15 following you.
16 Q. (BY MR. J.M. JIMMERSON) So to add that up,
17 since you just named these distance, the 1398.35 number,
18 using your calculator --
19 A. You want me to --
20 Q. Yes, please. I would ask just simply to
21 confirm the number.
22 A. Okay, okay.
23 THE COURT: Are you good with calculators or do
24 you want someone to help you?
25 THE WITNESS: I understand.

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1 Q. (BY MR. J.M. JIMMERSON) So the 1398.35 plus,
2 you said, this 1796.84.
3 A. Okay. I'm adding them. You told me to add
4 them.
5 Q. Plus the bottom number, 861.24.
6 MS. LUNDVALL: Why aren't you adding in the
7 2858 that's at the top?
8 THE WITNESS: Above 17, right to the right
9 of --
10 THE COURT: There's some numbers on the top and
11 some on the bottom.
12 MR. J.M. JIMMERSON: Because that's the same as
13 the 1796 plus the 861. It's the same distance. They
14 just are divided.
15 MS. LUNDVALL: Do you think that maybe the
16 witness might be able to provide the testimony?
17 MR. J.M. JIMMERSON: I thought you were asking
18 me. I didn't realize it was cross-examination.
19 THE WITNESS: It's logic to me. If I add those
20 up, I know --
21 THE COURT: Let's do this. You add the numbers
22 you think are appropriate. If we need to cross-examine,
23 we can do that. But I'll take this based on your
24 experience --
25 THE WITNESS: I'm sorry.

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1 THE COURT: You don't need to apologize. We're
2 all trying to get the truth.
3 Your experience reading these kind of maps, all
4 your years, you tell us what numbers you are adding up,
5 Mr. Jimmerson will follow along here, so we get a total.
6 So far we have -- am I right -- we started out
7 with what, 1796.84?
8 MR. J.M. JIMMERSON: I thought we started with
9 1398 and then we went to 1796.
10 THE COURT: I'm confused too.
11 MR. J.M. JIMMERSON: The last thing I have in
12 my phone is that number.
13 THE COURT: That's the new one. Let's start
14 from scratch.
15 MS. LUNDVALL: Mr. Wolfram --
16 THE COURT: There's numbers above the solid
17 black line and numbers below it. Do you see that?
18 THE WITNESS: I see that.
19 THE COURT: Do you add all of them together or
20 do you add the ones below or --
21 THE WITNESS: Well, to me --
22 THE COURT: How would you read it?
23 THE WITNESS: To me, I add the numbers like
24 between the -- you start out with the first dot. It
25 comes over to it looks like a balloon, to a dot, and I

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1 can see that that's 1398.35 feet. Then I go from that
2 dot to the next dot, I can see that that is 1796.84. I
3 go from that dot to the next dot, 861.24. Then we got a
4 long one right here, 2662.52. And then from there to
5 the end, it's 1277.97. It came out to almost 8,000.
6 MS. LUNDVALL: Is all this going on the record?
7 THE COURT: Start again. I'm just trying to
8 follow. And we'll get it all on the record so you are
9 not left out.
10 THE WITNESS: You want me to say it again?
11 THE COURT: Are you starting with the -- which
12 number are you starting with? I can find the location.
13 THE WITNESS: I'm starting with 1398.35.
14 That's the number I'm starting with.
15 THE COURT: Okay. So you are starting with
16 1398.35. Then what number are you doing next?
17 THE WITNESS: Then the next number, I'm going
18 1796.84.
19 THE COURT: All right.
20 THE WITNESS: Then the next number I'm going is
21 861.24.
22 THE COURT: Okay.
23 THE WITNESS: And then we've got a long one,
24 2662.52 and then the last number, 1277.97.
25 THE COURT: Okay.

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1 THE WITNESS: You want me to add all those up?
2 THE COURT: If you could.
3 THE WITNESS: He can go faster than I can.
4 MR. J.M. JIMMERSON: You are the witness,
5 Mr. Wolfram.
6 THE WITNESS: Okay. I got 11,000 -- 11,654.
7 MR. J.M. JIMMERSON: Do you want to try it
8 again?
9 THE COURT: Mr. Shipley, did you do it? What
10 did you get? The Court is wanting to know.
11 MR. SHIPLEY: 7996.
12 THE WITNESS: That's what I got the first time
13 when we were talking, close to 8,000. This time I put
14 another number in there.
15 THE COURT: So Mr. Shipley got 7996 point
16 something.
17 THE WITNESS: That's what I got when we did it
18 again.
19 THE COURT: So you are going to testify to me,
20 before you started redoing it, you also got 7996.92?
21 THE WITNESS: Yeah, point 92, right.
22 THE COURT: Okay. I'll accept that.
23 THE WITNESS: I know what I did.
24 THE COURT: That's the westerly to the easterly
25 quarter on the Lincoln-Clark County line. All right.

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1 THE WITNESS: It's nearly 8,000 feet.
2 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, you see
3 these lines right here in the middle of the page of
4 Sheet 2?
5 A. I do.
6 THE COURT: When you say Sheet 2 --
7 MR. J.M. JIMMERSON: I apologize. 10464, it's
8 on the same sheet.
9 THE COURT: Perfect. Keep the Bates number.
10 Okay. Perfect. I see it.
11 Q. (BY MR. J.M. JIMMERSON) Do you see it says
12 2640 and then it goes 5280?
13 A. Yes.
14 Q. If you flip the sheet, the next sheet, which is
15 10465?
16 A. Same number.
17 Q. And if you were to look at the third sheet,
18 which is 10466 --
19 A. Same numbers.
20 Q. Are you -- what are you able to conclude as to
21 whether or not the boundaries, the eastern-western
22 boundaries, as to whether or not they are parallel?
23 A. They're parallel because the distance is the
24 same all the way down.
25 Q. So to understand you correctly, when you say

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1 the distance is the same all the way down, the 7996.92
2 number would be the same at the same angle here and here
3 and here?

4 A. Yes.

5 MR. J.M. JIMMERSON: Excuse me, Your Honor.

6 Mr. Wolfram --

7 THE WITNESS: Am I done with this one?

8 MR. J.M. JIMMERSON: Almost. I have a couple
9 more questions, and then we can break, Your Honor, if
10 that would be convenient.

11 THE COURT: That's fine.

12 Q. (BY MR. J.M. JIMMERSON) Looking at your
13 sheets, what is the western border of this Parcel 1?

14 A. That's the highway that goes, Highway 93.

15 Q. Does the Highway 93 run the length of Parcel 1?

16 A. Yes.

17 MR. J.M. JIMMERSON: Your Honor, I think we can
18 take a break. We'll be moving into another document.

19 THE COURT: Okay. We'll go ahead and take our
20 luncheon recess. It's up to your preference, Counsel.
21 I know you are the ones preparing for stuff. Do you
22 want to come back at 1:30, an hour?

23 MS. LUNDVALL: Your Honor, an hour, 1:45?

24 THE COURT: Okay. That's fine. We'll take a
25 recess then until 1:45.

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1 (Whereupon, the lunch recess was taken
2 from 12:44 p.m to 1:45 p.m.)

3 THE COURT: Good afternoon, Counsel.

4 MR. J.J. JIMMERSON: Good afternoon,
5 Your Honor.

6 THE COURT: We're going to continue with
7 Mr. Wolfram?

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

9 THE COURT: You are still under oath.

10 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, please
11 flip to Tab 2, the Option Agreement.

12 A. Okay.

13 Q. Again, referencing paragraph B, (i), Buyer's
14 purchase of the portion of the entire site consisting of
15 Parcel 1 as shown on Parcel Map 98-57 recorded July 21,
16 2000, in Book 20000721, as Document No. 01332, Official
17 Records, Clark County, Nevada, containing approximately
18 3605.22 acres as shown on the map attached hereto and as
19 Exhibit B and made a part hereof, the Purchase Property.

20 In this Option Agreement, did it include a map
21 of this Parcel 1 of Parcel Map 98-57 at Exhibit B?

22 A. I don't know. Yeah, I guess it did.

23 Q. Well, can you flip to Exhibit B?

24 A. Okay. I have to think about that.

25 THE COURT: 050, that little number on the

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1 right side.

2 THE WITNESS: Okay.

3 Q. (BY MR. J.M. JIMMERSON) Do you see a map here
4 of Purchase Property?

5 A. No. And that's what I was telling you earlier.

6 Yeah. Okay. Go ahead.

7 Q. It appears, and correct me if I'm wrong,
8 Exhibit A, the map of the entire site, B, C, the map of
9 Option Property, D, the map of initial developed parcel,
10 basically these maps were not included in the Option
11 Agreement. Is that right?

12 A. No, they were not.

13 MS. LUNDVALL: Your Honor, I'd like to, as far
14 as have a continuing caution that the witness is
15 supposed to testify, not the attorney. And what I would
16 like to do is to make sure that we get the testimony of
17 Mr. Wolfram and not of the attorney.

18 THE COURT: Okay. So what she's saying, your
19 question was the other ones don't say it and he agreed.
20 It's really more a leading question. It may take a
21 little longer, but say, Look at Exhibit A, look at
22 Exhibit C. Okay?

23 MR. J.M. JIMMERSON: Yes, Your Honor.

24 THE COURT: So I'm going to sustain the
25 objection. And you want a clear record too.

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1 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, does
2 it include -- do the exhibits include a map of the
3 entire site?

4 A. No.

5 Q. Do they include a map of the Option Property?

6 A. No.

7 Q. Do they include a map of the initial developed
8 parcel and phasing plan?

9 A. No.

10 Q. Did it include a map of the Purchase Property?

11 A. No.

12 Q. Did you ever have any communications, after
13 receiving this document, the Option Agreement, with a
14 representative of Pardee concerning Parcel 1 on Parcel
15 Map 98-57 on the boundaries of Purchase Property?

16 A. Yeah. I've had a conversation.

17 Q. Who did you speak with?

18 A. Jon Lash.

19 Q. What did Mr. Lash say?

20 A. Well, the Purchase Property, to me, had
21 specific boundaries. Is that the direction that I'm
22 headed right here?

23 Q. I was just asking what he said.

24 A. I talked to Jon a lot of times on properties.

25 And to be very, very honest with you, when I'd call over

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1 there, the answer I got most is, You'll just have to
2 trust us.
3 I asked for certain individual things. And
4 they'd say, No, no, no. You know, we're doing what we
5 gotta do. You have to place your trust on us and
6 everything will be right.
7 And I'd explain the fact that I can't go on
8 trust. I need some maps. You've got to show me. You
9 have to show me something where I have something
10 concrete, but I never really -- I never really got
11 anything concrete.
12 **Q. Were those conversations where you were**
13 **requesting maps, were they around the time of summer of**
14 **2004?**
15 A. Yes.
16 MS. LUNDVALL: Once again, leading question,
17 Your Honor.
18 THE COURT: I'm going to go ahead. I agree
19 it's leading, but it's foundation.
20 See if you can get -- ask him if he knows the
21 time frame. If not, you can try to refresh his
22 recollection from now.
23 Since it's out, we'll go ahead and go forward,
24 but I understand your objection.
25 THE WITNESS: Okay.

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1 THE COURT: Now we have summer of 2004.
2 THE WITNESS: Okay. What you are asking me on
3 the Option Agreement, Option Agreement for the Purchase
4 of Real Property and Joint Escrow Instructions, ask me
5 that again, what you are talking about.
6 **Q. (BY MR. J.M. JIMMERSON) Well, you said that**
7 **you had conversations with Pardee about Parcel**
8 **Map 98-57, Parcel 1, and the boundaries of Purchase**
9 **Property. I just want to know what was said in the**
10 **conversations.**
11 A. We had boundaries on the Purchase Property.
12 There were definite boundaries on what we were going to
13 do with Purchase Property.
14 **Q. Did you later receive copies of these maps at**
15 **Exhibit B and Exhibit A to Exhibit C, later?**
16 A. Well, I heard about -- later on. But before I
17 ever signed the contract, my commission contract on, I
18 guess it was August 31st, there was an amendment, a
19 second amendment, which definitely defined the
20 boundaries of the Purchase Property. I mean, in no
21 uncertain terms, it defined them. Even though I hadn't
22 seen it at that particular point, I knew about it.
23 **Q. Have you seen a copy of a map of Parcel 1 on**
24 **Parcel Map 98-57?**
25 A. Yes.

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1 **Q. Can you please flip to Exhibit 4?**
2 A. Okay.
3 **Q. Page 1.**
4 **It's going to be the first page, Your Honor.**
5 A. Okay.
6 **Q. At the very bottom of the page, paragraph 3, it**
7 **says, Upon execution of this amendment --**
8 MS. LUNDVALL: Your Honor, maybe a question
9 might be appropriate.
10 MR. J.M. JIMMERSON: Your Honor, I'm about to
11 get there.
12 THE COURT: You are just --
13 MR. J.M. JIMMERSON: If he wants to read it
14 silently, it's fine.
15 THE COURT: Why don't you point him to -- do
16 you see where he's pointing to, the last paragraph?
17 **Q. (BY MR. J.M. JIMMERSON) Do you see**
18 **paragraph 3?**
19 THE COURT: The bottom.
20 THE WITNESS: Yeah, 3.
21 THE COURT: Can you read that to yourself? And
22 then counsel is going to ask you a question.
23 THE WITNESS: Okay.
24 **Q. (BY MR. J.M. JIMMERSON) Did those Exhibits A,**
25 **B, C, D, G, I, J, K, P, L, and Q -- I'm sorry. Strike**

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1 **that.**
2 **Is Exhibit A attached hereto?**
3 A. No.
4 **Q. Can you please check, Mr. Wolfram?**
5 A. Okay. Let me check. I had some questions
6 about that one. Oh, oh, oh, okay. Which exhibit was it
7 you said?
8 **Q. Are there maps reflecting on --**
9 A. Yes, there are.
10 **Q. -- Exhibit A?**
11 A. Yes. I'm sorry.
12 THE COURT: That's okay. Just take your time.
13 **Q. (BY MR. J.M. JIMMERSON) Please look to**
14 **CSI-Wolfram 1563. It's Exhibit B.**
15 A. All right.
16 **Q. What is this a map of?**
17 A. That's the Parcel 1, the Purchase Property.
18 Parcel 1.
19 **Q. What exhibit, looking back to Exhibit 2, was**
20 **supposed to be the map of Purchase Property, Parcel 1,**
21 **as show in Parcel Map 98-57?**
22 A. When you look at the maps in the back, it shows
23 Purchase Property. The Purchase Property is in all
24 those maps, really.
25 **Q. But this map -- I just want to talk**

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1 specifically about Exhibit B. Is this the map -- what
2 exhibit was the map attaching the map of Purchase
3 Property or Parcel 1, 98-57, on the original Option
4 Agreement on Exhibit 2?

5 A. I'm not understanding what you are doing here.

6 Q. Mr. Wolfram, you've testified that this is a
7 map of Purchase Property at Exhibit B?

8 A. Absolutely.

9 Q. Okay. This is part of Exhibit 4, Amendment
10 No. 2 to Option Agreement for the Purchase of Real
11 Property and Joint Escrow Instructions. Is this the
12 agreement that you were referring to when you talked
13 about the August 31st document?

14 A. Yes.

15 Q. Did you receive the attached exhibits of the
16 maps of A-1, A-2, B, as contained herein?

17 A. Yeah. I knew exactly -- I knew where they
18 were, but I didn't -- but I didn't really know the --
19 how do I put that? You've got me confused on what you
20 are asking me, and I don't want to answer wrong. It's
21 very important.

22 Q. I just want to know, is this the same exhibit
23 that was supposed to be attached --

24 A. Yes, it was.

25 Q. -- reference to --

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1 A. Right.

2 Q. -- Exhibit 2 to the original Option Agreement?

3 A. Right. That is exactly right. Now I
4 understand.

5 Q. I just wanted to confirm.

6 Mr. Wolfram, this Amendment No. 2 also included
7 other exhibits as we discussed; is that right?

8 A. Right.

9 Q. Please look at Exhibit A-1, CSI-Wolfram 1560.

10 A. Okay. Got it.

11 Q. What is this a map of?

12 A. That's before the realignment. That's -- the
13 property had an open space in the middle, and they were
14 going to do a realignment to get that to the outside so
15 that the property was whole.

16 THE COURT: This is Parcel 1 with the BLM land
17 in the middle of it?

18 THE WITNESS: No.

19 THE COURT: Please do it again.

20 MR. J.M. JIMMERSON: I'm about to.

21 THE COURT: I'm sorry. You were going to
22 clarify.

23 Q. (BY MR. J.M. JIMMERSON) When it says at the
24 top here "map of the entire site," what is that
25 referring to?

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1 A. That refers to Clark County, Lincoln County,
2 all the way, the whole site.

3 Q. Are you able to look at this map and see where
4 Parcel 1 is, if it's indicated here?

5 A. Yes.

6 Q. Where is that?

7 A. Lower left-hand corner.

8 THE COURT: Lower left-hand.

9 THE WITNESS: Right here.

10 MR. J.M. JIMMERSON: Your Honor --

11 THE COURT: For the record, there's a black
12 line at the bottom, the second black line towards the
13 lower. And it's anything below that on the left side of
14 the BLM land?

15 THE WITNESS: Right below this line.

16 THE COURT: Why don't you, for the record --
17 can you show Counsel?

18 MS. LUNDVALL: There's no labels on this
19 document. He's just --

20 THE COURT: I know, but that's where he thinks
21 it is. So I want it clear of what he is interpreting
22 this map he thinks it is.

23 So we need you to hold it up for us and
24 describe it and point to it --

25 MR. J.M. JIMMERSON: Yes.

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1 THE COURT: -- so we have a record.

2 MR. J.J. JIMMERSON: Jim, take it out of the
3 book, please.

4 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, can you
5 point --

6 A. This is what we're referring to right here.

7 THE COURT: Okay. And does it go all the way
8 from the black line there all the way down?

9 THE WITNESS: Right here.

10 THE COURT: For the record, he's pointing --
11 you can do it. I'm sorry.

12 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, can you
13 tell the Judge what that bottom line is, that dashed
14 line, that big black going horizontal one-third up from
15 the bottom of the page?

16 A. That's the top of Parcel 1.

17 Q. Is that the county line? Do you know?

18 A. Yeah. That's Lincoln County line, right.

19 Q. Again, for the record, can you please point to
20 where Parcel 1 is on this map?

21 Let the record reflect that he's pointing to
22 the bottom left-hand corner rectangular section --

23 THE COURT: The striped section.

24 MR. J.M. JIMMERSON: -- the striped section of
25 Exhibit A-1 on CSI-Wolfram 1560, below the county line.

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1 Q. Mr. Wolfram, please flip the page to
2 Exhibit A-2.

3 A. Okay.

4 Q. What is this a map of?

5 A. That's a map after the configuration, Judge.

6 MS. LUNDVALL: Is that his understanding of
7 what this map is?

8 THE COURT: Yes. You are testifying to your
9 understanding of what the map is?

10 THE WITNESS: Yeah. It's after the -- they
11 took the donut out, took the hole out of the middle and
12 made a whole property.

13 Q. (BY MR. J.M. JIMMERSON) Mr. Wolfram, does this
14 map identify the boundaries of Purchase Property or
15 Parcel 1?

16 A. Yes.

17 Q. Where is it?

18 A. Lower left-hand corner.

19 Q. Can you point to it?

20 A. Same place.

21 Q. Mr. Wolfram, comparing Exhibit A-1 to
22 Exhibit A-2, is there any difference that you can tell
23 of the location of Purchase Property or Parcel 98-57?

24 A. One and the same.

25 Q. Mr. Wolfram, please flip to Exhibit C-1,

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1 CSI-Wolfram 1565.

2 A. Okay.

3 MS. LUNDVALL: Where are you at?

4 MR. J.M. JIMMERSON: 1565, Exhibit C-1.

5 THE WITNESS: C-1 is -- okay.

6 Q. (BY MR. J.M. JIMMERSON) Do you have it in
7 front of you? Can you tell the Court what this is a map
8 of?

9 MS. LUNDVALL: What he understands this to be a
10 map of.

11 THE COURT: Yes. Everything you are testifying
12 to regarding these maps is your understanding. Correct?

13 THE WITNESS: Yes.

14 THE COURT: I'm clear on that.

15 THE WITNESS: It's the map of the entire site
16 before the configuration, and I do see the Purchase
17 Property down in the lower left-hand corner.

18 Q. (BY MR. J.M. JIMMERSON) Is it shaded in?

19 A. No. It's not shaded in.

20 Q. Do you know why?

21 A. Well, it wasn't really a part --

22 Q. Mr. Wolfram, I'm confused. Because I'm reading
23 here, it says, "Map of Option Property prior to BLM
24 reconfiguration" at the top here. I want to know -- are
25 you looking at --

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1 A. Okay. I see. I was looking at the
2 handwriting. Map of Option Property prior to BLM
3 reconfiguration. Right.

4 Q. Do you understand this --

5 A. I understand what your question is now. I do
6 understand.

7 What he wants me to see, and I do see it, is
8 that the Parcel 1 in the lower left corner, that was not
9 Option Property. That was Purchase Property. And so it
10 wasn't shaded in like the rest of the property.

11 Q. Okay. Can you please flip the page to C-2,
12 CSI-Wolfram 1566?

13 A. All right.

14 Q. What is this a map of?

15 A. That's the reconfiguration with the Purchase
16 Property down in the lower left-hand corner. The
17 stripes are still the Option Property.

18 Q. Mr. Wolfram, did you receive a copy of
19 Amendment No. 2 to Option Agreement for the Purchase of
20 Real Property and Joint Escrow Instructions?

21 A. Eventually. Let me explain how I think this
22 happened. I signed my Commission Agreement. I actually
23 signed it on September 6th. The Commission Agreement is
24 dated September 1st.

25 THE COURT: I saw your signature was

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1 September 6th. The record speaks for that.

2 THE WITNESS: And on August 31st, there was the
3 second amendment. And the second amendment defined
4 exact boundaries, like my contract, exact boundaries on
5 that Purchase Property, the portion in the lower
6 left-hand corner, distinct boundaries of what it was.

7 Q. (BY MR. J.M. JIMMERSON) Did you receive a
8 prior amendment to Option Agreement for the Purchase of
9 Real Property and Joint Escrow Instructions?

10 A. No.

11 Q. Can you please flip to Exhibit 3?

12 A. Bear with me. I don't do as good as you guys.
13 Did you say 3 or 2?

14 Q. Exhibit 3.

15 A. Give me a number at the bottom. I don't see
16 it.

17 Q. It's the Court's Exhibit 3, the Plaintiffs'
18 Exhibit 3.

19 MR. J.J. JIMMERSON: Bates stamp 91, 2 and 3.

20 THE COURT: It's in the Plaintiffs' book.

21 THE WITNESS: The plaintiff, okay.

22 THE COURT: It's okay. Take a deep breath.

23 You are fine.

24 THE WITNESS: All right.

25 Q. (BY MR. J.M. JIMMERSON) Did you receive this

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1 until a bench trial on the 7th. I can move everything
2 else around. That's not until November 7th. So that is
3 the only thing I don't want to move just because pro per
4 people don't understand when the Judge has to move
5 calendars, or they are not as gracious. So that is --
6 everything else we can move around. I will do whatever
7 you need.

8 So if that reassures you, I'll work around your
9 schedule. And you are not inconveniencing a jury or
10 anything, so I'm fine. I will make myself available.

11 (Remarks between counsel off the record.)

12 THE COURT: If that would work for you, that
13 will work for me.

14 MS. LUNDVALL: Thank you, Your Honor.

15 THE COURT: You're welcome. I promise I'll
16 give you whatever time you need.

17 MR. J.M. JIMMERSON: Thank you very much,
18 Your Honor.

19 -oOo-

20 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF
21 PROCEEDINGS.

22

23

24

25

JENNIFER D. CHURCH, CCR. No. 568, RPR

EXHIBIT D

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,)	
)	
PLAINTIFF,)	
)	
vs.)	CASE NO. A-10-632338-C
)	
PARDEE HOMES OF NEVADA,)	
)	
DEFENDANT.)	
)	

TRANSCRIPT
OF
TRIAL PROCEEDINGS

BEFORE THE HONORABLE KERRY L. EARLEY
DISTRICT COURT JUDGE
HELD ON THURSDAY, OCTOBER 24, 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

1 argument.

2 THE COURT: I understand. I think what she
3 is trying to say is not relevant is what you're trying
4 to -- I'm gonna overrule that. I don't know the
5 relevance yet.

6 I assume Mr. Jimmerson is going to ask the
7 question and get an answer, and then we can see whether
8 it is or is not relevant, so I'm going to overrule it.

9 MS. LUNDVALL: Thank you, your Honor.

10 THE COURT: Start again.

11 BY MR. J. J. JIMMERSON:

12 Q. Who gave you the idea that the focus of this
13 case was undue -- past due brokerage commissions?

14 A. It was my impression that I took from my
15 deposition.

16 Q. And did you, did I advise you we were looking
17 at obtaining information regarding purchases by Pardee
18 Homes during the course of their work with you?

19 A. You did.

20 Q. Let's focus upon that.

21 Did there come a time then following December
22 of 2002 when there was a meeting that Mr. Wolfram
23 brought a Pardee representative?

24 A. I can't say whether Mr. Wolfram brought a
25 Pardee representative. I can say that Mr. Wolfram and

1 correction I want to bring to your attention.
 2 Q. I understand.
 3 A. Okay.
 4 Q. But if you're gonna make a correction, you're
 5 going to be going against the words of this document.
 6 MS. LUNDVALL: Your Honor?
 7 THE COURT: I'm gonna strike that.
 8 Please, why don't you, what correction do you
 9 want to make of all of these things we read.
 10 THE WITNESS: He indicated that it was for
 11 3,605.22 acres. That is the correct, you read that
 12 number correctly.
 13 BY MR. J. J. JIMMERSON:
 14 Q. Okay.
 15 A. If you look at the map of the Purchase
 16 Property, it's land.
 17 Q. Right, it sure is.
 18 A. Okay. The 3,600 was the number which was
 19 necessary to give to Pardee a level of assurance that
 20 if Coyote Springs defaulted, that they would be able
 21 to, that they would be able to gain title to a
 22 significant chunk of our property.
 23 Q. Very good, okay.
 24 That language, as you just gave, is nowhere
 25 set forth in this contract, is it?

District Court IV

1 MS. LUNDVALL: Your Honor, I'm going to
 2 object to that, because it is, and that is
 3 misrepresentation of the contents of the document.
 4 MR. J. J. JIMMERSON: Then he can answer the
 5 question, "No," Mr. Jimmerson, you're wrong and it's
 6 here somewhere.
 7 THE COURT: I am going to overrule it. Let
 8 him answer the question. You're gonna have to explain
 9 this a little further, do you get that, Mr. Whittemore?
 10 THE WITNESS: Yes, I do.
 11 THE COURT: He's just asking a question.
 12 Okay. You do your question. He realizes we
 13 need more clarification.
 14 MS. LUNDVALL: And if he would ask a proper
 15 question rather than to try to put words in his mouth
 16 through leading questions, we would have a little bit
 17 of an easier time with this.
 18 MR. J. J. JIMMERSON: Okay.
 19 THE COURT: We're all doing the best we can.
 20 THE WITNESS: Am I being difficult?
 21 THE COURT: No, not at all. You can only
 22 answer the questions, and we'll get there one way or
 23 the other Mr. Whittemore.
 24 BY MR. J. J. JIMMERSON:
 25 Q. I'm showing you Exhibit 25.

District Court IV

1 THE COURT: What are we looking at?
 2 MR. J. J. JIMMERSON: Exhibit 25, Plaintiff's
 3 25.
 4 THE COURT: Hold on.
 5 THE CLERK: That's your map, Judge.
 6 THE COURT: What did we do with it? I
 7 apologize.
 8 THE CLERK: I think you, did you roll it back
 9 up?
 10 THE COURT: I am so sorry. I had it out.
 11 Sorry, it would have been too easy if I kept it out.
 12 Thank you.
 13 BY MR. J. J. JIMMERSON:
 14 Q. What is, please tell this Court what is the
 15 3,605.22 acres that was recorded in the 2000 Parcel Map
 16 Number 9857, and you have in front of you, just do you
 17 recall what it is?
 18 A. Well, I'm gonna check the numbers, if I can
 19 compare them.
 20 Q. I understand.
 21 A. It appears to be what's been designated as
 22 Exhibit 25, plaintiff's proposed Exhibit, which looks
 23 like, to me, the portion of the parcel map that I was
 24 contemplating when we described the 3,605 acres.
 25 Q. Okay. So the parcel, Exhibit 25, is a

District Court IV

1 depiction by map of what was being sold as Purchase
 2 Property referred to in the first sentence of
 3 paragraph B, correct?
 4 A. As you combine these documents together, the
 5 answer is correct.
 6 Q. Okay. Thank you.
 7 MR. J. J. JIMMERSON: And I have it and you
 8 have it in front of yourself, your Honor, and it's also
 9 right here on the easel.
 10 THE COURT: I understand Mr. Wolfram's
 11 testimony yesterday, it's all these pieces. I
 12 understand that.
 13 BY MR. J. J. JIMMERSON:
 14 Q. It's this parcel here, correct?
 15 A. Yes, sir.
 16 Q. All right. And this is the county line at
 17 the top, correct?
 18 A. That is correct.
 19 Q. All right. And so at this point in May of
 20 2004, there's gonna be a donut hole right at --
 21 A. No, sir.
 22 Q. There's not?
 23 A. No, sir.
 24 Q. It's over here? Where is the donut hole?
 25 A. The whole reason why there's straight lines

District Court IV

1 there, Mr. Jimmerson --

2 Q. Right.

3 A. -- is to ensure that Pardee and Coyote are

4 avoiding any overlap into the leased portion of the

5 land, because again, we cannot give fee title to that

6 which is subject to a lease.

7 Q. So the donut hole is to the east?

8 A. Yes, sir, right in that general area,

9 pointing to the right of that exhibit.

10 Q. Right here.

11 So what is being sold to Pardee under this

12 description is 3,600 acres depicted by this rectangle?

13 A. When you use the term, "sold" -- I'll explain

14 this. What's being described in this document --

15 Q. Right.

16 A. -- is the intent of the parties, that we can

17 only give title to that which is specific, defined by

18 specific parcel map, and at this point, there have been

19 no discussions as to where single-family residential

20 are going to be or where commercial property is going

21 to be or where the golf course is going to be, but

22 everybody knows, and this is why I wanted to say with

23 respect to this agreement, it must be clear that

24 neither Pardee nor Coyote Springs could have

25 anticipated the exact configuration of the parcels they

District Court IV

1 were ultimately going to acquire pursuant to this

2 agreement until that mapping and entitlements and

3 development process had taken place.

4 Q. And I accept that.

5 A. Thank you.

6 Q. You're not gonna have any quarrels from me,

7 that's my understanding as well. Fair enough.

8 But what is being purchased here,

9 understanding that you believe it was subject to change

10 as you define entitlements, as you work with the BLM

11 and the like, was selling them purchase property

12 described as 3,600 acres, Exhibit 25, correct?

13 A. I'll try to do this again.

14 Q. Yes or no?

15 THE COURT: No, honestly, please answer,

16 because I'm a little confused too. Could can you

17 answer that yes or no?

18 THE WITNESS: No.

19 THE COURT: Okay. Then please --

20 THE WITNESS: No, your Honor, I cannot.

21 THE COURT: Okay. Could you please --

22 THE WITNESS: Yes.

23 THE COURT: -- try to clarify for all of us.

24 BY MR. J. J. JIMMERSON:

25 Q. Please tell me under that contract what the

District Court IV

1 definition of Purchase Property is?

2 A. I would like to --

3 THE COURT: I would like further --

4 THE WITNESS: We --

5 THE COURT: Could you please give us, I would

6 like to hear --

7 THE WITNESS: Mr. Jimmerson and Judge, the

8 property which is described on that exhibit,

9 Exhibit 25, what's in front of me, what's in front of

10 the Judge, is a delineation of a portion of the Coyote

11 Springs property which served as a guarantee that

12 Pardee would be able to acquire their portion of the

13 single-family residential property which the parties

14 would subsequently describe on a map after the planning

15 process and entitlement process, and, quite frankly,

16 the development process associated with the golf course

17 had taken place, because until that took place, this

18 was my way of guaranteeing to them X number of acres,

19 because what they wanted was X number of acres.

20 And you will see in this agreement,

21 Mr. Jimmerson, that we had a right to reacquire this

22 from Pardee if the thing blew up, because we didn't

23 want to have a situation where there was a party out

24 there who had this piece and had a blocking strategy,

25 as opposed to what the intent of the parties was, which

District Court IV

1 was to combine their joint planning efforts and come up

2 with the right plan for Coyote Springs.

3 BY MR. J. J. JIMMERSON:

4 Q. No problem about that.

5 A. Thank you.

6 Q. To establish the events beforehand, in the

7 meeting you had, the all-hands meeting at Pardee's

8 offices roughly January/February 2004, after that,

9 after Pardee evidenced their interest to acquire the

10 land, and daily communication occurred between March

11 and May of 2004, is Mr. Wolfram or Mr. Wilkes present?

12 A. At any meeting?

13 Q. Yes, at any meeting.

14 A. No, sir. No.

15 Q. Okay. Were they, to your knowledge, privy

16 to the communication going on between you and

17 John Lash, you on behalf of Coyote Springs, John Lash

18 on behalf of Pardee?

19 A. No, sir. I was not aware of them.

20 Q. As far as you know, the answer is --

21 A. No, that's correct, sir.

22 Q. All right. So you know when or if they ever

23 received this Option Agreement, Exhibit 2?

24 A. No, I'm not aware.

25 Q. Did you deliver them, prior to this

District Court IV

1 litigation, this document, and by "you" I mean Coyote
 2 Springs?
 3 A. Not that I recall.
 4 Q. Okay. All right.
 5 All right. Now, understanding what you say
 6 was the idea, that you're going to now do entitlements
 7 and refine things and the like, at least for purposes
 8 of this document, would you agree with me that the term
 9 "Purchase Property" refers to Exhibit 25 for purposes
 10 of this contract?
 11 I understand you're gonna tell me, Jim, it's
 12 gonna change, but for a moment in time, was the
 13 Purchase Property Exhibit 25?
 14 A. Jim, I'm gonna say you have to take into
 15 account what the property was gonna look like with the
 16 BLM configuration and reconfiguration, so you cannot, I
 17 cannot sit here and tell you or the Judge that Exhibit,
 18 Exhibit 2 was complete until the reconfiguration
 19 determination was made, because as a part and parcel of
 20 this agreement, it had maps which, quote, required, and
 21 I don't recall the numbers, but my recollection is that
 22 there was, there were exhibits that were required to
 23 say this is what the property is gonna look like, the
 24 pre-configuration versus post configuration.
 25 Q. Mr. Whittemore, you're not gonna concede to

District Court IV

1 me that you defined in this contract Purchase Property
 2 as Exhibit 25, yes or no? I know you're gonna tell me
 3 it was subject to change, and I'm willing to accept
 4 that. Will you not accept the fact in one moment in
 5 time, May of 2004, Purchase Property is defined as
 6 Exhibit 25.
 7 MS. LUNDVALL: I'm gonna now object. This
 8 has been asked and answered.
 9 THE COURT: I'm not sure he did answer. He's
 10 explaining. I think he's trying to just do a very --
 11 he's just trying to say for purposes of just looking at
 12 Exhibit 2, is Purchase Property, at least why, your
 13 understanding, defined according to Plaintiff's
 14 Exhibit 25, I think that's what you're asking?
 15 MR. J. J. JIMMERSON: Precisely, yes.
 16 THE COURT: Just for purposes of this?
 17 THE WITNESS: Mr. Jimmerson, your Honor,
 18 Purchase Property is defined within Paragraph B as the
 19 3,605 --
 20 BY MR. J. J. JIMMERSON:
 21 Q. Thank you.
 22 A. -- 22 acres within Paragraph B.
 23 Q. And is Option Property, at that moment in
 24 time, defined as everything else outside of Parcel 1,
 25 the 3,600 acres?

District Court IV

1 A. No, sir.
 2 Q. What is Option Property defined as?
 3 A. Option Property is specifically defined.
 4 That is portion of the entire site which is or becomes
 5 designated for single-family detached production
 6 residential use.
 7 Q. Okay.
 8 THE COURT: Hold on, let him finish.
 9 BY MR. J. J. JIMMERSON:
 10 Q. Did I interrupt you?
 11 A. Yes.
 12 Q. Okay.
 13 A. And therefore, and therefore, depending upon
 14 what happened with respect to any portion of any
 15 subsequent agreements, entitlement, mapping, the Option
 16 Property could be zero, because I was going to
 17 designate it as multi-family, I was going to designate
 18 it as commercial, I was going to designate it as golf
 19 course, I was gonna designate it as any of a huge
 20 number of potential uses pursuant to the entitlements,
 21 which I received from Clark County.
 22 Q. Fair enough.
 23 A. That's the complete answer.
 24 Q. Would you then agree from your last answer
 25 that Option Property is outside of Parcel 1? I don't

District Court IV

1 care where it was, it's just not part of Parcel 1?
 2 A. Within the constraints of Paragraph B, yes.
 3 Q. Thank you. That's all I need to know.
 4 A. Okay.
 5 Q. Thank you.
 6 I'm gonna fill in the blanks with you. Work
 7 with me. Trust me, okay?
 8 A. Okay.
 9 Q. All right. So June 1, when they sign this,
 10 this is Purchase Property, a defined term, and
 11 somewhere within the other 43,000 acres, less the
 12 13,000 approximately, you're gonna retain for yourself,
 13 and Option Property is defined as property outside of
 14 Parcel 1 for single-family residential use, correct?
 15 A. Within the context of Paragraph B, the answer
 16 is yes.
 17 Q. Great, okay.
 18 Now, as you noted, there are no schedules or
 19 maps attached to that document?
 20 A. To Exhibit 2?
 21 Q. To Exhibit 2.
 22 A. Correct.
 23 Q. You first, in fact, learned that in your
 24 deposition last year, correct? Do you recall thinking
 25 that they had been attached to the document but then

District Court IV

1 later on weren't?

2 A. Well --

3 Q. On October 19th of 2012?

4 A. I don't recall what my --

5 Q. Fair enough.

6 MS. LUNDVALL: Your Honor --

7 THE COURT: Just let him finish. I know

8 you're trying to be real, Mr. Jimmerson, I know where

9 you need to go. Slow down, I know what you're trying

10 to -- he doesn't recall in his deposition, and you're

11 gonna show him, okay.

12 BY MR. J. J. JIMMERSON:

13 Q. Look at now, look at the schedules attached

14 as of June 1 of 2004.

15 THE COURT: Pursuant to Paragraph B?

16 MR. J. J. JIMMERSON: Correct, as of June 1

17 of 2004.

18 BY MR. J. J. JIMMERSON:

19 Q. Now, have you noticed attached to this

20 document are blanks for the schedules?.

21 THE COURT: We're still on Exhibit 2?

22 MR. J. J. JIMMERSON: Exhibit 2.

23 THE WITNESS: Yes.

24 BY MR. J. J. JIMMERSON:

25 Q. In other words, when you look at this,

District Court IV

1 beginning with -- let me find it here. Page 46.

2 A. Bates stamped 48, list of exhibits, do you

3 see that, Mr. Whittemore?

4 A. Yes, 46 and 48, yes, sir.

5 Q. And you listed the anticipated exhibits, and

6 they're all referenced in the course and agreements,

7 but when you go looking for them, you see that they're

8 not attached?

9 A. Right. What the parties did was prepare a

10 complete list of what was going to be subsequently

11 attached to Exhibit 2 to make it a complete agreement.

12 Q. Fair enough. Good.

13 Just turn to the next page, Exhibit 3, the

14 tab right below --

15 A. Exhibit 3, yes, sir.

16 Q. It's Bates Stamp Number 91?

17 A. Yes, sir.

18 Q. Pardee Homes 91, and it's called Amendment To

19 Option Agreement For The Purchase Of Real Property And

20 Joint Escrow Instructions.

21 Do you see that?

22 A. Yes, I do.

23 Q. Now, this is not central to this case, but

24 just tell us what was occurring here in July of 2004,

25 approximately six or seven weeks after the signed

District Court IV

1 document of June 1, 2004?

2 A. We were in the process of finalizing the

3 exhibits, and because we had not yet been able to

4 finalize what those exhibits were, the parties felt it

5 appropriate that we extend time under which part of the

6 money was supposed to go hard, and therefore, in

7 fairness to Pardee, we said we'll extend the

8 contingency periods, and we'll continue to work,

9 honoring what needs to be done to make this agreement

10 work for you.

11 Q. And there was some release of funds, \$125,000

12 from Pardee through escrow, released out of escrow to

13 Coyote Springs?

14 A. Yes. I made them pay a little bit to dance.

15 Q. I got it. Fair enough.

16 And the date of this is roughly July 28th of

17 2004?

18 A. That is correct.

19 Q. About seven weeks after the signing of the

20 original agreement?

21 A. Close enough.

22 Q. Fair enough.

23 Now, would you look at Exhibit 4 --

24 A. Yes, sir.

25 Q. -- in evidence, all right.

District Court IV

1 Do you know what Amendment Number 2 Option,

2 I think this answers a lot of questions you were

3 talking about earlier?

4 A. Yes, sir.

5 Q. All right. So let's work together now

6 talking about this.

7 What is going on now, it's dated August 31,

8 and I don't know if that's the exact date it was

9 signed, but it bears the date August 31, 2004.

10 We're going on to Amendment Number 2 Option

11 Agreement For The Purchase Of Real Property And Joint

12 Escrow Instructions, Exhibit 4.

13 A. Okay. Thank you.

14 The parties have finally determined that it's

15 time to bring greater specificity to what is your

16 Exhibit 2, which is the Baseline Agreement to me, and

17 it says that the parties hereby agree that upon

18 execution of this amendment, all of those exhibits

19 attached, A, B, C, D, G, I, J, K, L, P, and Q, are

20 gonna be made part of the agreement.

21 The Exhibit H reference was deleted. We had

22 an Exhibit H reference in the underlying agreement, but

23 we deleted it in its entirety, and the most important

24 piece of this, from my perspective and John's

25 perspective, was that Exhibit E, the price that they

District Court IV

1 were going to pay for this land purchase in the future
 2 would remain in affect.
 3 Q. All right. And why, what's the most
 4 important feature of this in your and Mr. Lash's minds?
 5 A. Because Exhibit E was the amendment which we
 6 got done most quickly to attach to the underlying
 7 agreement, because he wanted to know, Harvey, I trust
 8 you, but I want to make sure if I want to buy the
 9 entire property that you designate as single-family
 10 residential, that over a period of 40 years this is
 11 what I'm gonna have to pay for the property.
 12 I wanted to make sure that I had a deal that
 13 I was, I was going to have a partner who was gonna be
 14 in it with me for the long haul.
 15 Q. Okay. Now, I don't see Exhibit E here. Is
 16 it here?
 17 A. No. It's back on Exhibit -- if you turn to
 18 your Exhibit 2?
 19 Q. Please do that. I want the Court to do that.
 20 I want everybody in the room to follow along.
 21 A. Okay. And you'll see Exhibit E on Bates
 22 Stamp 54.
 23 Q. Okay. So now looking at Exhibit 2, Bates
 24 Stamp 54.
 25 A. Yes, sir.

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1 Q. Which is --
 2 A. 54, Exhibit E.
 3 THE COURT: It don't have a page number. It
 4 just says Exhibit E.
 5 MR. J. J. JIMMERSON: Thank you.
 6 THE WITNESS: Right.
 7 BY MR. J. J. JIMMERSON:
 8 Q. And so that schedule, that had been agreed to
 9 June 1, 2004?
 10 A. Yes.
 11 Q. It was an attached exhibit?
 12 A. Yes, sir.
 13 Q. All right. And so that is being reaffirmed,
 14 if you will, through Exhibit 4?
 15 A. It's just not addressed.
 16 Q. But it remains in force?
 17 A. Yes, it remains in force.
 18 Q. And that's why you say that was the most
 19 important part to him, to make sure he was able to buy
 20 out the entire property you designate single-family
 21 residential at the price established June 1, 2004?
 22 A. And for me to be able to guarantee I was
 23 gonna send a bill in the Year 40 for \$74,923 for any
 24 piece of property designated as single-family
 25 residential they want to exercise the option on,

District Court IV

1 because you will see Year 0 to 5 is the five year
 2 period you asked me about. It's \$40,000 an acre.
 3 Q. And then it escalates pursuant to the terms
 4 of the agreement?
 5 MS. LUNDVALL: Your Honor, from his
 6 perspective, once again, we get a witness.
 7 THE COURT: I'm trying, and Mr. Jimmerson,
 8 you probably understand it better than I do, and I know
 9 you've worked the case, but I'm trying to understand.
 10 MR. J. J. JIMMERSON: I will be more careful.
 11 THE COURT: This is really critical to me.
 12 MR. J. J. JIMMERSON: I will be more careful.
 13 THE COURT: And I'm not chastising, I'm just
 14 trying very hard to follow, because I know this is
 15 important.
 16 THE WITNESS: I'm trying to make it clear.
 17 THE COURT: You are, and I truly appreciate
 18 it.
 19 BY MR. J. J. JIMMERSON:
 20 Q. On Exhibit E --
 21 THE COURT: Once again, this is after the
 22 five years, if they do exercise the option, Pardee,
 23 this is the price they're gonna pay per acre?
 24 THE WITNESS: Yes.
 25 THE COURT: Thank you.

District Court IV

1 BY MR. J. J. JIMMERSON:
 2 Q. And as you've indicated, anytime they buy,
 3 including the entire site of 30,000 acres, 43 minus the
 4 13, it's 40,000 an acre Years 0 to 5?
 5 A. If I designated it, if they say, I want to
 6 buy the entire property without regard to any
 7 designation, commercial or anything else, their strike
 8 price is \$40,000 per acre for the full 30,000 acres,
 9 which would be 1.2 billion.
 10 Q. B, as in billion?
 11 A. Not an M, B.
 12 Q. So that's the magnitude of this potentially,
 13 is a \$1.2 billion purchase by Pardee if they --
 14 MS. LUNDVALL: Your Honor, once again, we've
 15 got -- the witness is supposed to provide the
 16 testimony, the examiner asks the questions.
 17 THE COURT: I think he's trying to clarify it
 18 to make sure I understand it, but that's if the whole
 19 site was designated as single-family residential,
 20 nothing else.
 21 THE WITNESS: Or they simply said we want to
 22 take down the entire site.
 23 THE COURT: And do what we want?
 24 THE WITNESS: Yeah, and we'll do the
 25 planning.

District Court IV

1 BY MR. J. J. JIMMERSON:
2 Q. And there was an agreement in Exhibit E on
3 June 1 of 2004, part of Exhibit 2, as to the escalation
4 so you wouldn't have any quarrels about what does the
5 escalation compute to?
6 A. That's why it's the most important part of
7 the deal.
8 Q. Price sometimes is, all right.
9 Now --
10 THE COURT: I think we would all stipulate to
11 that. It can be a deal breaker.
12 THE WITNESS: Uh-huh.
13 BY MR. J. J. JIMMERSON:
14 Q. Now, for purposes of Amendment 2, that's the
15 exhibit you're filling in the blanks that had been left
16 on June 1?
17 A. Absolutely, fair characterization.
18 Q. Okay. So now let's fill in the blanks
19 together.
20 A. Okay.
21 Q. Let's take a look at the attachments, please,
22 and you'll walk us through what it is now that we are
23 doing.
24 A. Right.
25 Q. What is Exhibit A-1, CSI Wolfram 1560?

District Court IV

1 A. Got it.
2 Q. What is that?
3 A. Got it, thank you.
4 Okay. Exhibit A-1 was prepared by my general
5 manager, Rob Dirk, to show what the site looked like
6 before any BLM reconfiguration
7 You can see the area which is white, your
8 Honor.
9 THE COURT: It's the BLM land?
10 THE WITNESS: It's the BLM land, and you'll
11 see a little area on the upper left-hand corner which
12 is also BLM land.
13 THE COURT: BLM land also.
14 BY MR. J. J. JIMMERSON:
15 Q. Looking at Exhibit 25, the BLM property is
16 right along the eastern border of the purchased
17 property?
18 A. Yes, sir.
19 Q. And here's the county line, and we find other
20 parts up in here?
21 A. Way off the chart but up to the northwest,
22 that's correct.
23 Q. All right. And just hold it up so, hold it
24 up, show me this. Tell me what this is, please.
25 A. Okay.

District Court IV

1 Q. The bottom left corner below the county
2 line --
3 THE COURT: And on the left.
4 THE WITNESS: This area which is designated,
5 which is shown to be crosshatched on Exhibit A-1 is
6 identical to what's been referenced as Exhibit 25.
7 BY MR. J. J. JIMMERSON:
8 Q. Purchase Property as originally defined in
9 the May agreement?
10 A. I'm gonna keep qualifying that, in
11 Paragraph B.
12 Q. Okay, no problem.
13 A. Yes, sir.
14 Q. Now, Purchase Property in Amendment Number 2
15 remains the same, the same definition, correct?
16 A. I don't think we changed anything. In fact,
17 if I drafted this right or my people did, it will say
18 that all the definitions remain the same.
19 Q. Thank you.
20 A. Let me look, please.
21 Q. Please confirm it.
22 A. Yes. Paragraph 23 basically said that the
23 provisions of this amendment control over the prior
24 terms of the agreement, so technically, you would have
25 to look at Amendment Number 2 as compared to the prior

District Court IV

1 agreement, your Honor.
2 Q. I understand. And would you agree that
3 Amendment 2, Exhibit 4, does not change the definition
4 of Purchase Property found on the first page of
5 Exhibit 2, the June 1, 2004 Baseline Agreements?
6 A. I'm gonna look to see.
7 THE COURT: Is there anything in this
8 amendment that even talks about Purchase Property?
9 THE WITNESS: That's what I want to find out.
10 THE COURT: Right, perfect, on the same page.
11 THE WITNESS: I would like it if somebody
12 could do a word search real quickly. It would help a
13 lot.
14 BY MR. J. J. JIMMERSON:
15 Q. You're years ahead of me. What is a word
16 search?
17 THE COURT: I wish we had it on a computer.
18 Come on, you've got to have OCR on the computer.
19 MS. LUNDVALL: We don't, your Honor. We
20 don't have it.
21 THE WITNESS: We don't have OCR.
22 MS. LUNDVALL: Not for these documents.
23 THE COURT: We'll have to use an eyeball
24 search.
25 THE WITNESS: Okay. So now I can tell you

District Court IV

1 this, that the parties at the time that this document
 2 is executed clearly anticipate that the Purchase
 3 Property, the purchase price of the Purchase Property
 4 is gonna be \$84 million.
 5 BY MR. J. J. JIMMERSON:
 6 Q. Right.
 7 A. And that's contained in Paragraph 4 (b).
 8 THE COURT: That's how you get to the
 9 \$84 million?
 10 THE WITNESS: That's how we get to the 84,
 11 because I negotiated with Mr. Lash an increase in the
 12 prior number to this, based upon my obligation to put
 13 in certain improvements that Pardee wanted to guarantee
 14 that we were gonna put the money in the land rather
 15 than just pocket it and go home.
 16 BY MR. J. J. JIMMERSON:
 17 Q. Got it.
 18 A. But it's critical that you look at
 19 Paragraph 4 (b), because it describes throughout the
 20 rest of this document all of the commercial
 21 improvements, clearly contemplating commercial
 22 property. It talks about all the different things
 23 which are required from recreation facilities, so I
 24 impose upon the buyer an obligation to commit to build
 25 a recreation facility, which means you need parks and

District Court IV

1 recreation land, and so again, now we have the
 2 integration of this agreement with this amendment to
 3 contemplate or to reach the contemplation of the
 4 parties.
 5 Q. Very good.
 6 And would you agree that during the course of
 7 this document, there is a specification that the first
 8 purchase that Pardee is going to make is purchase
 9 property of roughly 1,950 acres?
 10 A. Yeah. That's, I think that's --
 11 Q. And the 1,950 acres is a portion of the
 12 overall 3,600 acres Purchase Property, correct?
 13 A. Well, this is where you get, this is where
 14 you need to allow me to explain, if I could.
 15 If you please look at 1568, the map of the
 16 Initial Developed Parcel.
 17 Q. Okay.
 18 THE COURT: 1568 Bates Stamp?
 19 THE WITNESS: Yes, Bates Stamp 1568.
 20 THE COURT: Got it.
 21 THE WITNESS: You can see the double
 22 crosshatched area, the Initial Developed Parcel, the
 23 1,950, and Phase 1 is located in the southern portion
 24 of the parcel, and the parties will mutually agree upon
 25 the phasing of the additional purchases, your Honor,

District Court IV

1 the remaining 1,700 acres.
 2 BY MR. J. J. JIMMERSON:
 3 Q. Now, can we agree that the 1,950 acres is
 4 just what I just said, it's part of, part of the
 5 Purchase Property, it's part of Exhibit 25?
 6 A. Yes.
 7 Q. That's all I asked. I appreciate it.
 8 THE COURT: Do you need to explain something
 9 else?
 10 THE WITNESS: No.
 11 BY MR. J. J. JIMMERSON:
 12 Q. It's, it relates to the commission
 13 agreements, not anything to do with your being
 14 accurate, it's just how we're paid differs whether it's
 15 Purchase Property or Option Property, that's why I'm
 16 being so emphatic to describe where the 1,950 acres is.
 17 A. Okay.
 18 MS. LUNDVALL: Your Honor, again, I would ask
 19 to have the speech stricken by Mr. Jimmerson.
 20 MR. J. J. JIMMERSON: I agree to have it
 21 stricken, that's just fine.
 22 MS. LUNDVALL: And I would ask for him to
 23 exercise restraint, as the Court has repeatedly
 24 admonished him not to do that.
 25 MR. J. J. JIMMERSON: I didn't have breakfast

District Court IV

1 with the witness. I didn't have the opportunity to
 2 talk to him.
 3 THE COURT: You both had an opportunity. I
 4 don't infer anything from you talking to him. I know
 5 not to infer any -- I certainly would be disappointed
 6 if both of you didn't talk to a witness if you had the
 7 chance, so I'm not inferring anything by that.
 8 Honestly, it's easier if I get as much
 9 testimony as I can out of Mr. Whittemore, to be honest,
 10 so --
 11 MR. J. J. JIMMERSON: I understand, I'm gonna
 12 go through all of it.
 13 THE COURT: I know you know where you're
 14 going.
 15 MR. J. J. JIMMERSON: I'm gonna go through
 16 all of it, Judge, so we have a clear understanding.
 17 BY MR. J. J. JIMMERSON:
 18 Q. So let's start at Exhibit A-1. We're gonna
 19 go through the exhibits that are now locked in.
 20 This is what the provision of Amendment 2
 21 says: Subparagraph 3, Upon execution of this agreement
 22 by both parties, Exhibits A, B, C, D, G, I, J, K, L, P
 23 and Q to the agreement shall be the exhibits which are
 24 included in Exhibit 1 attached hereto and made a part
 25 hereof. Exhibit H to the agreement is hereby deleted.

District Court IV

1 A. Right.

2 Q. So now you're confirming what you had thought

3 you had in May, but now you've got the attachments,

4 right?

5 A. No.

6 Q. What's wrong with that?

7 A. That's not what we thought we had in May,

8 it's what we were going to do because we were going to

9 use a deliberative collegial process to ultimately

10 reach resolution.

11 Q. And you, you got by this amendment --

12 A. We got here, okay, we got here.

13 Q. And it's dated roughly August 31 of 2004, two

14 months later?

15 A. Yes, sir.

16 Q. So let's start at A-1.

17 A. Yes, sir.

18 Q. You already answered the question, but to

19 summarize, this is as it was with the donut hole?

20 A. That's correct.

21 Q. BLM leaves the property?

22 A. That's true.

23 Q. And the purchase property is the bottom

24 left-hand corner of --

25 A. As defined in Exhibit B on Page 1.

District Court IV

1 Q. Right, okay.

2 So now, if any portion above the county line

3 or to the east of the county line, not including BLM

4 property here and here --

5 A. Okay.

6 Q. -- was acquired by Pardee under the terms of

7 the agreement of May or of June 1, 2004, would that be

8 called Option Property?

9 THE COURT: I didn't see what you -- I'm

10 sorry, Mr. Jimmerson, I couldn't see what he was

11 pointing at.

12 THE WITNESS: Mr. Jimmerson was referring to

13 everything that is not --

14 THE COURT: Hash marked, the cross marks

15 hatched that are not BLM land, correct?

16 THE WITNESS: Yes.

17 THE COURT: Everything that we had marked

18 Parcel 1, that's not BLM land.

19 BY MR. J. J. JIMMERSON:

20 Q. Is that Option Property defined under the

21 agreement of June 1, 2004, if you designated it as

22 residential?

23 A. Correct.

24 Q. Thank you.

25 Now, let's go to A-2. What is A-2?

District Court IV

1 A. A-2 is --

2 Q. Referring to Bates Stamp 1561?

3 A. 1561 represents my best estimate at the time

4 that we were doing this as to what I had hoped would be

5 the map of the entire site post BLM reconfiguration.

6 Q. Okay. Now, looking at that map, A-2, I'll

7 show the Judge, this is Parcel 1, Purchase Property,

8 and it's immediately, and immediately to the east and

9 north would be Option Property, if it's designated as

10 residential as of August 31 of 2004?

11 A. If it's designated as single-family

12 residential for purposes, I am presuming we're talking

13 about for purposes of this trial, correct?

14 Q. Yes.

15 A. Yes.

16 Q. Thank you.

17 That's all I'm trying too establish, what's

18 Purchase Property and what's Option.

19 Next exhibit, please.

20 A. Uh-huh.

21 Q. What's Exhibit 1563, what we call Exhibit B

22 to this document?

23 A. It is a planning designation from

24 Wilson Miller, which is one of our consultants, that

25 shows what it look like in aliquot portions, again,

District Court IV

1 26 July, 2004.

2 Q. Okay. And it was the Exhibit B description

3 of it, Page 1 of the original Baseline Agreement,

4 June 1, 2004, it's the Exhibit B that wasn't attached

5 on June 1 and that is now attached?

6 A. That's fair.

7 Q. Thank you.

8 So what's shown herein is the Purchase

9 Property as that is a defined term in the Baseline

10 Agreement?

11 A. In Paragraph B.

12 Q. All right. Thank you.

13 Let's turn to the next page, 1565, and it

14 does skip one, 1563 to 1565.

15 What's C-1?

16 A. C-1 is the map of the, what's described as

17 Option Property prior to BLM reconfiguration, and then

18 it says, The actual Option Property will be the

19 production residential property within the designated

20 area determined pursuant to the Option Agreement.

21 Q. Okay. So again, it shows the Purchase

22 Property bottom left-hand corner, right?

23 A. By definition -- no. By the fact it's

24 excluded, it must be referring to prior documents,

25 which therefore would be --

District Court IV

1 Q. Purchase Property?

2 A. Purchase Property.

3 Q. Okay. Now, the difference between C-1 and

4 A-1 is what, if there's any difference?

5 A. Well, there's a lot. Exhibit A-1, the

6 crosshatched marks cover what you call the Purchase

7 Property, and Exhibit C-1, it's blank.

8 Q. Is that the only difference between the two?

9 A. Yes.

10 Q. All right. Did you make the notation on the

11 right, the actual Option Property will be, quote,

12 production residential property within the designated

13 area pursuant to the Option Agreement?

14 A. That was done by our drafters when we were

15 getting to sign the final documents.

16 Q. Okay.

17 A. Both Pardee and CSI wanted that on -- all of

18 these written notes were done prior to my execution of

19 the agreement.

20 Q. That's what I want to know. Here's my

21 questions: Was it done prior to June 1? Was it done

22 prior to the Amendment Number 2 of roughly August 31 of

23 '04?

24 A. I don't know when the map was created.

25 Q. Okay. But we know it was attached at least

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1 as of August 31, Amendment Number 2, the document in

2 front of you, Exhibit 4?

3 A. Yeah. The effective date of the agreement is

4 when all of these exhibits were gonna be attached.

5 Q. I just want the court to know you did it,

6 it's not something Ms. Lundvall or I did during

7 discovery?

8 A. Absolutely not.

9 THE COURT: He's testified to have that, you

10 said they were actually there before you signed the

11 agreement?

12 THE WITNESS: Yes, your Honor.

13 BY MR. J. J. JIMMERSON:

14 Q. All right. Thank you.

15 THE COURT: I understand that, that would be

16 true of C-2 and any --

17 BY MR. J. J. JIMMERSON:

18 Q. It's true for all of them?

19 A. Any of the notations, your Honor.

20 Q. Now, continue to the next page.

21 A. 1566 is, again, the actual Option Property

22 has the exact same quote, okay?

23 Q. All right. And this is with the swap or the

24 removal of the donut hole, the readjustment of BLM land

25 to the east?

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1 A. After BLM reconfiguration, that's correct.

2 Q. All right. And with this C-2 then, the

3 Purchase Property is the blank bottom left corner?

4 A. That's as defined in.

5 Q. The first agreement, the first agreements

6 within that paragraph.

7 Q. And then the Option Agreement is everything

8 hatched?

9 A. That's correct.

10 Q. Thank you.

11 And would you go to the next one, 1568,

12 Exhibit D?

13 A. Yes, sir.

14 Q. What's that, please?

15 A. Exhibit D is the crosshatched, and in this, I

16 think my people, I would rather them have said on here

17 documents hatched and this is crosshatched, but the X

18 crosshatched area represents the first 1,950 acres

19 which I was referring to.

20 THE COURT: Earlier.

21 THE WITNESS: Earlier.

22 BY MR. J. J. JIMMERSON:

23 Q. And to save further questions on this point,

24 would you endorse the handwritten description of your

25 staff as being accurate?

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1 A. Yes.

2 Q. That's all I want to know.

3 So when I say, "your staff" said this, you're

4 gonna say, Yes, that's true, my understanding at the

5 time?

6 A. Yes.

7 Q. All right. And to read that then, the

8 crosshatched area to the Initial Developed Parcel,

9 1,950 acres, Phase 1 is that 250 acres?

10 A. Yes, sir.

11 Q. I'm sorry, I do have bad eyes.

12 It's located in the southern portion of the

13 parcel, and the parties will mutually agree upon the

14 phasing of the additional purchases with an arrow to

15 the 1,950 acres outlined within the 3,600 acres that we

16 have described as purchased property?

17 A. We had determined by this date that we could,

18 with certainty, start the planning process by saying if

19 you take 250 acres in the lower corner of this piece

20 of, this piece of land, knowing all of the geotechnical

21 and wash considerations taken into account, that this

22 would be an area where you'd have, for example, your

23 signs, and then at some point single-family homes.

24 Q. Got it. Thank you.

25 Would you now look at Exhibit G-1, Grant,

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1 Bargain and Sale Deed.
 2 A. G-1, yes, sir.
 3 Q. What's going on with -- it's called Grant,
 4 Bargain and Sale Deed, parentheses, Purchase Property,
 5 close parenthesis.
 6 A. This is a document prepared for my general
 7 manager's signature giving to Pardee certain land as
 8 described on Exhibit A, excluding water rights, and our
 9 right to put in and over the designated property the
 10 construction of fiber optic and telephone lines and
 11 those sorts of things, because we were retaining those,
 12 as it was our business plan to engage in that activity.
 13 Q. Okay. Looking at the Exhibit A, what is the
 14 legal description? Can you tell me the legal
 15 description so we can look at the map and see what's
 16 being conveyed from Coyote Springs to Pardee by this
 17 Grant, Bargain and Sale Deed, G-1?
 18 A. I would have to look at the Parcel 1 of the
 19 parcel map which was recorded, and if you're telling me
 20 that it's Number 25 --
 21 Q. It is.
 22 A. And those are the appropriate file
 23 designations, and then it would be all of that
 24 property.
 25 Q. Thank you.

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1 Now look at the next exhibit, Form Of Grant,
 2 Bargain and Sale Deed, Option Property, Exhibit G-2,
 3 Bates stamped 1573.
 4 What property is being conveyed there from
 5 Coyote to Pardee?
 6 A. Okay. I don't want to be hypertechnical, but
 7 I have to be. No property is being conveyed by either
 8 of these documents. These are forms of exhibits.
 9 Q. Right.
 10 A. That's --
 11 THE COURT: I understand nothing has been
 12 signed, they're just deeds.
 13 THE WITNESS: They're just proposed deeds,
 14 your Honor, and therefore, okay --
 15 THE COURT: I understand that.
 16 THE WITNESS: Okay. And the attachment is
 17 blank.
 18 BY MR. J. J. JIMMERSON:
 19 Q. All right. Now, as of September 1, August 31
 20 of 2004, looking at maps that have been now discussed,
 21 have been agreed to, and have been attached to the
 22 agreement by Amendment Number 2, where was the Option
 23 Property located?
 24 A. The parties had not finalized what it would
 25 be. It would clearly be included within the fee

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1 portion of any property which Pardee had not yet
 2 purchased and for which a single-family residential
 3 designation had taken place after Year 5.
 4 Q. And not including the Purchase Property?
 5 A. And not including the prior Purchase
 6 Property, because Purchased Property was designated
 7 within a prior exhibit.
 8 Q. Thank you.
 9 Now, continuing on the set of exhibits,
 10 please, would you look at the next exhibit, which I
 11 think is, is it I? I'm sorry, my eyes are poor,
 12 Exhibit I, Wolfram 1577?
 13 A. 1577 is Exhibit 11.
 14 Q. 11?
 15 A. Uh-huh.
 16 Q. The actual commercial property will be
 17 portion of the Designated Area which is not --
 18 A. Deemed --
 19 Q. -- deemed Option Property pursuant to the
 20 Option Agreement?
 21 Q. So we're not talking Purchase Property, we're
 22 not talking about Option Property for residential use,
 23 we're talking a third category, right?
 24 A. Yes.
 25 THE COURT: Slow down, let him explain.

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1 THE WITNESS: So what we had done is we had
 2 completed an overlay, a crosshatched portion, that said
 3 this can be the Option Property, and we had said that
 4 that identical land could be commercial property,
 5 because in effect what we were saying was Coyote
 6 Springs was retaining the right to do what it wanted to
 7 do with respect to that property.
 8 BY MR. J. J. JIMMERSON:
 9 Q. And had we looked at the previous D-1 --
 10 A. If we go here from Exhibit 11 and if you go
 11 to Exhibit D-1.
 12 Q. I think it was D-1.
 13 THE COURT: Let's find it, is it D-1 or D --
 14 THE WITNESS: I'm going to say it's
 15 Exhibit D.
 16 THE COURT: I have that.
 17 BY MR. J. J. JIMMERSON:
 18 Q. Now, looking at, comparing D with 11, tell us
 19 what we're looking at?
 20 A. Right. So what we had done is to ensure that
 21 there could be no confusion between the parties, we had
 22 said clearly that the blank portion which is included
 23 on Exhibit 11, that area was designated single-family
 24 residential at this point in time, and what we had said
 25 was that all the remaining map was going to be, if you

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1 just hold them up here, because all they did when they
2 drew the maps was simply erase the crosshatch that,
3 those are identical, so both maps depict an area which
4 can be, quote, called the Option Property or commercial
5 property.

6 THE COURT: So you were just keeping your
7 options.

8 THE WITNESS: Our options.

9 THE COURT: And if you decided CSI to
10 designate it as single-family dwellings, that's what
11 Pardee would have the first option on?

12 THE WITNESS: Unless, your Honor, and I want
13 to make this very clear, that between Years 0 and 5, if
14 they had said, We want to take the whole property, they
15 would simply pay 40,000 times the --

16 THE COURT: And they get everything.

17 THE WITNESS: And Harvey is a lot heavier
18 than he is today.

19 THE COURT: I got you, it would have been
20 Pardee's problem.

21 THE WITNESS: So, and you guys would have
22 been -- okay, nevermind.

23 THE COURT: I understand the contingency, but
24 it didn't happen.

25 MR. J. J. JIMMERSON: I should add that to

District Court IV

1 the amended complaint.

2 THE COURT: At least we're laughing, all
3 right.

4 BY MR. J. J. JIMMERSON:

5 Q. And then I'll continue on the next page,
6 Mr. Whittemore.

7 A. Okay.

8 Q. Close that up, and we'll turn the next page.

9 THE COURT: Now we're at Exhibit 12?

10 THE WITNESS: I did not see a 1576. Did I
11 miss something?

12 MR. J. J. JIMMERSON: No.

13 THE COURT: No.

14 THE WITNESS: While I was putting this back
15 in.

16 THE COURT: You're right.

17 BY MR. J. J. JIMMERSON:

18 Q. It's the way you guys produced it.

19 THE COURT: It's okay, we skip them
20 sometimes. No inference there.

21 BY MR. J. J. JIMMERSON:

22 Q. Okay, 1578, Exhibit 12.

23 A. Okay.

24 Q. What's Exhibit 12, Wolfram 1578?

25 A. 1578 is the corresponding map of the

District Court IV

1 commercial property, i.e., the, it's the mirror image
2 post BLM reconfiguration to maintain the same
3 contingency and ability to designate all the property
4 commercial.

5 Q. Got it.

6 THE COURT: You just moved it, got ya.

7 THE WITNESS: We moved it over and retained
8 the flexibility.

9 THE COURT: Same rights, just changed if you
10 could move over BLM, same thing?

11 THE WITNESS: Yes, ma'am.

12 BY MR. J. J. JIMMERSON:

13 Q. The next document, Exhibit J, is Description
14 Of Commercial Improvements.

15 What does Exhibit J?

16 A. Exhibit J is the obligations for the seller
17 to produce certain improvements on the property with
18 the money and additional resources that the seller has
19 to improve the property adjacent to the property which
20 it was selling to Pardee.

21 Q. Fair enough.

22 THE COURT: Was that why there was the
23 increase from 66 to 83?

24 THE WITNESS: Yes, your Honor. That was part
25 of the reason, was because --

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1 THE COURT: You were committing to do things.

2 THE WITNESS: We were committing to do more,
3 Pardee was asking us to do more, and therefore, I was
4 going to say to Pardee, You're gonna have to step up to
5 the plate.

6 THE COURT: And help.

7 THE WITNESS: To give us a little more money,
8 your Honor.

9 THE COURT: Okay.

10 BY MR. J. J. JIMMERSON:

11 Q. And that's one of the reasons. There may
12 have been others, but that's one of the reasons why the
13 price went up to \$84 million?

14 A. Yes. And with that, the corresponding
15 increase in the, quote, actual per acre price
16 associated with the first sale. It didn't magically go
17 from 40,000 it's a construct, a resulting sum by
18 determining 1,950 into the 88 million.

19 Q. 84 million?

20 A. That's the number you get per acre.

21 Q. Thank you.

22 And did you, within Exhibit J or maybe
23 somewhere else at this point now, I'm talking now
24 September 1, August 31 of 2004, designate where outside
25 of the 1,950 acre takedown of Pardee that commercial

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1 improvements are going to be located that are
 2 referenced here?
 3 A. Yes.
 4 Q. And how did you do that and where is that
 5 shown?
 6 A. That was done internally by CSI on literally
 7 thousands upon thousands of design pages which were
 8 done by firms called Wilson Miller, Jack Nicklaus.
 9 Everybody who was associated with the project literally
 10 had reams and reams of -- VTN Consulting.
 11 Q. Got it.
 12 A. All of our engineers.
 13 Q. But for purposes of this question though,
 14 they were not gonna be constructed within the first
 15 1,950 acres, within the 1,950 acre area shown on the
 16 previous exhibits?
 17 A. That's not true.
 18 Q. Tell me, that's why I'm asking.
 19 A. Yes. The agreement between the parties was
 20 that if it was necessary for the parties to put in a
 21 particular type of street, a major infrastructure,
 22 street, that the parties would agree to endure that
 23 burden on a 50/50 basis.
 24 Q. All right.
 25 A. That meant in effect, what we were doing was

District Court IV

1 forcing Coyote Springs to, in effect, give them
 2 additional land a little bit outside the 1,950, because
 3 on a 50/50 basis, if you, if CSI was paying for it, you
 4 got to adjust it up.
 5 Q. Got it, okay.
 6 A. And, and this is more important, if it made
 7 better sense for the golf course because of the wash
 8 considerations to develop a hole along the washes
 9 within that particular area.
 10 THE COURT: The 1,950?
 11 THE WITNESS: Within the 1,950 acres, your
 12 Honor, that the parties would compensate each other on
 13 a one for one basis, that if I took land that was gonna
 14 be associated with these golf courses, put it there,
 15 that you will then subsequently see, your Honor, the
 16 normalcy of a business transaction which the purchaser
 17 says that you're gonna put a golf course on my
 18 property, and we say yes, and in return --
 19 THE COURT: What are you giving me?..
 20 THE WITNESS: Exactly. You're gonna give us
 21 a golf course premium.
 22 BY MR. J. J. JIMMERSON:
 23 Q. Got it.
 24 A. So of course they were gonna be adjustments
 25 as contemplated by the parties with respect to the

District Court IV

1 1,950.
 2 Q. All right. Is there any language in the base
 3 agreement or in Amendment Number 2 that gives the right
 4 to put the golf course on the 1,950 acres being
 5 purchased by Pardee within those two documents as of
 6 September 1 of 2004?
 7 A. Well, I would have to see if it was in this
 8 or later.
 9 Okay, for example, if you take a look at
 10 1554, Item Number 17.
 11 Q. I have it in front of me, go right ahead?
 12 A. Uh-huh. It talks about the fact that buyer
 13 is going to construct a recreation center.
 14 Q. And the buyer is Pardee?
 15 A. Buyer is Pardee.
 16 Q. Go ahead.
 17 A. And as a result of that, we're agreeing to
 18 sell up to 15 acres of land within the, what is termed
 19 here the entire site to buyer without cost for such
 20 purpose.
 21 Q. Okay.
 22 A. So that's an example where you contemplated
 23 the construction and use by Pardee of property outside
 24 the Purchase Property, and there was a corresponding
 25 understanding that if we went into, as a result of the

District Court IV

1 planning process, if the government, of course, went in
 2 there, that we would negotiate what those terms would
 3 be, so in a subsequent document, I'm sure you're going
 4 to find --
 5 Q. Right.
 6 A. -- an agreement that talks about view
 7 premiums or golf course premiums.
 8 Q. We're talking about September 1, I want to
 9 find out if the 15 acres is still gonna be within the
 10 Purchase Property --
 11 A. No, sir.
 12 Q. -- contemplated in paragraph?
 13 A. No, sir. That's what I'm saying.
 14 Q. Why is --
 15 A. It said 15 acres within the entire site.
 16 Q. So where was the retail -- excuse me, the,
 17 the recreation center was going to be within the 15
 18 acres?
 19 A. No, sir.
 20 Could I show you?
 21 Q. Please.
 22 THE COURT: Please.
 23 THE WITNESS: So if we went to ask what
 24 ultimately happened, if you went to take a tour of the
 25 site, which I don't suggest you do, but you will see,

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1 you will see a great big lake that was dug for purposes
 2 of creating a recreation center, because Pardee's
 3 appetite at the time was with the understanding that
 4 they thought they were going to build a, an amenity
 5 that involved the construction of a beautiful lake,
 6 because that was where we were going to be able to
 7 store water and do all those sorts of things.
 8 BY MR. J. J. JIMMERSON:
 9 Q. And that would be outside the Purchase
 10 Property, outside of Parcel 1 in this area if I were to
 11 point?
 12 A. Probably a little bit lower.
 13 Q. No problem if you want to write a circle
 14 yourself?
 15 A. I will say about there.
 16 THE COURT: You're doing an approximation.
 17 THE WITNESS: Yes.
 18 THE COURT: Your point is it's outside, for
 19 the question. It doesn't --
 20 THE WITNESS: Wait, wait, let me finish.
 21 THE COURT: Please.
 22 THE WITNESS: You were talking about the
 23 initial, the initial property, the 1,950?
 24 BY MR. J. J. JIMMERSON:
 25 Q. Right.

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1 A. The reason why it was specifically saying
 2 this, notwithstanding Paragraph 17 of the agreement,
 3 Seller hereby agrees to transfer legal title to up to
 4 15 acres of land within the entire site to buyer
 5 without cost for such purpose. Such land shall be at a
 6 location which is mutually agreeable and, what was,
 7 ultimately it was to the west of the 1,950 acres.
 8 Q. To the west would be on the street?
 9 A. Excuse me, east of the 1,950 acres.
 10 Q. Okay.
 11 A. Okay. And then ultimately moved in its
 12 entirety of being the lake and the recreation building
 13 which was starting to be constructed and move it onto
 14 property which was down more. The recreation
 15 facilities were ultimately going to be built in town
 16 center somewhere in here.
 17 Q. Okay. Also outside of Parcel 1?
 18 A. Without getting a snapshot physically, I'm
 19 giving you the concept.
 20 THE COURT: Your best estimate?
 21 THE WITNESS: Yes. I'm giving you the
 22 concept that the parties had contemplated the transfer
 23 and the swapping of land on a post agreement basis
 24 simply because that was smart planning.
 25 / / / /

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1 BY MR. J. J. JIMMERSON:
 2 Q. Got it.
 3 A. Let me make sure, the parties, when you're
 4 talking about -- the parties had contemplated.
 5 THE COURT: Parties, I know, party/Pardee.
 6 It's hard. Our court reporter said yesterday, Oh, my
 7 gosh, I don't know if they're saying "parties" or
 8 "Pardee." I said, Jennifer, do the best you can, but
 9 my understanding of the parties, which are Pardee and
 10 CSI, contemplated a swapping of land after these
 11 agreements, which includes the Option Agreement and the
 12 Amendment I and 2.
 13 THE WITNESS: Yes, your Honor.
 14 THE COURT: Fill it in for me.
 15 THE WITNESS: Yes, your Honor.
 16 BY MR. J. J. JIMMERSON:
 17 Q. How many years later did they do that?
 18 THE COURT: Could you just fill in, I want to
 19 make sure I understand your complete answer. I
 20 apologize, not trying to be slow.
 21 THE WITNESS: At the inception of the
 22 earliest discussion, John Lash and I made a personal
 23 commitment to each other that with a project that could
 24 go over 40 years, that there would be absolutely no way
 25 that you could identify, as you might in an infield

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1 project in Clark County, that when you do a new town
 2 development, that you have to have the greatest degree
 3 of flexibility to allow the parties to ultimately get
 4 the best plan.
 5 And ultimately what Pardee wanted was a great
 6 golf course community to start with. What CSI wanted
 7 was a great community that ultimately would allow us to
 8 sell property to other people if Pardee did not want
 9 it, or to development it ourselves.
 10 THE COURT: Okay.
 11 BY MR. J. J. JIMMERSON:
 12 Q. Between June 1 of 2004 and September 1 of
 13 2004, did you have any meetings with Jim Wolfram or
 14 Walt Wilkes?
 15 A. I did not.
 16 Q. Do you know whether or not Pardee had any
 17 meeting with Mr. Wolfram or Walt Wilkes?
 18 A. I don't.
 19 Q. With regard to Amendment Number 2, the
 20 negotiations that took place between June 1 of 2004 and
 21 roughly September of 2004, did Mr. Wolfram or Mr.
 22 Wilkes attend any such meetings, that you were aware
 23 of, between yourself and Pardee?
 24 A. No, they did not.
 25 Q. Were they on any telephone calls, as far as

District Court IV

1 you recall, between Pardee and Coyote Springs?

2 A. Not that I was aware of.

3 Q. Did you have any conversations where you

4 disclosed the terms of Exhibit Number 2 with

5 Mr. Wolfram and Mr. Wilkes with respect to the 2004

6 time period?

7 A. No.

8 Q. Now, is there a reason why -- I'll just ask

9 this question: Is there a reason why exhibits K, L, P,

10 and Q are not attached as documents, because both sides

11 say this is the document?

12 A. Yes. They were excluded by agreement between

13 John and I at the time as not being necessary for

14 purposes of executing this document. Let me explain

15 why.

16 Q. Is there a document that says that, or is

17 this sort of an oral agreement between you and

18 Mr. Lash?

19 A. That was an oral agreement, because we were

20 still working on, working on how to use all the

21 information.

22 THE COURT: I apologize, my clerk just went

23 out, so she obviously needed a break, and I'm still

24 interested in the testimony, but we probably do need a

25 break.

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1 MR. J. J. JIMMERSON: Fair enough. Thank

2 you.

3 THE COURT: I apologize.

4 Off the record.

5 (Off-the-record discussion.)

6 THE COURT: We're gonna be in recess for 15

7 minutes.

8 THE WITNESS: Thank you, your Honor.

9 (Short break.)

10 THE COURT: Have a seat, Mr. Whittemore.

11 You're still on the stand.

12 We left off with the Exhibits K, L, P, and Q.

13 BY MR. J. J. JIMMERSON:

14 Q. You mentioned they were intentionally omitted

15 by the agreement they not be included, and that may

16 have been an oral agreement, not a writing, because I

17 don't know everything that's in the file.

18 A. That there was an agreement to not include

19 them.

20 Q. Okay. Thank you.

21 Now, I think you've covered this document and

22 covered the changes.

23 Now, did you deliver this Amendment Number 2

24 to Mr. Wolfram or Mr. Wilkes contemporaneous to the

25 events of 2004 as opposed to Coyote Springs responding

District Court IV

1 to the subpoena we got?

2 MS. LUNDVALL: Your Honor, once again, I'm

3 going to object as far as the commentary.

4 MR. J. J. JIMMERSON: I'm asking the

5 question: Did you provide it to them in 2004, as

6 opposed to what the company provided to us in response

7 to subpoena that's a legitimate question, your Honor.

8 THE COURT: I think the question was: In

9 addition to complying with the subpoena, and did you

10 give it earlier.

11 BY MR. J. J. JIMMERSON:

12 Q. Earlier.

13 A. Not that I'm aware of.

14 Q. Thank you.

15 Now, because it's in two books, I actually

16 planned it that way, but if you compare 4, the second

17 amendment, and now pull up Exhibit 2 -- maybe you can

18 take that out.

19 A. You want me to take Exhibit 4 out?

20 Q. Well, either one. If you go to 2 --

21 THE COURT: 2 is the --

22 BY MR. J. J. JIMMERSON:

23 Q. Why don't you take it out.

24 A. Thank you.

25 THE COURT: Exhibit 2.

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1 BY MR. J. J. JIMMERSON:

2 Q. Take that out?

3 A. Okay.

4 Q. Put them side by side.

5 MS. LUNDVALL: Are you asking him to place

6 two next --

7 THE WITNESS: Put 4 next to 2.

8 THE COURT: Yes. I think he wants them

9 available, easier for him to cross reference then.

10 BY MR. J. J. JIMMERSON:

11 Q. All right.

12 A. Okay.

13 Q. Thank you.

14 And all I'm saying is that by September 1,

15 you have the exhibits that you had hoped to have when

16 you signed the Baseline Agreement on June 1, right?

17 A. We had most of the --

18 Q. Right.

19 THE COURT: Most of the exhibits, okay.

20 BY MR. J. J. JIMMERSON:

21 Q. Let's look at Exhibit 2.

22 THE COURT: I'm sorry.

23 BY MR. J. J. JIMMERSON:

24 Q. Look at the language of Exhibit 2.

25 THE COURT: Okay.

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1 BY MR. J. J. JIMMERSON:
2 Q. Go to the Baseline Agreement?
3 A. Can we refer to plaintiff's exhibits as, you
4 know, and defendant's exhibits?
5 Q. I'll be happy to do it, so you know
6 plaintiffs are numbers?
7 A. I know that.
8 Q. You know from your practice days.
9 THE COURT: Plaintiff's Exhibit 2.
10 BY MR. J. J. JIMMERSON:
11 Q. Follow along the language of Paragraph 2 of
12 Plaintiff's 2, the original Option Agreement,
13 June 1, 2004, and let's speak to the amendments that
14 are maps, Exhibits A through G and 11 and 12, like
15 we've just gone through.
16 So we know from Paragraph B what the Purchase
17 Property is, I'm not replowing that ground. The next
18 page, we know what the Option Property is, you've
19 already defined that for us.
20 Now, Paragraph 1, Page 2 of Exhibit 2,
21 Plaintiff's Exhibit 2, Bates Stamp Number 2, Page 2,
22 talks about the purchase and sale of purchase property.
23 Do you see that?
24 A. On Page 2?
25 Q. Yes.

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1 A. Yes.
2 Q. All right. As of June 1 of 2004, the
3 Purchase Property was 3,600 acres, Exhibit 25, and on
4 September 1, it had been redefined to 1,950 acres; am I
5 correct?
6 A. I don't know whether the definition has
7 changed or the amount has changed.
8 Q. Well, the amount definitely?
9 A. Yeah.
10 Q. We already established that.
11 A. I do not believe that there was any course of
12 conduct or any other memorialization that had a change
13 to the definition. I'm being very specific.
14 Q. And I also am trying to do the same.
15 A. Yeah.
16 Q. But now by September 1, with this second
17 amendment, we do know there is a designation by you,
18 Coyote, and accepted by Pardee of residential
19 production real estate of 1,950 acres?
20 A. That's correct.
21 Q. And the 1,950 acres translated to \$84 million
22 for the reasons you also already told us?
23 A. Yes.
24 Q. So were you to do the math, you're going to
25 get more than 40,000 an acre?

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1 A. Yes.
2 Q. All right. Now, when you look at paragraph,
3 Page 2, Paragraph 1, Page 2, let's just follow that
4 along. It says --
5 THE COURT: I'm sorry, counsel, where are
6 you?
7 MR. J. J. JIMMERSON: I'm gonna ask you to
8 focus. I just want to go through the structure of the
9 development so we're familiar with this.
10 THE COURT: Okay.
11 BY MR. J. J. JIMMERSON:
12 Q. Page 2, Paragraph 1, talks about the purchase
13 and sale of Purchase Property and which --
14 THE COURT: 1,950 acres.
15 BY MR. J. J. JIMMERSON:
16 Q. In June, 66 million. In September, it went
17 to 1,950 acres.
18 Go back, back to Page 4, Paragraph 1 (c).
19 You've already indicated if it's not
20 specifically amended in the second amendment, it still
21 stands, correct?
22 A. Unless there's a provision that says,
23 Notwithstanding the provision of that, yeah.
24 Q. Right. I'm with you.
25 Okay. Here's one of those provisions in

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1 Paragraph 1 (c), Page 4 of Exhibit Plaintiff's 2, Bates
2 stamped 4: Notwithstanding any provision in the
3 contrary in this Paragraph 1, Seller and buyer
4 acknowledge and agree that the first portion of the
5 Purchase Property that will be developed by buyer is
6 that area containing approximately 1,500 acres of
7 production residential property as shown on Exhibit D.
8 Do you see that?
9 A. Yes, sir.
10 Q. Let's go to Exhibit D now, Amendment 2.
11 And again, to help everything, what I'm
12 seeing is Bates Stamp Number 1568 of Plaintiff's 4.
13 Do you see that?
14 A. Well, Exhibit D of Plaintiff's Number 2 is --
15 THE COURT: I think he wants you to go to
16 Exhibit D.
17 BY MR. J. J. JIMMERSON:
18 Q. Is there an Exhibit D to Plaintiff's 2?
19 A. I want to explain.
20 THE COURT: Perfect.
21 THE WITNESS: I want to explain. The
22 parties' contemplated a map of the Initial Developed
23 Parcel and a phasing plan.
24 BY MR. J. J. JIMMERSON:
25 Q. Right. Let's go through that.

District Court IV

1 A. And it's blank.
 2 Q. Exactly, so Exhibit D, Plaintiff's Bates
 3 Stamp 52, is blank?
 4 A. Correct.
 5 Q. By Amendment 2, it's no longer blank, so
 6 let's go to Amendment 2, Bates number, I think it's
 7 1558.
 8 THE COURT: 1568.
 9 BY MR. J. J. JIMMERSON:
 10 Q. 1568, thank you.
 11 A. Yes, sir.
 12 Q. All right. Now, was it true on June 1 of
 13 2004 that the initial drawdown for residential was
 14 about 1,500 acres within the 3,600 acres defined as
 15 Purchase Property as shown on Page 4 of Exhibit 2?
 16 A. The area which is crosshatched on Page
 17 Bates 1568 represents the planning area of 1,950 acres,
 18 which is why it's called the Initial Developed Parcel
 19 and it states that Phase 1 is 250 acres in the south,
 20 southwest corner of this document.
 21 Q. Okay.
 22 A. That's what, this is now a map of the Initial
 23 Developed Parcel.
 24 Q. Now, if you looked at Exhibit 2, Page 4?
 25 A. Yes.

District Court IV

1 Q. You had agreed to develop the term Initial
 2 Developed Parcel as roughly 1,500 acres?
 3 A. And it was modified as a result of --
 4 Q. Okay.
 5 THE COURT: 2
 6 THE WITNESS: -- Exhibit D.
 7 BY MR. J. J. JIMMERSON:
 8 Q. I just need you to say yes or no.
 9 A. Yes.
 10 Q. Initially, in June 1, it was estimated to be
 11 1,500 acres, and that was defined as the Initial
 12 Developed Parcel?
 13 A. Yes.
 14 Q. Now, two months later, September 1, or three
 15 months later, three months later it's now been agreed
 16 to be modified, changed to 1,950 acres, right, and it's
 17 shown in the crosshatch area of Exhibit D, Wolfram
 18 1568?
 19 A. Yes, the 1,950, with the understanding that
 20 Phase 1, which is what we were really referring to, is
 21 the 250 acres in the lower corner.
 22 Q. Got it. Got it.
 23 THE COURT: So Phase 1 of the 1,950 was 250?
 24 That was include in the 1,950?
 25 THE WITNESS: Yes, your Honor. And most

District Court IV

1 importantly, that was the area which finally had been
 2 fixed by both parties.
 3 THE COURT: Okay.
 4 THE WITNESS: Somewhat in stone.
 5 THE COURT: Okay.
 6 THE WITNESS: Subject to my earlier testimony
 7 that if there were changes into that 250, that they'd
 8 be -- you'd swap out the acreage if it was for planning
 9 purposes or you needed something for a wash.
 10 THE COURT: Okay. That was kind of in stone?
 11 THE WITNESS: Kind of in stone.
 12 THE COURT: Okay.
 13 BY MR. J. J. JIMMERSON:
 14 Q. Now, within the crosshatch of 1,950 acres,
 15 Exhibit D, where is the 250 approximately?
 16 A. Where is it?
 17 Q. On your crosshatch?
 18 A. Yeah.
 19 Q. Where is the 250 within the 1,950?
 20 A. It's the lower southwest corner.
 21 Q. Okay. I think that is the southeast corner.
 22 You think it's the --
 23 A. Southwest corner, right at the bottom of --
 24 Q. Uh-huh.
 25 THE COURT: Can you --

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1 THE WITNESS: Can I show you?
 2 MR. J. J. JIMMERSON: Right in here.
 3 THE COURT: I want to get it right.
 4 THE WITNESS: Since this is a judge trial, if
 5 we could put this little line as being Highway 168.
 6 THE COURT: Okay.
 7 THE WITNESS: If you put that there, and if
 8 you put this line as Highway 93, we can define the 250
 9 acres as the 250 acres on the corner at the
 10 intersection of Highway 93, north/south, and
 11 Highway 168.
 12 BY MR. J. J. JIMMERSON:
 13 Q. Why don't you take a pen, use my pen and just
 14 put a designation, put this 93.
 15 And this is the highway right here, Harvey?
 16 A. Uh-huh, Highway 168.
 17 MS. LUNDVALL: Do you want to identify, for
 18 purposes of the record, which exhibit you're drawing
 19 on?
 20 THE WITNESS: Yes, it's Page 1568.
 21 MS. LUNDVALL: Thank you.
 22 THE WITNESS: It's Bates stamped 1568.
 23 Do I need to say anything else?
 24 THE COURT: Exhibit 4? It's 4, right?
 25 BY MR. J. J. JIMMERSON:

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1 Q. And the road actually curves like this?

2 A. Yes, it does.

3 Q. That's what I'm asking.

4 A. Yeah.

5 Q. So this here, so turn a little to the right

6 and the left and --

7 MS. LUNDVALL: Your Honor, once again --

8 THE COURT: For clarification, the 250 --

9 MS. LUNDVALL: May we put the exhibits back

10 with the witness, please?

11 MR. J. J. JIMMERSON: Of course, we certainly

12 can.

13 THE COURT: The original, the Phase 1, 250

14 acres that was kind of cast in stone, is right in that

15 area?

16 THE WITNESS: That's correct, your Honor.

17 THE COURT: Thank you. I appreciate that.

18 Thank you.

19 THE WITNESS: Yes.

20 BY MR. J. J. JIMMERSON:

21 Q. All right.

22 THE COURT: What you call Phase 1?

23 THE WITNESS: That's correct, your Honor.

24 And it's now called Map Of Initial Developed Parcel.

25 THE COURT: Okay.

District Court IV

1 BY MR. J. J. JIMMERSON:

2 Q. Now, would you turn to, in Paragraph D it

3 says, At the initial purchase closing, in consideration

4 of the payment of the entire deposit of \$10 million; is

5 that right?

6 THE WITNESS: Yes.

7 THE COURT: I'm sorry, I need the page.

8 MR. J. J. JIMMERSON: Page 4, Paragraph D.

9 THE COURT: I got it.

10 BY MR. J. J. JIMMERSON:

11 Q. At the initial purchase closing, in

12 consideration of the payment of the entire deposit,

13 \$10 million, buyer shall be entitled to legal title to

14 the portion of the Initial Developed Parcel consisting

15 of approximately 250 neat useable acres.

16 A. Yes.

17 And now you can, your Honor, it's very

18 important, buyer will receive record title to

19 approximately 3,605 acres at the initial purchase

20 closing, showing that the parties contemplated, as I

21 indicated earlier that the 3,605 was simply security

22 for performance, because they were only giving me

23 10 million.

24 Q. Okay.

25 A. And if you multiplied 3605 times 44,000 --

District Court IV

1 Q. And it's \$120 million.

2 MS. LUNDVALL: Hold on, please let the

3 witness testify.

4 THE COURT: I would appreciate that too.

5 Start again, so 3,605 was security for th

6 performance?

7 THE WITNESS: For the performance. If you

8 had multiplied 3,605 by either the 40,000 net number or

9 the 44,000 number, which is ultimately achieved down

10 the rode in furtherance -- you would come up with a

11 number of 120 million plus.

12 THE COURT: Right.

13 THE WITNESS: Not 66 million, not 84 million,

14 not anything else. It was security for the performance

15 of my obligations, because they wanted record title to

16 a parcel, because Pardee did not -- nobody had maps.

17 BY MR. J. J. JIMMERSON:

18 Q. Okay.

19 A. That's -- sorry.

20 Q. That's no problem. That's fine.

21 And by Amendment Number 2, you did have --

22 A. By Amendment Number 2, we had a, we had an

23 idea of -- if you take a look at what is on Bates 1568,

24 by virtue of what I see on that Exhibit D, it appears

25 to me that the crosshatch of 1,950 acres would have to

District Court IV

1 have been done by map.

2 Q. Thank you.

3 A. And that there would be exhibits reflecting

4 that.

5 Q. Thank you.

6 THE COURT: And that would just be a portion

7 of the 3605.22?

8 THE WITNESS: Yes, your Honor.

9 THE COURT: Not where the remaining portion

10 of the 3605.22 is located?

11 THE WITNESS: Yes, your Honor.

12 THE COURT: Is that your testimony?

13 THE WITNESS: That is.

14 THE COURT: I just want to make sure.

15 BY MR. J. J. JIMMERSON:

16 Q. Now, in reading the two agreements together?

17 A. Yes, sir.

18 Q. Okay. Exhibit 2, Plaintiff's 2, the June 1,

19 2004, what you call the Baseline Agreement?

20 A. Yes.

21 Q. All right. And the Amendment Number 2, the

22 September 1, 2004, Amendment Number 2, reading them

23 together --

24 A. Yes, sir.

25 Q. Okay. For definitional purposes, Purchase

District Court IV

1 Property remains, as of September 1, 3,600 acres,
 2 correct? I want to go down one by one.
 3 A. Now --
 4 Q. Yes or no, Mr. Whittemore.
 5 THE COURT: Can you answer that yes or no?
 6 THE WITNESS: The answer is no as of this
 7 date because, because the 1,750 --
 8 BY MR. J. J. JIMMERSON:
 9 Q. You mean 1,950?
 10 A. The 1,950, minus the 250, the 1,950 now
 11 represents the total parcel that the parties are
 12 contemplating as being security for the entire purchase
 13 price.
 14 THE COURT: For the 84 million?
 15 THE WITNESS: For the 84 million.
 16 THE COURT: So basically the 84 million was
 17 for 1,950 acres?
 18 THE WITNESS: Yes.
 19 BY MR. J. J. JIMMERSON:
 20 Q. Is there a definitional, is there a change in
 21 definitions from, in the second amendment, from that
 22 which is in the first amendment? That language that
 23 says Purchase Property, defined as Exhibit 25 of 3,600
 24 acres, is now something different? There isn't, is
 25 there --

District Court IV

1 A. It's, is there a sentence that says that, is
 2 there an exhibit that, is there a sentence that says
 3 it? No. Is there an exhibit that says it? Yes.
 4 Q. Okay. Thank you.
 5 Now, the 1,950 acres, let's look at Amendment
 6 Number 2, if we could.
 7 A. Yes, sir.
 8 Q. All right. Specifically referenced -- let me
 9 find it.
 10 I will ask you this question: Do you know
 11 where the 1,950 acre reference is?
 12 A. In --
 13 THE COURT: Amendment 2?
 14 BY MR. J. J. JIMMERSON:
 15 Q. It will be in Exhibit 4.
 16 THE COURT: The first one has --
 17 MR. J. J. JIMMERSON: I had it, and I just
 18 lost it here.
 19 THE COURT: Okay.
 20 MS. LUNDVALL: 1,950 is a designation for not
 21 Purchase Property, but for the initial development.
 22 MR. J. J. JIMMERSON: Correct.
 23 THE COURT: Paragraph Number 5, it is found
 24 on Page 3 of Exhibit Number 4.
 25 / / / /

District Court IV

1 BY MR. J. J. JIMMERSON:
 2 Q. Right, exactly, and that's my point. The
 3 only thing that changed between Plaintiff's 2 and
 4 Plaintiff's 4, the Initial Developed Parcel, that
 5 changed from 1,500 acres to 1,950 acres.
 6 Do you see that?
 7 A. Yes, I do.
 8 Q. The Purchase Property definition never
 9 changed between the amendments, would you agree?
 10 MS. LUNVALL: Your Honor, once again, this is
 11 not a question.
 12 THE COURT: I think what he is doing is to
 13 clarify his testimony, so Mr. Whittemore, if his
 14 understanding is incorrect, you let him know.
 15 THE WITNESS: I'll let him know. I am not
 16 shy. I try to be honest.
 17 THE COURT: Do it again.
 18 BY MR. J. J. JIMMERSON:
 19 Q. Purchase Property remains the same as defined
 20 in both agreements, both agreements being defined as
 21 Exhibit 2 and Exhibit 4?
 22 A. Purchase Property in -- because now that you
 23 brought me this page, I need you to understand why I'm
 24 creating the distinction between a recital,
 25 Paragraph B --

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1 Q. Right.
 2 A. Bates Number 1, your Honor.
 3 THE COURT: Okay, I'm there.
 4 THE WITNESS: That reference is to a map.
 5 BY MR. J. J. JIMMERSON:
 6 Q. Right.
 7 A. Okay. Now, if you go to Page 4, Bates 4 in
 8 the actual agreement, the purchase price of the
 9 Purchase Property on Paragraph B, your Honor, right in
 10 the middle of the page.
 11 THE COURT: Paragraph B or C?
 12 THE WITNESS: B, B on Page 2 -- 3, I will get
 13 to 4, so the purchase price of the property is
 14 \$66 million.
 15 Now, if you go through and read all of
 16 Paragraph C and go to Paragraph D, you'll now
 17 understand why, and Paragraph C is very important,
 18 because it creates the process by which the 1,500 acre
 19 initial development, Initial Developed Parcel, is taken
 20 out, and that there's a reversionary right out of that
 21 3,600 acres that is contemplated by Paragraph C, and
 22 that was all the reconveyance mechanisms that I was
 23 talking about earlier, and then up go to Paragraph D,
 24 and Paragraph D says, Buyer shall be entitled to legal
 25 title to the portion of the Initial Developed Parcel

District Court IV

1 consisting of approximately 250 net useable acres, even
2 though buyer shall receive record title to
3 approximately 3,600 acres.

4 That's why, your Honor, that's why the 3,600
5 is simply a place holder security interest reference in
6 a way that doesn't create lot of deeds of trust or we
7 have to do anything else, because I was sticking my
8 hand out to Pardee and saying, I trust this company so
9 much, I'm going to give you title to 3,600 acres when
10 pursuant to this agreement, you're only buying 250
11 acres for \$10 million.

12 But back to your question of has that
13 changed. The answer is by definition it's changed,
14 because now they're committing to buy 1,950 acres for
15 \$84 million.

16 BY MR. J. J. JIMMERSON:

17 Q. Right, okay.

18 Now, I'm gonna ask the same question now, and
19 I would like you to answer. I've heard your
20 explanation.

21 Would you work with me?

22 A. Yes.

23 Q. Did the term "Purchase Property" change as
24 defined in Exhibit 2 in Exhibit 4?

25 A. Now we're switching to Purchase Property?

District Court IV

1 Q. That's the only question I asked the time
2 before. You chose to give an answer, and I'm being
3 patient.

4 A. That's not what I said.

5 Q. Answer my question. Did the term "Purchase
6 Property," as defined in Exhibit 2 as 3,600 acres, do
7 the words "Purchase Property" and the definition in
8 Exhibit 2 language in Exhibit 4 --

9 A. Mr. Jimmerson, I've already said there's no
10 sentence to -- I have no knowledge, I have no knowledge
11 that a sentence specifically changing a definition
12 change from your, from the initial Baseline Agreement
13 to this amendment.

14 Q. That's all I need. Thank you.

15 A. Yeah.

16 Q. Thank you.

17 A definition that did change is Initial
18 Development Parcel, correct?

19 A. Not the definition, but the amount.

20 Q. But the definition, according to this, was
21 the 1,500 acres, Exhibit 2?

22 A. That's why I said "the amount."

23 Q. And then the Initial Developed Parcel was
24 changed to 1,950?

25 A. Yes. The amount. The definition initial of

District Court IV

1 what it was did not change, the amount changed.

2 Q. Okay.

3 A. Okay.

4 Q. Thank you.

5 A. Okay.

6 Q. And Initial Developed --

7 THE COURT: From 15 through 19?

8 THE WITNESS: Yes, your Honor.

9 BY MR. J. J. JIMMERSON:

10 Q. And the Initial Development Parcel is 1,950
11 acres within the 3,600 acres Purchase Property, and
12 that's clearly established?

13 A. That is clear.

14 Q. Okay.

15 A. If you --

16 Q. Thank you.

17 A. I do not believe I need to explain that any
18 differently than the 1,950 is included within the 3,605
19 acres which was received, designated and received by
20 deed from CSI to Pardee as part of this transaction.

21 Q. And as you clearly said, and I want to honor
22 it, okay, you protected yourself by retaining a
23 reversionary interest for things Pardee doesn't acquire
24 and pay for?

25 A. Correct.

District Court IV

1 Q. No problem.

2 And that included a reversionary interest
3 beyond the 1,950 acres of September 1 of 2004?

4 A. And within the 1,950, if they didn't perform.

5 Q. Got it. Thank you.

6 THE COURT: So once again, so I'm clear,

7 Pardee committed to buy 1,950 acres within that
8 designated Parcel 1 for \$84 million?

9 THE WITNESS: Yes, your Honor.

10 THE COURT: Thank you.

11 BY MR. J. J. JIMMERSON:

12 Q. Okay. Now, would you turn, please, to
13 Paragraph 2 of Exhibit 2, Bates Stamp Number 4, Page 5?
14 This is called Grant of Option.

15 A. That's correct.

16 Q. There's two types of options, and you've
17 already worked with me on it?

18 A. Yes.

19 Q. One is I get to buy it all, you go home a
20 rich man 1.2 or 1.4 billion richer, right?

21 A. Yes.

22 Q. Fine. Then there is a second type of option
23 that talks about a another feature or right given to
24 Pardee.

25 What is that second type of option?

District Court IV

1 A. That's called the Option Property price,
2 which relates to the land which CSI designated as
3 single-family residential.
4 Q. Right. And for purposes of definitions, on
5 June 1, it was outside of 3,600 acres. On September 1
6 it is outside of 1,950 acres, fair?
7 A. No.
8 Q. Okay. On a map, show me the Option Property.
9 THE COURT: Can you explain your answer so I
10 know, because we need to know?
11 THE WITNESS: Yes.
12 THE COURT: We need to understand.
13 THE WITNESS: The Option Property, by
14 definition, because we had retained the right, we had
15 only really sold them 250 acres to start at this point
16 and 1,950 acres at some other point, that property
17 within that area or outside that area could either be,
18 if it was outside that area it could have been
19 designated commercial then residential or residential,
20 and then commercial within the area that we retained,
21 our right to reacquire, could have been a golf course,
22 could have been a water facility.
23 Excuse me, your Honor, may I point some other
24 things out?
25 THE COURT: Yes.

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1 THE WITNESS: So, for example, within, within
2 the area of the development, because of the constraints
3 of where the wells were gonna be and where the water
4 campus needed to be, within what Mr. Jimmerson is
5 calling the Purchase Property, it's clear that the
6 parties contemplated that there would be other uses
7 within that, like those that I just gave.
8 BY MR. J. J. JIMMERSON:
9 Q. Okay.
10 A. So when you say CSI did not retain any
11 interest or somehow the Option Property was just
12 limited to the Purchase Property, I think we're
13 conflating the agreements of the property.
14 Q. First of all, I'm not saying anything like
15 that.
16 THE COURT: Can I ask a follow-up question?
17 If you go to what's defined as Parcel 1, the
18 Purchase Property within the Option Agreement, and CSI
19 uses it for other uses, then that protects -- you would
20 have to make that up if they brought that property some
21 other place, right, so they're even --
22 THE WITNESS: Yes. At any time, at any time
23 that, that CSI reacquired and used for another purpose
24 property which had previously been designated as --
25 THE COURT: For Pardee?

District Court IV

1 THE WITNESS: For Pardee, we would have to
2 correspondingly let Pardee pick another portion of a
3 parcel for single-family, and that's the way that the
4 project worked.
5 BY MR. J. J. JIMMERSON:
6 Q. Thank you.
7 THE COURT: So for the 1,950 they committed
8 to, if CSI had to take parts of that, for some reason
9 Jack Nicklaus wants that?
10 THE WITNESS: Right.
11 THE COURT: Then Pardee would have to be
12 given another part, but that wouldn't be exercising an
13 option, that would be giving them the benefit of the
14 bargain for 84 million?
15 THE WITNESS: Yes, your Honor. You've
16 exactly got it. There is a swapping process by which
17 Pardee and CSI would get together and say, Here's the
18 land we're gonna designate.
19 Again, within that area, Mr. Jimmerson, if we
20 want to have a small coffee shop, village center type
21 of amenity so that people could go get coffee in the
22 morning, that would be a commercial site within that
23 area. It would punch it out a little bit.
24 BY MR. J. J. JIMMERSON:
25 Q. Three acres? Five acres?

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1 A. Three acres, five acres, and roads and major
2 arterials and areas that couldn't be built upon because
3 they had utility trumps, all of those things had to be
4 taken into account post designation of this simple
5 snapshot of bare dessert along Highways 93 and 168.
6 Q. I'm with you.
7 A. So that's the only thing I want to correct,
8 because I think you got it. The bottom line is the
9 parties agreed to sell land, the parties' then further
10 intent said, Here's the next phase, how we get down to
11 1,950, because we're giving you a little bit more
12 money, now we want you to do more, so the number goes
13 up a little bit, and that's how you get to the
14 84 million.
15 Q. Okay, good.
16 THE COURT: Okay. I assume if you're gonna
17 swap out land, it's gonna be something that Pardee will
18 agree to, and it will be of mutual benefit?
19 THE WITNESS: Yes, your Honor.
20 BY MR. J. J. JIMMERSON:
21 Q. All right. September 1 then we have two
22 agreements that have been inked, right?
23 A. Oh, September 1, the commission letter?
24 Q. We have two documents that have been inked?
25 A. Yes. Well, two documents, yes.

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1 Q. And you also -- that is the first amendment?
 2 A. That's what I was going to say.
 3 Q. So three documents have been inked, no
 4 problem. The second one doesn't have --
 5 A. Right.
 6 Q. The next one, being the key here --
 7 A. Uh-huh.
 8 Q. -- as we've already established this morning,
 9 under the terms of the two agreements read together
 10 option property is outside of the 1,950 acres, correct,
 11 subject to your swap option that might happen in the
 12 future? For definitional purposes, knowing where you
 13 were exactly at a moment in time, September 1, 2004,
 14 you had Purchase Property defined, and you had Option
 15 Property defined as shown by the maps?
 16 MS. LUNDVALL: And once again, I'm going to
 17 object to this as leading. I think the question is
 18 more appropriate to the witness: What was Option
 19 Property?
 20 THE COURT: I think we kind of went through
 21 this, I'm gonna overrule it. We have gone through it
 22 with the maps, so I think we're pretty clear, you know,
 23 what you meant by Purchase Property and Option
 24 Property, he's trying to make sure we clarify, am I
 25 right, following you, Mr. Jimmerson?

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1 MR. J. J. JIMMERSON: Of course.
 2 THE COURT: Let's do it again.
 3 THE WITNESS: Let's do it one more time.
 4 THE COURT: Make sure we're as clear as we
 5 can on the record.
 6 THE WITNESS: Under the original Baseline
 7 Agreement, under, on Plaintiff Bates Stamp Number 1,
 8 3,605.22 acres is designated as Purchase Property.
 9 BY MR. J. J. JIMMERSON:
 10 Q. Okay.
 11 A. That term and in the recital is not what I
 12 felt was controlling, because what I felt was
 13 controlling was the -- on the bottom of Bates Stamp
 14 Number 4 is not what I felt was controlling, making it,
 15 it clear that what Pardee was getting was 250 acres out
 16 of the 3,605 acres, and that the Initial Developed
 17 Parcel in this agreement was \$1,500 -- 1,500 acres,
 18 period.
 19 Q. I totally agree. That changed then on
 20 September 1 slightly. They're still take the 250
 21 initial drawdown --
 22 A. Yes, sir.
 23 Q. -- on the southwest corner of Parcel 1,
 24 Purchase Property?
 25 A. Yes.

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1 Q. And they've enlarged the Initial Developed
 2 Parcel from 1,950 acres up from --
 3 A. That's correct, and none of that is outside
 4 of anything or inside anything, that's just what the
 5 parties agreed.
 6 Q. But we do know geographically it was in what
 7 was initially described as Purchase Property,
 8 Exhibit 2, as you have described it?
 9 A. The answer is yes.
 10 Q. As the documents described it?
 11 A. As it's been described.
 12 Q. And through the September 1st second
 13 amendment, that definition remained the same?
 14 A. There's no change in the words.
 15 Q. All right. Now, about that same time period,
 16 real estate commission agreement was negotiated between
 17 Mr. Wolfram and Mr. Wilkes and Pardee.
 18 Did you have any involvement in that?
 19 A. No, sir.
 20 Q. All right. Months pass, and there is yet now
 21 a third agreement.
 22 Can I just ask you when is, when does close
 23 of escrow for the 250 acres occur?
 24 A. I would have to take a look at when the, the
 25 wire transfer came in. I don't recall the specific

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1 date.
 2 Q. Do you remember it was in 2004 versus 2005?
 3 A. I would have to look at the agreement.
 4 Q. All right. In any event, you got paid
 5 \$10 million?
 6 A. Yes, sir.
 7 Q. 40,000 an acre, was that the first drawdown?
 8 A. There is a, that's the first drawdown, I
 9 believe that's correct.
 10 Q. Now, look now at Exhibit 5. Seven months
 11 pass and --
 12 A. Okay.
 13 MS. LUNDVALL: Your Honor, I now need to make
 14 an objection as to seven months passing from the close
 15 of escrow.
 16 MR. J. J. JIMMERSON: I didn't say, "from
 17 close of escrow."
 18 MS. LUNDVALL: That's what the question was
 19 and what the implication was, and that's a false
 20 statement based on the context of these documents;
 21 therefore, I'm objecting.
 22 BY MR. J. J. JIMMERSON:
 23 Q. Five months passed between September 1 and
 24 March 28th -- excuse me, did five months pass from
 25 September 1 of 2004 to March 28th of 2005? Six months?

District Court IV

1 A. Yeah, by calendar.
 2 Q. Okay. And what is this Exhibit 5, Amended
 3 And Restated Option Agreement For The Purchase Of Real
 4 Property And Joint Escrow Instructions?
 5 A. Okay, we reestablish, by agreement, a
 6 document which goes into great depth as to
 7 incorporating new, new terms of very significant
 8 obligations on the parties, and I guess, your Honor,
 9 the best way to put it is it restates for another time
 10 the true status of the agreement between Pardee and CSI
 11 at that exact moment.
 12 THE COURT: Okay. March 28th, 2005?
 13 THE WITNESS: Yes.
 14 BY MR. J. J. JIMMERSON:
 15 Q. How long did it take to negotiate Exhibit 5,
 16 The Option agreement For The Purchase Of Real Property
 17 And Joint Escrow Instruction dated March 28th of 2005?
 18 A. From the beginning of this process, when I
 19 met Lash and started to negotiate with Pardee, wasn't a
 20 moment, a day, or a week that didn't go by that we were
 21 talking about some modification to a prior -- it just
 22 didn't stop.
 23 THE COURT: So it was ongoing.
 24 THE WITNESS: Absolutely, your Honor.
 25 / / /

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1 BY MR. J. J. JIMMERSON:
 2 Q. Now, did you have any meetings with
 3 Mr. Wolfram and Mr. Wilkes from the beginning of 2004
 4 to March 2005?
 5 A. Not that I recall.
 6 Q. Specifically, did you have any conversations
 7 regarding this Amended And Restated Option Agreement of
 8 March 28, 2005?
 9 A. No, I did not.
 10 Q. Were they part of any negotiation with regard
 11 to the changes on behalf of Coyote and Pardee to be
 12 made?
 13 A. No.
 14 Q. And did you cause this document to be sent to
 15 Wolfram and Wilkes after it was signed in late March of
 16 2005?
 17 A. No, I did not.
 18 Q. I read the document, and I agree with you,
 19 there are significant changes from June 1 and
 20 September 1 of 2004?
 21 A. Right. We restated and redid the agreement.
 22 Q. All right. Now, would you tell the Court
 23 what changes, as it relates to drawdowns, occur now on
 24 March 28th, 2005?
 25 A. Okay. There's a purchase and sale of

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1 property which provides for payments to be made by
 2 Pardee to reach the acquisition target price of
 3 84 million.
 4 THE COURT: And that 1,950 acres minus the
 5 250 that had already been --
 6 THE WITNESS: Yes.
 7 THE COURT: Had it been taken down by this
 8 point?
 9 THE WITNESS: It had, so your Honor is
 10 absolutely correct, we've got money that is remaining
 11 to be paid under the original --
 12 THE COURT: Agreement?
 13 THE WITNESS: -- agreement that's been
 14 restated, and they're going to now, over time, buy a
 15 total of 1,950, and we said, Okay, your option to
 16 acquire the entire site is restated, and we put a
 17 schedule of payments that have to be made, the
 18 obligations of the parties with respect to how they're
 19 gonna work together with respect to water development,
 20 how we're gonna work together on planning and
 21 developing the property. It is now a very --
 22 THE COURT: Real thing?
 23 THE WITNESS: It's getting very, very real.
 24 BY MR. J. J. JIMMERSON:
 25 Q. I want to show you one other definition in

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1 the original agreement, Exhibit 2, that will go into 2,
 2 into 5.
 3 Exhibit 2, the original Baseline Agreement, I
 4 just want to show you the term, what's called Purchase
 5 Property Remainder. I want you to explain that. I
 6 didn't ask that question. I omitted to do that.
 7 It's at Page 4 of Exhibit 2.
 8 A. Bates 4.
 9 Q. Right, exactly, Paragraph 1 (c).
 10 A. Yes.
 11 Q. So we have an understanding now, there's
 12 Purchase Property defined as 3,600 acres, there's
 13 Initial Developed Parcel of 1,500 acres, and then
 14 there's this concept of the remainder. Define what
 15 that means, and we'll see it in the later document.
 16 A. Yes. All of the -- when you specifically
 17 pick out one parcel of a larger parcel, the parcel
 18 that's picked out is the parcel, and the remainder
 19 parcel now becomes a parcel, because in the process of
 20 creating one, you end up with two.
 21 THE COURT: Okay.
 22 THE WITNESS: So this reversionary parcel is,
 23 by definition, retained by the original owner, which
 24 is, which is --
 25 THE COURT: So if you take one off another

District Court IV

1 one, you get what's left. They don't take --
 2 THE WITNESS: That's correct, and it creates
 3 a parcel.
 4 BY MR. J. J. JIMMERSON:
 5 Q. And the more they acquire, the less the
 6 reversionary parcel would be?
 7 A. Yes.
 8 Q. Now, we see that again here on March 28th of
 9 2005 repeated again. So just a couple of things I want
 10 to establish.
 11 Would you agree with me that the definition
 12 of Purchase Property in Exhibit 2, the original
 13 Baseline Agreement of June 1, 2004, never changed even
 14 with the amended restated document, Exhibit 5, March
 15 28, 2005, in terms of the definition?
 16 A. Okay. Now, this is gonna get hypertechnical,
 17 but you have to be.
 18 This document --
 19 THE COURT: "This," meaning Exhibit --
 20 THE WITNESS: Excuse me, your Honor, thank
 21 you very much. Exhibit 5.
 22 BY MR. J. J. JIMMERSON:
 23 Q. Yep.
 24 A. It's an amended and restated agreement, and
 25 therefore, nothing which is contained in the earlier

District Court IV

1 agreements, please, your Honor, to Bates 125, Page 45
 2 of the agreement --
 3 THE COURT: Okay, I'll find it. I got it.
 4 BY MR. J. J. JIMMERSON:
 5 Q. To use your words, would it be a superceding
 6 document?
 7 A. Yes.
 8 Q. That's the concept you're trying to
 9 communicate here, right?
 10 A. Yes. Whatever terms anybody wants to use.
 11 THE COURT: I understand superceding,
 12 Mr. Jimmerson.
 13 It means, what you're saying is, say this is
 14 the new complete agreement. Any agreements prior to
 15 that have no force and effect?
 16 THE WITNESS: That is correct.
 17 BY MR. J. J. JIMMERSON:
 18 Q. And to evidence the point, there is, in fact,
 19 a new definition of Purchase Property, isn't there,
 20 within Exhibit 5, Page 2, Bates stamp Number 82?
 21 THE COURT: Can we -- I apologize,
 22 Mr. Jimmerson, I'm trying to follow the witness. I
 23 apologize if I stopped you.
 24 MR. J. J. JIMMERSON: That's okay.
 25 THE COURT: But we're on Page 125 Bates

District Court IV

1 stamped.
 2 THE WITNESS: And Paragraph 25.
 3 You asked me the question, I believe -- could
 4 I have it repeated?
 5 BY MR. J. J. JIMMERSON:
 6 Q. I withdrew it.
 7 The term "Purchase Property" we know didn't
 8 change from one and, Exhibit 2 and Exhibit 4, but now
 9 I'm suggesting to you that it does change, the
 10 definition does change on March 28th in Exhibit 5, and
 11 I call to your attention to Page 2, Bates Stamp Number
 12 82, to perhaps Bates Number 82 to help you understand
 13 that.
 14 A. Okay.
 15 Q. And the way I'm reading this document --
 16 MS. LUNDVALL: Hold on, is there a question?
 17 MR. J. J. JIMMERSON: Yeah, there is.
 18 THE COURT: Tell us what to look at. I
 19 apologize Mr. Jimmerson, I was, wasn't following as
 20 quickly.
 21 MR. J. J. JIMMERSON: Not a problem.
 22 THE COURT: Where are we, Exhibit 5?
 23 MR. J. J. JIMMERSON: The bottom of Page 1,
 24 Paragraph C.
 25 THE COURT: Page 1, Bates Stamp --

District Court IV

1 MR. J. J. JIMMERSON: 81.
 2 BY MR. J. J. JIMMERSON:
 3 Q. The parties desire to enter into this
 4 agreement to provide for buyer's purchase of the
 5 property entire site, consisting of the portion of
 6 Section 20 and 21 of T13S, R63E, M.D.M. Clark County,
 7 Nevada, as more fully described on Exhibit B attached
 8 hereto and incorporated herein, containing
 9 approximately 511.82 acres more or less as shown on the
 10 map attached hereto as Exhibit B-1 and made a part
 11 hereof, the Purchase Property.
 12 You can see that?
 13 A. Yes. Yes.
 14 Q. So no longer is the Purchase Property 3,600
 15 acres as shown by a record map, now it's changed to
 16 511.82 acres as defined.
 17 Why did that happen?
 18 A. What we did is in this recital, bring the
 19 documents up to speed from a time perspective without
 20 changing the parties's express understanding of what
 21 the transaction was, and so if you go to some of the
 22 exhibits, you will see great definition, your Honor,
 23 as, as you go through the attachments on this
 24 particular agreement.
 25 Q. Okay.

District Court IV

1 A. And you will see from my perspective that the
2 Exhibit C-1 --
3 THE COURT: Of this document, okay.
4 THE WITNESS: Exhibit C-1, it's 749, your
5 Honor.
6 THE COURT: Let me get there. Thank you.
7 THE WITNESS: Uh-huh.
8 BY MR. J. J. JIMMERSON:
9 Q. I don't know where you're getting 749. Can
10 you help me?
11 A. Yes. It says Bates Stamp 749.
12 THE COURT: They're real small.
13 THE WITNESS: It's in Exhibit C-1.
14 BY MR. J. J. JIMMERSON:
15 Q. I've got Pardee 52, 53.
16 THE COURT: It's right here.
17 THE WITNESS: It's a purple one on the side.
18 Can I go to the map, your Honor?
19 THE COURT: Yes. Hold on.
20 BY MR. J. J. JIMMERSON:
21 Q. I need you to look at the document you have
22 in your book there.
23 A. It's there. It's 749.
24 Q. I got it.
25 A. Jim, it looks like this.

District Court IV

1 THE COURT: We're on the same page.
2 THE WITNESS: May I approach the map?
3 THE COURT: Absolutely, you can explain how
4 we got there.
5 THE WITNESS: So this portion of the land,
6 which extends probably over to the edge of this board,
7 that is the parcel which has now been acquired in fee
8 as a result of the BLM reconfiguration moving over.
9 BY MR. J. J. JIMMERSON:
10 Q. So one thing we have to establish is
11 reconfiguration occurs between September 1 and
12 March 28?
13 A. Well, the designation of the land which is
14 going to be actually done occurs, whether it's
15 finalized or not, the parties are --
16 THE COURT: But at least you know what it's
17 gonna be.
18 THE WITNESS: Yes. We know what it's gonna
19 be your Honor, and therefore, if you turn on that page
20 and if you turn the exhibit to head north/south --
21 BY MR. J. J. JIMMERSON:
22 Q. Can we agree the highway is on the left?
23 A. Highway 93 is on the left.
24 THE COURT: It says, Highway 93.
25 THE WITNESS: And it cuts it off,

District Court IV

1 unfortunately, highway 168, but you'll see
2 Carl Savely's language that says -- there's corner of
3 the initial property, right there.
4 THE COURT: Yes.
5 THE WITNESS: Now, this is a planning map.
6 We finally have a planning map of what the parties
7 potentially think the development would look like at
8 Coyote Springs.
9 THE COURT: Okay.
10 THE WITNESS: Then, if you turn it back to
11 the way that it would put in, it says, Parcel
12 boundaries and phasing may be modified during
13 development as used on this exhibit. The additional
14 residential neighborhoods, the production residential
15 property, and the Option Property is that portion of
16 the production residential property located outside of
17 the boundary of the initial property.
18 BY MR. J. J. JIMMERSON:
19 Q. Now, whether you look at this map or another
20 map that's here, tell us, show us where the initial
21 property is and show us where the Option Property is
22 under this new agreement, March 28th, of 2005?
23 A. Because that is superceding agreement, this
24 agreement and this map is now the most up-to-date
25 snapshot of what the initial property was.

District Court IV

1 THE COURT: Okay. The initial property is
2 the first 250 acres they'd already paid for at this
3 point.
4 THE WITNESS: Yes, your Honor.
5 THE COURT: Taken it down.
6 THE WITNESS: They have taken it down.
7 THE COURT: I don't want to use the wrong
8 term.
9 THE WITNESS: They had taken it down. We had
10 received the money, they had received the title. It
11 was not subject to any reversionary right.
12 THE COURT: It was theirs?
13 THE WITNESS: That was theirs.
14 THE COURT: That's what --
15 THE WITNESS: That's what I was pointing out,
16 if you turn sideways, that little thing right there
17 that says, Initial property.
18 THE COURT: Okay.
19 BY MR. J. J. JIMMERSON:
20 Q. And it might go down a little further?
21 A. For sure it goes down a little further,
22 because the designation of the Exhibit -- the map cuts
23 off the southernmost parts of my property.
24 THE COURT: It doesn't go to the other
25 highway?

District Court IV

1 THE WITNESS: It goes to the other highway,
2 that's correct, 168, your Honor.
3 BY MR. J. J. JIMMERSON:
4 Q. My question to you then is: Within the
5 legend that you just read into the record, where is
6 capital O, capital P, Option Property, located?
7 A. Okay.
8 THE COURT: We know that the Purchase
9 Property is this.
10 THE WITNESS: Now, the Option Property,
11 there's two pieces. There are now still two pieces of
12 Option Property.
13 BY MR. J. J. JIMMERSON:
14 Q. Okay.
15 A. There is an option for the entire site, which
16 is called Option Property.
17 Q. Right.
18 A. And there is the right of Pardee to buy all
19 single-family residential that I designated, which is
20 an option to purchase property.
21 Q. That's what I went over, which there are two
22 types of options, right?
23 THE COURT: So the right to buy all that CSI
24 designates in the future as single-family residential?
25 THE WITNESS: Yes.

District Court IV

1 THE COURT: But you haven't even done all
2 that yet.
3 THE WITNESS: No, your Honor.
4 THE COURT: So we don't know what they may
5 have an option on.
6 THE WITNESS: We're doing it.
7 THE COURT: I don't mean you're doing it
8 unilaterally, I understand that.
9 THE WITNESS: And collectively, the parties
10 are designating this because Pardee wants to buy, and
11 CSI wants to sell.
12 THE COURT: Okay. So they have an option,
13 Pardee does, to buy all or any part thereof of what CSI
14 will designate as single property.
15 THE WITNESS: Single-family residential.
16 THE COURT: Single-family residential.
17 THE WITNESS: SFR, Single-Family residential
18 production. You'll see in the record, your Honor,
19 traditional residential neighborhoods, you'll see it as
20 production residential property. There are lots of
21 different designations within this industry that mean
22 the same thing.
23 / / / /
24 BY MR. J. J. JIMMERSON:
25 Q. But designations are important.

District Court IV

1 THE COURT: It's confusing on agreements.
2 BY MR. J. J. JIMMERSON:
3 Q. But designations are important versus
4 residential or commercial?
5 A. It is.
6 THE COURT: So at this point, you couldn't
7 give us -- there isn't a map included here of this
8 Option 2, correct?
9 MR. J. J. JIMMERSON: There is, your Honor.
10 THE WITNESS: Of the --
11 THE COURT: Not the entire site, I get that,
12 of, of what may potentially be Option 2, which is what,
13 you didn't give us a map of that?
14 THE WITNESS: I think we can --
15 THE COURT: Not the entire site, I'm saying.
16 THE WITNESS: I think we can --
17 THE COURT: All right.
18 BY MR. J. J. JIMMERSON:
19 Q. That's what I want to point out.
20 THE COURT: That would help.
21 BY MR. J. J. JIMMERSON:
22 Q. I just want to show the definition, if you
23 turn to Page 2.
24 THE COURT: This is Exhibit 5?
25 / / / /

District Court IV

1 BY MR. J. J. JIMMERSON:
2 Q. Exhibit 5, Page 2, we've established now and
3 with this superceding amended and restated document we
4 have a new definition of Purchase Property. It's no
5 longer 3,600 acres, it's 511 acres.
6 Do you see that?
7 A. The 500?
8 Q. I'm just reading the words.
9 A. I'm gonna wait for the Judge to get there.
10 THE COURT: Because I put my question here:
11 How did it become 511.82 acres?
12 BY MR. J. J. JIMMERSON:
13 Q. They made it that way.
14 A. We have made that definition apply to the
15 511, because we can identify the 511 on the entire site
16 through the map.
17 Q. Okay.
18 A. And it doesn't change, it does not change the
19 underlying obligation to buy the 1,950 that we
20 subsequently designate, your Honor, to reach the total
21 purchase price of 84 million, so we're gonna go through
22 that process.
23 THE COURT: As you keep going forward, you
24 are able to solidify in stone what was included in the
25 1,950?

District Court IV

1 THE WITNESS: Yes, your Honor.
2 THE COURT: That's all, so the 84 million.
3 BY MR. J. J. JIMMERSON:
4 Q. The designations, therefore, are subject to
5 change as the months and years go by as this project
6 unfolds?
7 A. Right.
8 THE COURT: Designation for --
9 BY MR. J. J. JIMMERSON:
10 Q. Residential?
11 A. Yes. If CSI took property and said, We're
12 going to sell it as multi-family, it wouldn't be
13 available for sale as single-family.
14 Q. Exactly.
15 A. Or you'll pay a multi-family price, down
16 zone, continue and make it into single-family, but that
17 would all be the work of the individual purchase.
18 Q. Okay.
19 A. Nor could -- excuse me, let me finish, nor
20 could we, nor would the property include the sites that
21 we have designated as golf course, recreation, water
22 facilities, recreational facilities, major interior or
23 arterial roads, paths, recreational areas throughout.
24 THE COURT: Right. So I want to make sure
25 I'm clear, so it was March 28th, 2005, when this

District Court IV

1 Amended And Restated Option Agreement For The Purchase
2 Of Real Property And Joint Escrow Instructions, you
3 have solidified to Pardee 511.82 acres where that's
4 gonna be located at CSI. You still owe them the
5 difference between 1,950 and 511 to designate specific
6 sites by map.
7 THE WITNESS: You're correct, your Honor.
8 BY MR. J. J. JIMMERSON:
9 Q. Subject to them paying the balance?
10 THE COURT: I know if they don't pay, I'm
11 trying to get acreage.
12 MS. LUNDVALL: Is it possible for us to take
13 a lunch break?
14 THE COURT: Let me write this down.
15 MR. J. J. JIMMERSON: Could I have two
16 minutes? I just want to complete this line of
17 questioning.
18 THE COURT: Okay.
19 BY MR. J. J. JIMMERSON:
20 Q. Now, Purchase Property is now tied to a map.
21 Let's look at Exhibit B.
22 THE COURT: Let me ask this: How much longer
23 are you going to be?
24 I need to talk to the witness.
25 Can you come back?

District Court IV

1 THE WITNESS: I can stay.
2 THE COURT: I know you mentioned something.
3 MR. J. J. JIMMERSON: At the break I
4 referenced something that we weren't gonna get done by
5 lunch.
6 THE COURT: We're almost done with this line
7 of questioning.
8 BY MR. J. J. JIMMERSON:
9 Q. Just with regard to B, the purchase, it's
10 defined as 511 acres, 500 acres as shown in Exhibit B-1
11 and made a part hereof of the Purchase Property, that's
12 the new defined term of the Purchase Property.
13 Let's turn to 745, which is, -- I am not --
14 not B-1. B-1?
15 A. 52.
16 Q. 51 and 52, but the map shows it as 52 and
17 show us what that is?
18 A. Okay. Because the parties knew, because the
19 parties knew that they were going to have the 250 in
20 the corner, they, and the, the fee area was going to
21 move over to this side.
22 THE COURT: Move over, because you traded
23 with BLM?
24 THE WITNESS: Right. What they did was say,
25 We're gonna take all along the state highway these

District Court IV

1 parcels. Rather than go up here, we're gonna come
2 along here, so that map reflects going along from west
3 to east if you turn to the map. Again, you have to
4 turn the map.
5 THE COURT: That's 52, right?
6 THE WITNESS: Yes. If you turn to 52, your
7 Honor, and you go sideways.
8 BY MR. J. J. JIMMERSON:
9 Q. Which one would be north?
10 THE COURT: I think it says, The Mount Diablo
11 Meridian.
12 BY MR. J. J. JIMMERSON:
13 Q. So the words, "The Mount Diablo," that would
14 be at the top?
15 A. This is supposed to be designating north,
16 your Honor.
17 THE COURT: Okay.
18 THE WITNESS: And this corner, this corner,
19 if you take a look, your Honor, at this point right
20 here.
21 BY MR. J. J. JIMMERSON:
22 Q. I want to see it too.
23 A. If you take a look at this point here, if you
24 put a red dot right there, or blue dot, for the record,
25 I'll show the other counsel.

District Court IV

1 THE COURT: Yes.

2 THE WITNESS: I'm circling that.

3 THE COURT: It's a blue dot.

4 THE WITNESS: It's a blue circle.

5 My understanding is that if you blew it up,

6 that corner would look exactly like that right here, so

7 what they've done is flipped things on the side, and

8 that corner is the corner of Highway 93 and State Route

9 168.

10 BY MR. J. J. JIMMERSON:

11 Q. Don't run away.

12 THE COURT: So that's what's gonna be an

13 addition to the original 250, that's the difference to

14 get up to your 511.82 at that point?

15 THE WITNESS: I'm not gonna hold myself to

16 that, because I haven't done the calculation, but the

17 general intent of that was in that direction, your

18 Honor.

19 THE COURT: So the general intent was to go

20 from the 250, so it was a contiguous 511.82.

21 THE WITNESS: And if you needed to go above,

22 you would, but right now we have parcels, we have

23 sections that you can give an aliquot.

24 THE COURT: Hence, the description we just

25 had.

District Court IV

1 THE WITNESS: Rather than metes and bounds,

2 if you read real quickly, I know Jim wants me back up

3 there, but if you turn to Page 51, you'll see that it

4 is an aliquot description rather than metes and bounds.

5 THE COURT: Okay.

6 BY MR. J. J. JIMMERSON:

7 Q. And when you used the word "aliquot," what

8 did you mean to communicate?

9 A. Aliquot is a real estate term which describes

10 by sections and quarter sections or lots within those,

11 a portion of properties.

12 Q. And you've got more recorded maps by this

13 time too?

14 A. We've each got, because we haven't yet

15 finalized all the plans, we're making, we're gonna be

16 using this as a temporary way to describe --

17 THE COURT: Where they're going.

18 THE WITNESS: Where they're going.

19 BY MR. J. J. JIMMERSON:

20 Q. And I get you back up here, I just didn't

21 understand why the circle is on this map.

22 A. Go like that.

23 So this is at an angle. This is at an angle.

24 Q. Okay.

25 A. So that point, this here and this here, this

District Court IV

1 here.

2 Q. Got it.

3 Now, how far east is this far east point on

4 Bates Number 51, B-1?

5 A. Okay. I can tell you exactly.

6 Q. Please.

7 A. It is quarter sections, 1, 2, 3, 4, 5, 6, 7,

8 8, it is two miles from this point, your Honor.

9 THE COURT: Okay.

10 THE WITNESS: Two miles further here. I

11 can't tell you.

12 BY MR. J. J. JIMMERSON:

13 Q. This is 8,000 feet, we know that.

14 A. I know this is 8,000.

15 Q. No, here is 8,000. I will give you that this

16 is 7,999.

17 A. It keeps going, so there is Parcel 2, Parcel

18 2, right there is 526 acres along here.

19 Q. And there's, okay, so it's --

20 A. All I want the Court to understand is now,

21 rather -- because the way this map was presented to

22 you, you could get confused that this going this way --

23 THE COURT: Is that --

24 THE WITNESS: This, and it's not --

25 / / /

District Court IV

1 BY MR. J. J. JIMMERSON:

2 Q. Right.

3 A. It's this --

4 THE COURT: The bottom portion.

5 BY MR. J. J. JIMMERSON:

6 Q. And that's what I'm trying to establish

7 before we break for lunch, where the Purchase Property

8 was in June of 2004 has now changed to another location

9 by March 28th of 2005?

10 A. Absolutely.

11 Q. It's no longer here or here, it's now

12 horizontal more, and it does, in fact, extend beyond

13 the Parcel 1 line from --

14 A. I don't know, Mr. Jimmerson, whether it cuts

15 off here, because there's a section line. The point is

16 what they were trying to do was, again, while we were

17 doing this with Mr. Lash and Pardee, we were always

18 making sure that the Pardee received more than the

19 amount of land that they had paid for, that there was

20 additional security.

21 Q. Now, would you --

22 THE COURT: And then as you went along, what

23 they paid for, you gave them what they bought. You

24 said, Here's what you get for this much, you know,

25 we're gonna make up the difference. We know you paid

District Court IV

1 84 million, we're gonna get there.
2 THE WITNESS: Exactly. That's exactly what
3 we are doing.
4 BY MR. J. J. JIMMERSON:
5 Q. Before the lunch break, I need to establish
6 this: Isn't it true that some of the land here,
7 Exhibit B-1, extends more to the east, beyond the
8 Parcel 1 Purchase Property limit to the east?
9 A. I think based upon, based on my understanding
10 of what that exhibit shows and your representations
11 that that's 8,000 square feet -- I mean 8,000 feet,
12 yes, it would extend into an area that is not described
13 on that map.
14 THE COURT: As Parcel 1?
15 THE WITNESS: As Parcel 1.
16 BY MR. J. J. JIMMERSON:
17 Q. In this area?
18 A. Yes.
19 MR. JIMMERSON: I have nothing further at
20 this time. I'm not passing the witness.
21 THE COURT: He's not finished with his
22 direct.
23 MR. J. J. JIMMERSON: The defendant asked to
24 take a lunch break.
25 THE WITNESS: Jim, are you buying lunch?

District Court IV

1 MR. J. J. JIMMERSON: I will buy lunch,
2 absolutely.
3 THE COURT: All right. We'll take a break.
4 (A lunch recess was taken.)
5 THE COURT: So are you on standby?
6 THE WITNESS: I'm gonna have to leave right
7 at 3:15.
8 THE COURT: Okay, that's fine. You
9 graciously said you will come back.
10 THE WITNESS: Yes.
11 THE COURT: Whatever, we'll do what we do.
12 I'm keeping an open mind until all the evidence is in,
13 but thank you for your time.
14 THE WITNESS: Thank you.
15 BY MR. J. J. JIMMERSON:
16 Q. Mr. Whittemore, good afternoon.
17 A. Good morning.
18 Q. We'll work at least another hour and fifteen
19 minutes. Let me know when you have to go.
20 I've read the agreements. I don't see the
21 right to swap in the written words of either Exhibit 2,
22 4, or 5.
23 Am I mistaken?
24 MS. LUNDVALL: From his perspective, once
25 again, not starting out the afternoon very well, what

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1 he has interpreted out of these agreements is
2 irrelevant. He needs to answer the question without
3 giving the commentary to the Court, and I would ask for
4 this, that is continuing problem that we have.
5 THE COURT: I think what he's asking is, is
6 literally, in those two documents. It refers to either
7 party getting the right to swap.
8 MR. J. J. JIMMERSON: Right.
9 THE COURT: And he can answer, I mean that's
10 -- so I'm gonna overrule.
11 THE WITNESS: And if you were to refer to
12 Exhibit --
13 BY MR. J. J. JIMMERSON:
14 Q. Let's start with 2.
15 MS. LUNDVALL: You've asked the question.
16 Please allow him to answer.
17 THE COURT: Sustained. Let Mr. Whittemore
18 tell us. I've already got my exhibits out. This is
19 Exhibit 5.
20 THE WITNESS: An example of that,
21 Mr. Jimmerson, is page 1568.
22 BY MR. J. J. JIMMERSON:
23 Q. What do you, are you looking at, please?
24 A. It's Bates stamped 1568, which is in the
25 Plaintiff's Number 4.

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1 Q. That's the second amendment then, thank you.
2 A. Yeah.
3 Q. All right, no problem.
4 THE COURT: Sorry.
5 THE WITNESS: There we go.
6 And you can see that the parties agreed that
7 the crosshatch series, the Initial Developed Parcel is
8 1,950, Phase 1 is 250 acres located in the southern
9 portion of the parcel, and the parties already mutually
10 agree upon the phasing of the additional purchases.
11 BY MR. J. J. JIMMERSON:
12 Q. All right.
13 A. Okay. Now, may I finish, please?
14 Q. I'm not saying anything.
15 A. Okay. Then if you go to the other map we
16 had?
17 THE COURT: Exhibit 5?
18 THE WITNESS: Yes, please.
19 Your Honor, what Bates Stamp is that?
20 THE COURT: 749 of Exhibit 5. It's the real
21 small one.
22 THE WITNESS: Right. Right. I have it as
23 751, your Honor.
24 THE COURT: Okay.
25 THE WITNESS: 749, they are -- no, your Honor

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1 is correct, there are two exhibits, and Exhibits C-1
 2 with two separate maps, and Exhibit C-2, and, and then
 3 the second page of Exhibit C-2, Page 749, I don't know
 4 whether that was in the wrong, or, or not.
 5 THE COURT: I see where it -- it's in front
 6 of it.
 7 THE WITNESS: Right in front of it.
 8 Then 751, and 752 are all exhibits that talk
 9 about, and then you turn the page to the biggest one,
 10 which is 755, developed by Pardee's consultants
 11 GC Wallace.
 12 And your Honor, may I approach the big thing
 13 again?
 14 THE COURT: Yes.
 15 Did I pull out 755? I don't have mine here.
 16 MR. J. J. JIMMERSON: It is part of the same
 17 exhibit, just as Exhibit D, second page, I believe.
 18 THE COURT: I'm looking at --
 19 MR. J. J. JIMMERSON: It's Exhibit 5.
 20 THE COURT: I have Exhibit 5. And I go from,
 21 I see where I go from 751, 752, and then this goes to
 22 58.
 23 MR. J. J. JIMMERSON: Keep going.
 24 THE COURT: 55 is what I'm looking for?
 25 THE WITNESS: 755.

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1 THE COURT: I apologize. I'm used to it
 2 being in consecutive order.
 3 THE WITNESS: Well, these exhibits --
 4 Mr. Jimmerson asked is there anything in the documents
 5 that refers to "swap."
 6 THE COURT: Swap.
 7 BY MR. J. J. JIMMERSON:
 8 Q. Language.
 9 A. If we can go to 755 and hold it this way.
 10 THE COURT: Okay.
 11 MR. J. J. JIMMERSON: That corner, again,
 12 that are corner is right here. That corner is right at
 13 the bottom.
 14 THE COURT: I see a six. Is that similar?
 15 THE WITNESS: This is, this part right there,
 16 your Honor.
 17 THE COURT: Right.
 18 THE WITNESS: It has Number 6 on it.
 19 THE COURT: Okay.
 20 THE WITNESS: Number 6 on it.
 21 THE COURT: And that is --
 22 THE WITNESS: That is this corner of this,
 23 and I'll see that the lines aren't straight, they're
 24 kind of curvy, and then you go over Exhibit -- Parcel 5
 25 now, it says Parcel 5, and it's starting a little bit

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1 curvy.
 2 Now, these documents, all the exhibits that
 3 are attached with respect to those plans have the
 4 notations on these exhibits that reflect what compels
 5 the parties to agree to the specific parcel lines, and
 6 therefore, swap within those areas, by saying, as used
 7 on this exhibit, the term traditional residential
 8 property means the production residential property,
 9 which is also described as the Option Property together
 10 with the Purchase Property.
 11 The Initial Developed Parcel is located in
 12 the southern portion of the area marked Traditional
 13 Residential Neighborhood, and this parcel is Phase 1 of
 14 the production residential property.
 15 Buyer anticipate the development of phases of
 16 production residential property to start along the
 17 southerly boundary and move northward to the adjacent
 18 areas.
 19 All these things taken together compel one to
 20 understand that as the development proceeded, when we
 21 put a golf course, it's physically there, your Honor.
 22 THE COURT: Okay.
 23 THE WITNESS: When you put a golf course in
 24 that area, you take land away from Pardee that you have
 25 to replace at a location different, in a different

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1 location within that might be reflected on the first
 2 document.
 3 So, Mr. Jimmerson, these documents and others
 4 that occur later in time require the parties to jointly
 5 plan the development and concur where the roads go, and
 6 therefore, where the parcel line goes, where a golf
 7 course goes, and therefore, as a result of creating a
 8 parcel for a golf course to create a parcel for a
 9 residential subdivision adjacent to this golf course.
 10 To the north of the golf course, along the
 11 edge of the golf course are some custom lots, but all
 12 along the way, within that development area, your
 13 Honor, the parties came up with --
 14 THE COURT: Single-family.
 15 THE WITNESS: Single-family and what we
 16 retained and what we did, but at the end of the day,
 17 you had to what we call equalize the money to the
 18 property and who had to pay 50 percent for this, who
 19 had to pay 25 percent for that, all those equalizations
 20 took place, and that's how I meant swapping,
 21 Mr. Jimmerson.
 22 I didn't mean that there was a phrase in here
 23 that said that the parties shall do A, B, C, D, and E,
 24 I was giving you a process rather than necessarily a
 25 specific description in the document.

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1 BY MR. J. J. JIMMERSON:
2 Q. All right. I think we both have accomplished
3 our goals. There's no language in the four corners of
4 the agreement that requires swapping. What you will
5 say as you sit here, and I understand, is it requires a
6 mutual agreement of the parties to operate in good
7 faith, and there's many good faith requirements that
8 are in writing here?
9 A. Yes, Mr. Jimmerson, I think that's fair.
10 Q. Okay.
11 A. With one caveat. I believe that at some
12 point in our relationship, we did get around to
13 formalizing and saying those exact words, which are,
14 You get this, we get this, and therefore --
15 THE COURT: To become memorialized later down
16 the line, but not as of --
17 THE WITNESS: Not as of this time, because
18 nothing had been built yet.
19 THE COURT: Exhibit 5, okay.
20 BY MR. J. J. JIMMERSON:
21 Q. Would you look at Exhibit 5 again? It's the
22 restated agreement of March 28th, and it's renumbered
23 slightly, instead of 18, Broker Commission, it's 19.
24 Look for these at Paragraph 19 of Exhibit --
25 A. Exhibit 19?

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1 THE COURT: Paragraph.
2 MR. J. J. JIMMERSON: Paragraph.
3 THE COURT: Paragraph 19, excuse me. Broker
4 commissions, okay.
5 BY MR. J. J. JIMMERSON:
6 Q. And by my review --
7 MS. LUNDVALL: Once again, I'm gonna ask him
8 not to say, "This is what I read," to the witness.
9 MR. J. J. JIMMERSON: This is my style, your
10 Honor. Sorry it doesn't suit the opposing counsel.
11 BY MR. JAMES M. JIMMERSON:
12 Q. The line in the earlier Option Agreement,
13 Exhibit 2 --
14 A. It looks very similar without doing word for
15 word.
16 Q. Would you agree the word for word,
17 Notwithstanding, is also identical, Notwithstanding the
18 foregoing?
19 A. Oh, yes, yeah, it's still in there.
20 Q. Now, were you advised that by now, March 28th
21 of 2005, there had been, indeed, a contract entered
22 into between Pardee and Wolfram and Wilkes and their
23 respective companies?
24 A. I was advised that by Mr. Levy.
25 Q. Lawyer for Pardee?

District Court IV

1 A. Lawyer for Pardee, that they had reached an
2 agreement, because I had asked him in one of our
3 meetings, Do we still need this language, and he said,
4 Yes.
5 Q. Okay. And in that meeting of Levy and
6 yourself --
7 A. It was a group meeting, but it was --
8 Q. Sometime preparatory of March 28, 2005?
9 A. Before this agreement was signed, as I
10 indicated, we had negotiating sessions every day, every
11 week over the phone, and again, you sit down when you
12 finally get the document, and I can't tell you this is
13 Carl Savely's second version, so we had received
14 comments and put them in here, and then by March 28th,
15 the parties are agreed and ready to go.
16 Q. So in terms of conversation you had with
17 Mr. Levy, and not being precise, would a February/March
18 2005 time period be accurate in terms of when you
19 learned that there was still a necessity to have the
20 Broker Commissions and Finder Fees paragraph restated
21 here?
22 A. From my perspective, yes, because I did not
23 want to pay a broker's fee.
24 Q. Go back to the definitions. We talked about
25 Purchase Property and how that definition changed.

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1 Let's see if the Option Property definition changed
2 herein in the amended and restated document in
3 Exhibit 5.
4 Turn to Page 2, same paragraph we were
5 talking about, and it follows after the description of
6 Purchase Property of 511 acres, and I will pick it up.
7 And little i, the fourth line, Buyer's option
8 to purchase remaining property, entire site, which is
9 or becomes designated for single-family detached
10 production residential use as described, the Option
11 Property and a number of several phases referred to
12 here collectively as Option Parcels and individually as
13 Option Parcel upon the terms and conditions hereinafter
14 set forth, end of quote.
15 Do you see that?
16 A. Yes.
17 Q. By looking at the maps or whatever you feel
18 is best for us, tell me now how Option Property has
19 been defined now under the new amended restated March
20 28th agreement, Exhibit 5?
21 A. Okay. I advanced this discussion, apparently
22 inappropriately, because you now need to go to
23 Exhibit C-1, which are the three, if you look at
24 PH Bates Number 53.
25 THE COURT: Okay.

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1 THE WITNESS: That's, that's after Bates 52
 2 that we put the little blue circle around.
 3 THE COURT: Okay.
 4 THE WITNESS: It says, Map Of Option
 5 Property.
 6 THE COURT: Let me get to it, please. You
 7 are ahead of me a little bit.
 8 Exhibit C-1, did you say?
 9 THE WITNESS: It's your reference to
 10 Exhibit C, Map Of Option Property, and you look at that
 11 and it is blank.
 12 THE COURT: Yeah, I see a blank.
 13 THE WITNESS: Yes, exactly.
 14 THE COURT: Okay.
 15 THE WITNESS: You're on the right page.
 16 THE COURT: Okay. I got nervous.
 17 THE WITNESS: No, because the parties needed
 18 more specificity.
 19 BY MR. J. J. JIMMERSON:
 20 Q. Okay.
 21 A. And therefore, they started to create the
 22 Exhibits C-1, has two pages, okay.
 23 Q. I'm with you, thank you.
 24 A. So --
 25 Q. And C-1, so we have it here, is at Bates

District Court IV

1 Stamp 7 --
 2 THE WITNESS: 749.
 3 Q. It's blank, and then 749 and 65.
 4 BY MR. J. J. JIMMERSON:
 5 Q. My eyes are bad.
 6 A. Now, what do we show? We show all the
 7 potential option property in Clark County on Page 749.
 8 THE COURT: Okay.
 9 THE WITNESS: That's everything to the west
 10 of the Pahranaagat Wash.
 11 Can I identify this? Can I approach, your
 12 Honor.
 13 THE COURT: Yes.
 14 BY MR. J. J. JIMMERSON:
 15 Q. I need you to show us by holding it up and
 16 showing the position, counsel?
 17 A. I will.
 18 Q. Thank you.
 19 A. So 749 shows it, your Honor.
 20 Q. Okay. This is --
 21 THE WITNESS: This is the southern edge, and
 22 again, it's cut off a little bit. It's cut off a
 23 little bit, and then the northern edge, which is the
 24 Lincoln County line, so now this shows everything to
 25 the east of U.S. Highway 93.

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1 THE COURT: Right.
 2 THE WITNESS: And everything south of, up to
 3 the Lincoln County line, and everything east of the
 4 demarcation section lines, that shows the eastern
 5 boundary of the Coyote Springs project in Clark County.
 6 BY MR. J. J. JIMMERSON:
 7 Q. Okay.
 8 A. What is missing is the bottom line, which we
 9 know is Highway 168.
 10 THE COURT: We just don't show it.
 11 THE WITNESS: We just don't show it here.
 12 So this, so this, you want to know what the Option
 13 Property is.
 14 BY MR. J. J. JIMMERSON:
 15 Q. Right.
 16 A. This is the Option Property in Clark County.
 17 Then the next page --
 18 THE COURT: This is the Option Property in
 19 Clark County.
 20 BY MR. J. J. JIMMERSON:
 21 Q. So would you say here and there, in other
 22 words, is the everything but the little rectangle in
 23 the bottom left corner?
 24 A. Well, as defined in this agreement.
 25 Q. That's what I'm asking.

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1 A. As defined in this agreement, the Option
 2 Property is the remaining acres that are required to be
 3 purchased under the agreement of 1,950, so, you know,
 4 you had 1,950 -- I'm sorry if I'm standing, your Honor.
 5 Is that okay?
 6 THE COURT: I'm fine. I'm following.
 7 THE WITNESS: And so you subtracted 250, so
 8 you have to get 1,700 acres in this general area.
 9 BY MR. J. J. JIMMERSON:
 10 Q. Which is still the purchase property, ask,
 11 then you're talking about something outside that; is
 12 that right?
 13 Q. If I understand your statement --
 14 A. Yes, this is really hard, but originally,
 15 remember the Purchase Property was all this?
 16 Q. Right.
 17 A. Now the Purchase Property goes like this.
 18 Q. Okay.
 19 A. And now this is saying the Purchase Property
 20 is all of this, because it's Clark County, and we want
 21 to give the advantage of taking everything in here.
 22 THE COURT: If it's designated as --
 23 THE WITNESS: Yes, and you exercise your
 24 option.
 25 THE COURT: And you exercise your option, so

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1 you're just giving them every available that you can?

2 THE WITNESS: We're giving them their choice,

3 their options, and as this development plan went, they

4 certainly wouldn't go from, your Honor, this corner to

5 this corner, because there would be no advantage of

6 continuity of development.

7 THE COURT: But you gave them the option if

8 they want to go up north?

9 THE WITNESS: They can go up, they can go

10 here, but the reason why this happens, your Honor, they

11 come down in this direction is 'cause we designed and

12 built a Jack Nicklaus signature golf course, because

13 it's part of our requirements under our obligation to

14 spend money to develop there.

15 THE COURT: That would be attractive to

16 Pardee.

17 THE WITNESS: That is extremely attractive to

18 Pardee and their lots, your Honor, located within the

19 area that has the golf courses, as he we sit here

20 today. Their lots are here and our property, CSI's

21 property is in this same area because they own the golf

22 course.

23 BY MR. J. J. JIMMERSON:

24 Q. If I can sort of summarise, stay right here,

25 if you will. Purchase Property, including the 1,950 of

District Court IV

1 2004 June and September 1 now changes. March 28th of

2 2005 has it going along here, right?

3 A. Sure.

4 Q. 511 acres going this way?

5 THE COURT: They have 511.

6 BY MR. J. J. JIMMERSON:

7 Q. With that being that, where is the Option

8 Property as you read the language of the new agreement?

9 THE WITNESS: The Option Property is located

10 within the Purchase Property, as defined by the entire

11 Clark County side.

12 BY MR. J. J. JIMMERSON:

13 Q. Okay.

14 A. If Pardee designates it and we agree this

15 should be residential production property, and we want

16 to exercise our option to purchase it, we'll probably

17 go along with it, because everybody's interest is in

18 getting the right kind of mix and everything else.

19 THE COURT: You're basically giving them

20 everything else that hasn't been squared down -- I know

21 that's not in stone -- purchased.

22 THE WITNESS: Yes. Subject to, subject to

23 the limitation that we're gonna retain commercial,

24 we're gonna retain multi-family.

25 THE COURT: But you have to designate, you,

District Court IV

1 CSI, has to designate it as single-family residential

2 property.

3 THE WITNESS: Yes.

4 THE COURT: But you're saying it could be

5 anything. It's up to you to decide, and you get first

6 option?

7 THE WITNESS: And then Exhibit C-1, the

8 second page, says the Option Property that are a

9 portion of the crosshatched area designated as

10 production residential property or traditional

11 residential neighborhood during the joint planning

12 process.

13 So for Lincoln County, this document right

14 after the one that we just picked up says how -- Jim

15 asked, Mr. Jimmerson asked how do we know what is

16 covered by these agreements.

17 THE COURT: What's the Bates stamp?

18 THE WITNESS: 55, your Honor.

19 THE COURT: Okay.

20 THE WITNESS: That's what he was referring

21 to.

22 THE COURT: Okay.

23 THE WITNESS: Okay. So if you put these two

24 together, these two C-1's, nots C-1 (a) or C-1 (b), but

25 these two C-1's you've got Clark County and you've got

District Court IV

1 Lincoln County, and it's clear that the parties were

2 saying if Pardee agreed to build single-family homes

3 within these areas after the joint planning process,

4 that they would have the right to purchase that

5 property by exercising an option to do so.

6 THE COURT: Could have.

7 BY MR. J. J. JIMMERSON:

8 Q. Okay.

9 A. Now, if we go to C-2, both C-2's.

10 THE COURT: Give me the Bates Stamp number.

11 THE WITNESS: Bates Stamp 751 and 752.

12 THE COURT: Okay.

13 THE WITNESS: And I hate to keep doing it,

14 but it's just easiest now to go to PH 58 and Bates

15 Stamp 755.

16 Okay. That's okay. Because now these four,

17 and 754, if you take all those out from 751, including

18 the Pardee Homes 55, excuse me, Pardee Homes 751, your

19 Honor.

20 THE COURT: Right.

21 THE WITNESS: 752, your Honor.

22 BY MR. J. J. JIMMERSON:

23 Q. 56?

24 A. 58, Map Of Initial, and 755 and 754, why

25 they're out of order, I don't know.

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1 THE COURT: Okay.

2 THE WITNESS: Okay. Now, if you take that

3 package, your Honor --

4 THE COURT: Together.

5 THE WITNESS: -- together, if you simply say,

6 Okay, where are we, what do we have, who's got what, by

7 going through each of these documents, you can identify

8 where the planning process has taken place.

9 For example, the first page of Exhibit 2,

10 it's the planning process on all of Clark County, as

11 you see it, right?

12 THE COURT: Correct.

13 THE WITNESS: Then you go to 752, and I'll

14 see the opposite, the rest of that gray area.

15 THE COURT: Right.

16 THE WITNESS: You see, your Honor, that those

17 lines match up?

18 THE COURT: They do.

19 THE WITNESS: Do you see that, your Honor, or

20 should I come up and show you just to make sure.

21 THE COURT: Why don't we --

22 THE WITNESS: You want your record.

23 THE COURT: We want to get it right.

24 THE WITNESS: Right.

25 Everything on the same thing.

District Court IV

1 THE COURT: Absolutely.

2 THE WITNESS: So this line right here is

3 gonna be the edge of this line here.

4 THE COURT: This line right here, this

5 squiggly line.

6 THE WITNESS: No.

7 THE COURT: That's this line, this one

8 matches up.

9 THE WITNESS: It to ultimately match up with

10 what is going to be called --

11 THE COURT: Yes.

12 THE WITNESS: There you go.

13 THE COURT: Okay.

14 THE WITNESS: It says, Lease.

15 THE COURT: It says, Lease.

16 THE WITNESS: Yeah. We moved it over, so

17 what we've done is in these two pages show what can be

18 done in Clark County. Then on Exhibit D, 55, 755, your

19 Honor, it shows Pardee's proposed phasing plan of what

20 they're gonna do, which is now more consistent with

21 this direction than that direction, because they had

22 determined, excuse me, so the court reporter gets it,

23 that direction being north along Highway 93, instead

24 the parties have said it's better to go east from 93

25 above 168 over to that area, and the reason why is

District Court IV

1 there's a golf course, there's roads, and we want the

2 lots and the, the residential property that's gonna be

3 associated with that.

4 BY MR. J. J. JIMMERSON:

5 Q. Just answer that question. Those same maps,

6 where are the, where's the Option Property? It's been

7 changed. Where is it now on the same map.

8 A. I've answered it. Everything, everything

9 that's included in Clark County, they have the right to

10 purchase residential -- property, which is designated

11 as single-family residential or production homes.

12 Q. Excluding the 511 acres, the Purchase

13 Property now, and --

14 A. The 511 is treated differently, because the

15 parties believed that they had identified 511 acres

16 that Pardee wants, but it's not 511, Mr. Jimmerson,

17 because I've explained that the 511, included within

18 the 511 are golf courses.

19 THE COURT: That's not theirs.

20 THE WITNESS: That's not theirs so you

21 started with the 511, and you came in, and so, and it's

22 so frustrating, because I can understand with the

23 utilization of the different terms without

24 understanding what was actually going on.

25 THE COURT: Contemporaneously.

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1 THE WITNESS: On the ground

2 contemporaneously. You could not understand that there

3 were these great big parcels that were taken out as a

4 result of development choices made by both parties.

5 THE COURT: Right.

6 BY MR. J. J. JIMMERSON:

7 Q. Now, would you look, please --

8 THE COURT: It's almost a moving target.

9 THE WITNESS: Yes, your Honor, it is.

10 BY MR. JAMES M. JIMMERSON:

11 Q. Would you look then, please, at Exhibit 55,

12 which falls at 749?

13 A. You want me to look at Bates 755?

14 THE COURT: This one.

15 BY MR. J. J. JIMMERSON:

16 Q. Yes. The bottom says it's Option Property,

17 that property crosshatched area designated as

18 production residential property or traditional

19 residential neighborhood during the joint planning

20 process.

21 Do you see that?

22 A. Yes. I'm trying to find it, but I recall

23 reading it.

24 Q. I want you to have it in front of you. It's

25 55, and it follows 749, it's the second C-1. You had

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1 two C-1's in your hand. It's the second one.
 2 A. Can't find the first C-1 now.
 3 Q. Just find any C-1?
 4 A. I have a C-2, I got a --
 5 Q. Hang on, it's gotten out of place here.
 6 That's Exhibit D. That's 755, Here's Exhibit C-2?
 7 Q. Right.
 8 A. C-1 and then the second C-1, you're talking
 9 about 55.
 10 Q. Let's talk about this one first.
 11 A. Okay. Back --
 12 Q. The C-1?
 13 A. Back to the C-1's.
 14 Q. Right. C-1 now with the color map, which is
 15 749, Bates Stamp 749?
 16 A. Yes, sir.
 17 Q. Okay, great, and we'll turn the page to page
 18 755.
 19 A. Okay.
 20 Q. At the top, it says I believe the following:
 21 Parcel boundaries and phasing may be modified during
 22 development. As used in this Exhibit, the term
 23 "traditional residential neighborhood" means that the
 24 production residential property the Option Property is
 25 that portion of the production residential property

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1 located outside the boundary of the initial property.
 2 Do you see that?
 3 A. Yes.
 4 Q. Do you agree with that statement, yes or no.
 5 THE COURT: If you can't answer yes or no --
 6 THE WITNESS: It's a no.
 7 BY MR. J. J. JIMMERSON:
 8 Q. It's a no. You don't agree with your own
 9 statement on this document?
 10 A. I do not believe it's accurate in that the
 11 initial property, in my judgment, had already been
 12 planned to be modified. The golf course was gonna
 13 be --
 14 Q. And the initial property, that which we see
 15 looking at the documents, top left-hand portion, but it
 16 would really be the bottom left-hand portion?
 17 A. It's the bottom property map as you hold it
 18 correctly, and remember, that was identified as 250
 19 acres that that was gonna be the starting point of the
 20 development to ensure that Pardee had \$10 million worth
 21 of land.
 22 Q. Right. But whether you agree with it or not,
 23 this document says what it says.
 24 A. Oh, yeah, it definitely says what it says.
 25 Q. All right. Now, turning the page --

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1 A. Yes, sir.
 2 Q. -- to C-1, Bates Stamp P H 55?
 3 A. Yes, sir.
 4 Q. It says at the bottom of the Option Property,
 5 that property crosshatched designated as production
 6 residential property or traditional residential
 7 neighborhood during the joint planning process, end of
 8 quote, and it shows everything north of the north edge
 9 of Clark County.
 10 Do you see that?
 11 A. Yes, I do.
 12 Q. And is that what is being referenced as
 13 crosshatched?
 14 A. Yes.
 15 Q. That's how I interpret it.
 16 A. You're accurate.
 17 Q. So now, in combination, that is to say the
 18 land south of the Lincoln line, first C-1, 749?
 19 A. Yes.
 20 Q. And land north of the county line, PH 55 is
 21 the Option Property?
 22 A. It includes the Option Property, that's
 23 really, if you combine these two things, Mr. Jimmerson,
 24 it's really called the entire site.
 25 Q. For purposes of this contract, you title it

District Court IV

1 Option Property?
 2 A. No, sir. For purposes of this contract, we
 3 cannot lose sight of the fact that this is an entire
 4 site, and that within specific areas we identify
 5 single-family production property, which becomes the
 6 option property that remains.
 7 There are two options. The parties
 8 negotiated an option which allowed Pardee to buy the
 9 entire site. That's Option Number 1.
 10 Option Number 2 was Pardee negotiated and
 11 said, We, Pardee, want to be the single person that
 12 controls what happens on single-family production
 13 property. We want to be the master developer of that,
 14 either build our own homes or bring in guest builders.
 15 At no time did anybody think that these maps
 16 were going to require X number of acres of land. That
 17 was done in a different section of the contract when
 18 Mr. Lash asked me to use my best efforts to get, I
 19 think 13,000 acres of single-family homes in Lincoln
 20 County.
 21 At the time we all had a big appetite. As it
 22 turned out, they weren't going there.
 23 Q. It, it didn't happen.
 24 A. Not going north of the Clark County line.
 25 Q. Right.

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1 A. But there is a provision that talks about the
2 total number of single-family homes, and there is a
3 provision that makes it clear that Pardee has an option
4 to buy all the single-family residential property that
5 the parties designate --

6 Q. Okay.

7 A. -- within this entire site.

8 Q. You understand the concept of parol evidence
9 not being permitted to alter the terms of a contract?

10 A. Of course.

11 Q. And this sort of is an integrated agreement?
12 It says so, right?

13 A. Yes.

14 Q. So you're not suggesting you're entering
15 parol evidence to try to construct this document?

16 MS. LUNDVALL: Your Honor, I'm going to
17 object. There is a difference between an integrated
18 contract and parol evidence, so this question contains
19 a material misstatement to the witness.

20 MR. J. J. JIMMERSON: We have been approached
21 by opposing counsel there can't be parol evidence, and
22 all I'm suggesting is at a moment in time, and there
23 are eight further amendments, your Honor, which we'll
24 go through. At a moment in time there was a definition
25 with respect to Option Property and a definition with

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1 respect to Purchase Property. It affects those terms
2 in the agreement in Exhibit 1 that I haven't bothered
3 this man with, but I'm trying.

4 You have to understand how this developed. I
5 don't have any quarrel with the cooperation between
6 these parties, I understand that, but they never went
7 back to the plaintiff to modify the definitions.

8 THE COURT: That's a whole different issue.
9 My problem with the question is he's not here as an
10 expert on parol evidence. You happen to be an
11 attorney, God love you, but I will object, I don't want
12 the question anyway, because I think that's a legal
13 issue. I'm sure we will at some point or have argued
14 it recently.

15 MS. LUNDVALL: Exactly.

16 THE COURT: He's a percipient witness, and
17 that's why I'm going to sustain the objection that I
18 don't think it's appropriate to ask him a legal
19 question.

20 Now, and I understand, okay, so we'll do it
21 that way.

22 MS. LUNDVALL: Thank you, your Honor.

23 And in addition, the Court's order dealing
24 with the parol evidence only dealt with the initial
25 agreement.

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1 THE COURT: I understand. I went back and
2 looked at it, Ms. Lundvall.

3 MS. LUNDVALL: Thank you, your Honor.

4 THE COURT: I know where we stand, and let's
5 move forward, and Mr. Jimmerson is ready to move
6 forward.

7 BY MR. J. J. JIMMERSON:

8 Q. The parcel boundaries and phasing required
9 the continual mutual agreement of the parties; is that
10 right?

11 A. Yes.

12 Q. And the continual mutual agreement of the
13 parties is something that progressed months and years
14 following May of 2004 through 2008 and 2009?

15 A. Yes, sir.

16 Q. Okay. And the definition of Purchase
17 Property, as we see in March of 2005, is different than
18 the definition of the Purchase Property from May of
19 2004, correct?

20 A. The, the entire document reflects an approach
21 which is becoming more refined with every paragraph,
22 because every day there's something happening to change
23 the boundaries. So when we say, so when we say the
24 Purchase Property is fixed at a specific point in time,
25 in my judgment, is irrelevant with respect to whether

District Court IV

1 or not Pardee and CSI agreed to sell certain property
2 and that they performed in doing so.

3 BY MR. J. J. JIMMERSON:

4 Q. Do you know whether or not the definitions of
5 Purchase Property and Option Property impact the amount
6 of compensation my clients are entitled to receive?

7 A. No. I recall that during the deposition
8 there was a percentage difference, something like that.

9 Q. Would you agree that the choice to build
10 1,950 going north changed between September 1 of 2004,
11 Amendment 2, to March 28th of 2005?

12 A. There was a physical change?

13 Q. There was a physical location change, yes?

14 A. Yes, sir.

15 Q. And there was a physical location change in
16 the definition of Option Property in March of 2005,
17 correct?

18 A. No.

19 Q. In other words, what you're looking at,
20 these, Exhibit C-1, are different than the Exhibit C's
21 of the earlier agreements we went over the Amendment
22 Number 2 or the original agreement?

23 MS. LUNDVALL: Once again, your Honor, this
24 is now misstating this witness' testimony. I don't
25 know how many times he has to tell Mr. Jimmerson that

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1 it, it requires a designation by CSI of what the Option
 2 Property was.
 3 MR. J. J. JIMMERSON: I understand.
 4 MS. LUNDVALL: And he --
 5 THE COURT: I understand. I do understand
 6 the testimony. I think we've gone over this many
 7 times, so let's just move on.
 8 MR. J. J. JIMMERSON: Thank you.
 9 THE COURT: Because we understand the point
 10 of what's in the documents, so we understand the
 11 interpretation and the understanding of at least CSI,
 12 which is what Mr. Whittemore is here for.
 13 BY MR. J. J. JIMMERSON:
 14 Q. The parties to the amended and restated
 15 agreement March 28, 2005, were CSI and Pardee, right?
 16 A. Yes, sir.
 17 Q. Were Mr. Wolfram and Mr. Wilkes generally a
 18 party to that agreement?
 19 A. Not that I recall.
 20 Q. Would you turn, please, to the amendments in
 21 Exhibit 6?
 22 A. Okay.
 23 Q. We're gonna cover eight more amendments to
 24 this now restated document.
 25 THE COURT: Hold on. Exhibit 6, we need a

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1 new book.
 2 THE WITNESS: I apologize if these are going
 3 back out of order.
 4 MR. J. J. JIMMERSON: 20 lashes.
 5 THE COURT: Mr. Whittemore, mine went back
 6 out of order, but we'll fix them at the end of the day.
 7 We'll get them fixed.
 8 Exhibit 6, right, Mr. Jimmerson?
 9 MR. J. J. JIMMERSON: Yes, your Honor.
 10 THE WITNESS: And we're talking about --
 11 THE COURT: A new binder.
 12 MR. J. J. JIMMERSON: It's a new binder,
 13 hundred percent, right.
 14 THE WITNESS: Can I put in Number 4, please?
 15 BY MR. J. J. JIMMERSON:
 16 Q. Please.
 17 A. Thank you.
 18 Okay, back up on the shelf. Thank you.
 19 Okay. Jim.
 20 Q. Would you look at Exhibit Number 6, which is
 21 called, Amendment Number 1 to the Amended And Restated
 22 Option Agreement, which I will tell you we've been
 23 looking at Exhibit 5.
 24 MS. LUNDVALL: Your Honor, at this point in
 25 time, I need to place a caution for purposes of the

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1 court reporter and ask her for to designate this
 2 portion of the record as confidential that is
 3 confidential beginning at Exhibit 6. That begins the
 4 designation for the purposes of our stipulated
 5 protective order.
 6 THE COURT: Can you note that in the record,
 7 and after we do the testimony we'll see how we want to
 8 do it, but absolutely.
 9 (The following portion of the transcript
 10 is designated as confidential by
 11 agreement of counsel for the parties.)
 12 THE COURT: So we're starting out with
 13 Exhibit 6, Amendment Number 1 to Exhibit 5.
 14 THE WITNESS: Yes, because the other ones
 15 didn't exist.
 16 Let's go.
 17 BY MR. J. J. JIMMERSON:
 18 Q. Now, a year and four months, a year and three
 19 months have passed. The date of this document is the
 20 28th of July, 2006.
 21 Do you see that?
 22 A. Yes, I do.
 23 Q. So we were at the amended and restated
 24 superceding document, March 28th, 2005?
 25 A. Yes, sir.

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1 Q. And a year and three months have passed,
 2 we're in the July of 2006.
 3 What happens to this Amendment Number 1 to
 4 the superceding amended and restated document of
 5 March 28th of 2005?
 6 A. Okay. Within this document, Pardee exercises
 7 its right to purchase an additional parcel, and we also
 8 have created a, on the land itself, on the physical
 9 land as reflected in Exhibit A, Bates 1103, your Honor.
 10 THE COURT: Okay. Thank you.
 11 That's referred to as Exhibit A, as part of
 12 the document?
 13 THE WITNESS: As part of the document, your
 14 Honor. It says, Map Showing Parcel Map Land And
 15 Additional Purchase Parcel. That's the, that's what
 16 it's entitled.
 17 THE COURT: Okay.
 18 THE WITNESS: So what have we done? Pardee
 19 and CSI have agreed -- and the orientation of this map,
 20 your Honor, is correct.
 21 THE COURT: Okay.
 22 THE WITNESS: So that the lower left-hand
 23 corner of this map, you have the great big north. They
 24 actually put it in the correct way.
 25 THE COURT: Okay.

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1 THE WITNESS: This goes along on the map in
 2 front of us simply straight up Highway 93.
 3 BY MR. J. J. JIMMERSON:
 4 Q. Like that?
 5 A. Yes.
 6 Q. Like that?
 7 A. Yes.
 8 Q. And so what is happening?
 9 A. What is happening?
 10 Q. A takedown of 822 acres?
 11 A. We are doing the following: If you could
 12 blow up the numbers on the little parcels that look
 13 like fingers, they are golf holes, your Honor.
 14 THE COURT: This is what you're talking about
 15 here?
 16 THE WITNESS: If I could show --
 17 THE COURT: Would you please?
 18 THE WITNESS: I'm not gonna get them out of
 19 order, because otherwise the books are gonna be
 20 horrible, but this, your Honor, these are, these are
 21 golf holes.
 22 THE COURT: That's okay.
 23 THE WITNESS: These, your Honor, these
 24 fingers are golf holes.
 25 See, this is --

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1 THE COURT: Oh, these are golf holes?
 2 THE WITNESS: Yes, that look like they're
 3 coming out of this.
 4 THE COURT: Oh, so for the record, for the
 5 record -- poor Ms. Lundvall, she's left out.
 6 It's on the right side of this exhibit, which
 7 is 1103. It looks like, it does look like fingers.
 8 These are golf holes on the right side, correct?
 9 THE WITNESS: That's correct, from the
 10 Highway 93 to -- this is called Coyote Springs Parkway.
 11 THE COURT: Okay.
 12 THE WITNESS: So those are holes, and if you
 13 were to count them out, you'd find nine or ten holes
 14 within those areas designated in that corner.
 15 THE COURT: Okay.
 16 THE WITNESS: This is the good news and the
 17 bad news. Mr. Jimmerson is gonna say, Isn't that the
 18 first parcel?
 19 THE COURT: Parcel Number 1?
 20 THE WITNESS: Isn't that the first part of
 21 250 acres? And the answer is, Of course.
 22 THE COURT: Yes.
 23 THE WITNESS: Of course, because the parties
 24 agreed that these were placeholders until we developed
 25 where residential homes are gonna be.

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1 Now, your Honor, with Mr. Jimmerson's
 2 approval, can I see show you where the single-family
 3 residential property is?
 4 MR. J. J. JIMMERSON: That's fine.
 5 THE WITNESS: I think it will be help.
 6 THE COURT: We know where the golf holes are.
 7 THE WITNESS: Except for this parcel right
 8 there, right here, your Honor.
 9 THE COURT: Except for that parcel.
 10 THE WITNESS: That parcel is part of a custom
 11 lot agreement.
 12 THE COURT: Right here, where I'm yellowing
 13 it in on mine.
 14 THE WITNESS: That's the special one, and CSI
 15 kept land over here but clearly was contemplating that
 16 this would be land that ultimately would be purchased
 17 by Pardee.
 18 THE COURT: Okay.
 19 THE WITNESS: Okay? So we wanted to have a
 20 custom lot agreement, because as part of the
 21 demographics, Pardee determined that there would be
 22 custom lot buyers.
 23 THE COURT: On the golf course?
 24 THE WITNESS: By the golf course, and they
 25 have had enough single-family homes here, here, here,

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1 and if we could show it?
 2 THE COURT: There are three locations of SFR
 3 land, correct?
 4 THE WITNESS: Yes.
 5 Can we show it on the map? This would really
 6 be helpful if you bring it up for the Judge. This is
 7 so clear.
 8 Your Honor, here's Highway 93.
 9 THE COURT: Okay.
 10 THE WITNESS: And here's 168.
 11 THE COURT: 168.
 12 THE WITNESS: And this little thing
 13 Mr. Jimmerson was pointing to was that outer edge
 14 boundary of what has been on these various exhibits.
 15 THE COURT: Right.
 16 THE WITNESS: And you will see, you can get
 17 Google Earth, you will see, you will see, number one,
 18 the golf course; number two, you will see actually
 19 graded lots that were ready for production, and you'd
 20 see there's nothing over here, because we don't know,
 21 but Pardee has in the back of their minds that, Wait a
 22 second, that could potentially be a multi-family, I
 23 will have to go back to Mr. Whittemore, see if I can
 24 keep that for multi-family and get more single-family
 25 residential up there, see if he will let me buy

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1 multi-family. Can we buy all the custom lots? No.
 2 We'll keep those. We'll sell them. We'll split them.
 3 If you want to pay us and put in the infrastructure,
 4 we'll come up with a custom lot agreement.
 5 THE COURT: That was a separate --
 6 THE WITNESS: Separate agreement totally,
 7 happened after the golf course was being built.
 8 THE COURT: But CSI has to compensate them
 9 for what you took?
 10 THE WITNESS: Yes. That land is now part of
 11 -- it's like jellybeans, you take three, you've got to
 12 give me back three somewhere else, okay, because at the
 13 end of the day, you still have to -- Pardee's given us
 14 84 million.
 15 THE COURT: For 650 acres?
 16 THE WITNESS: 950 acres.
 17 THE COURT: 950 acres?
 18 THE WITNESS: Yes. And anything other than
 19 that is all just simply adjustments of where these
 20 things are going.
 21 Here's the water plant that I was talking
 22 about right up here. Here's, these are, these are
 23 ponds where you're actually delivering water to
 24 everything.
 25 The point was that none of this could have

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1 been identified during the process of negotiating this
 2 agreement, because you didn't have all the
 3 professionals coming in and identifying where they want
 4 to, your Honor.
 5 So now Mr. Jimmerson asked, Okay, tell me
 6 what these exhibits mean now in Number 6, and what
 7 we're doing --
 8 THE COURT: Okay. What you are doing
 9 July 28th, 2006?
 10 THE WITNESS: What we're doing is showing
 11 that we're gonna build exactly that on this exhibit and
 12 start to put together a plan where you can see that
 13 buyer is exercising their right to purchase an
 14 additional 822 acres.
 15 THE COURT: When you say "buyer," you mean
 16 Pardee?
 17 THE WITNESS: Pardee. They're gonna add
 18 822.88 towards their 1,950, and then that segment also
 19 includes areas designated as commercial property and
 20 certain lands which also is designated for custom lots,
 21 because again, the parties have an agreement as to what
 22 happens with those specific things. While they're
 23 getting 822, they're not ultimately gonna get to keep
 24 exactly that 822, because there will be further
 25 adjustments, so again, Pardee, in my perspective, is

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1 being overcompensated for what they're paying. In
 2 other words, they're getting more land during this
 3 process.
 4 MR. J. J. JIMMERSON: Okay.
 5 MS. LUNDVALL: Your Honor, at this point in
 6 time, can we capture this Google Earth image and mark
 7 this as Defendant's next in line? It would be
 8 Exhibit VV.
 9 THE COURT: I assume your technical person --
 10 MR. J. J. JIMMERSON: That's fine. It
 11 doesn't matter.
 12 THE COURT: I assume you're the one that can
 13 capture it for us, your technical person?
 14 MS. LUNDVALL: Thank you.
 15 THE COURT: And make it VV.
 16 MS. LUNDVALL: It will be Exhibit VV.
 17 THE COURT: I want to make sure my clerk
 18 heard it.
 19 MS. LUNDVALL: And we would move for the
 20 admission of VV.
 21 THE COURT: Any objection? Okay, it's
 22 admitted.
 23 MR. J. J. JIMMERSON: No objection.
 24 THE WITNESS: So what happens, this is really
 25 critical, CSI is relieved of lots of obligations to

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1 build additional golf courses and to do other things,
 2 and CSI is going to be paid a water commodity charge of
 3 \$150,000 a month, because it's very expensive to pump
 4 that water, deliver the water and do all that, so the
 5 parties are again splitting costs and coming up with
 6 plans to --
 7 THE COURT: Keep the golf course?
 8 THE WITNESS: -- keep the golf course green.
 9 BY MR. J. J. JIMMERSON:
 10 Q. Okay.
 11 THE COURT: As part of this Amendment 1?
 12 THE WITNESS: That's correct, because you
 13 will see we talk about water, financing it through GID,
 14 we talk about infrastructure, sharing infrastructure
 15 costs, we've negotiated a CC&R handbook, and that's
 16 reflected in this agreement. We're adopting it. So
 17 throughout this document, paragraph by paragraph, we
 18 are now describing again a brand new deal.
 19 BY MR. J. J. JIMMERSON:
 20 Q. Okay.
 21 A. Modified, but it is not a superceding
 22 document yet, because the lawyers haven't gotten mad at
 23 us enough to say, Well, we have to put it into one
 24 document.
 25 THE COURT: And the 822.88 acres, that still

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1 could be applied towards 1,950, but it may not all be
 2 applied, depending on what happens.

3 THE WITNESS: Exactly, your Honor, because
 4 again, just like the earlier property was subject to
 5 these minor modifications, until you have a very
 6 specific plan and you've done all your calculations and
 7 adjustments --

8 THE COURT: Right.

9 Is somebody keeping track of all these
 10 jellybeans, I hope?

11 THE WITNESS: That's exactly the point, is
 12 that Pardee will never lose a jellybean, and neither
 13 will CSI, I can just tell you that, okay?

14 THE COURT: Somehow I suspected that. I
 15 don't even want to know what the jellybean counter got,
 16 okay.

17 BY MR. J. J. JIMMERSON:

18 Q. Could we just look at the balance of the
 19 exhibits?

20 A. Sure.

21 Q. Okay. What is Exhibit A, please? Is it 822
 22 acres? Is it 250 acres? Is it 1,950 acres? What's
 23 Exhibit A? I read it as 822 acres. If I'm misreading
 24 it, correct me. The parcel says, it says 822 acres,
 25 see?

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1 A. I believe that the parcel of land that is
 2 designated as -- well, unfortunately we're gonna have
 3 to get into -- to make sense of this, your Honor, I'm
 4 gonna have to take you forward, Mr. Jimmerson, to 1105.

5 THE COURT: Bates Stamp 1105, that's fine,
 6 because right now Exhibit A, which is 1102, is blank.
 7 It says, See attached, but I don't know if the order we
 8 have here, do you, Mr. Whittemore?

9 THE WITNESS: I think the order is correct.

10 THE COURT: Okay.

11 THE WITNESS: So I think that that
 12 information, I think that that shows you something
 13 that, in relationship to 1105, will become clear.

14 THE COURT: Okay.

15 THE WITNESS: So if you'll please turn to
 16 1105?

17 THE COURT: Okay.

18 THE WITNESS: Okay. Now, here we go.
 19 To get to the total that -- and 1106.

20 THE COURT: Think of them in conjunction with
 21 each other?

22 THE WITNESS: Yes, I would ask that you do
 23 so, simply because, Mr. Jimmerson, your Honor, what has
 24 happened --

25 THE COURT: Mr. Jimmerson, do you want to

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1 come up?

2 MR. J. J. JIMMERSON: Yes, please.

3 THE COURT: Ms. Lundvall, you're invited to
 4 come up at will.

5 MS. LUNDVALL: Thank you, your Honor.

6 THE COURT: You're not left out.

7 THE WITNESS: You can see the degree of
 8 specificity that has now taken place with respect to
 9 the property.

10 This is the Lincoln County line. There's
 11 Highway 93. There's 168. There's the golf course
 12 right there we previously --

13 THE COURT: That orients us, okay.

14 THE WITNESS: This line, your Honor, do you
 15 have a highlighter?

16 THE COURT: I do.

17 THE WITNESS: Mr. Jimmerson, this line will
 18 generally look like what everybody was worried about at
 19 the beginning of the world, so what the parties did,
 20 those designations are here, and these designations, I
 21 can tell you what they are.

22 MS. LUNDVALL: Because of the coloring on the
 23 map?

24 THE WITNESS: Yeah, the coloring on the map.
 25 Generally all of this is Pardee.

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1 THE COURT: Okay.

2 THE WITNESS: And this wraps around to cover,
 3 and I can't tell you the exact wash, your Honor, but
 4 this is a good estimation. It's something like that.
 5 That's also Pardee.

6 THE COURT: That's also Pardee.

7 THE WITNESS: Again, it had to be acquired,
 8 your Honor, to equalize the amount of land they needed.

9 THE COURT: Sure.

10 THE WITNESS: And then this makes it very
 11 clear, so if I grew this line, I grew this line a
 12 little bit more like this, it looks like it's a little
 13 bit higher, and I fit it down a little lower, it makes
 14 it clear the CSI/Pardee planning area, 4,207 acres,
 15 which clearly would have your 1,950 in this, leaving
 16 excess acres for CSI. That's 4,207 acres.

17 The CSI planning area --

18 THE COURT: So you're saying what we see as
 19 Exhibit 1106, the 4,207 would include --

20 THE WITNESS: The 1,950, yes.

21 THE COURT: So we're at 1,950 now, not -- at
 22 least the area, not necessarily what each plot is?

23 THE WITNESS: That's correct. Therefore,
 24 this line is extremely important, because the parties
 25 have said, Well, CSI, this is your planning area for

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1 the PGA Village. That alone --

2 THE COURT: I see.

3 THE WITNESS: You see, so the parties have

4 said to Pardee, Looks like your single-family

5 residential is gonna be over here, you should make

6 arrangements to provide services to do whatever is

7 next. Let's build the road together, and by the way,

8 we have just negotiated with the PGA to become the PGA

9 Village, the only one, huge, you know, pluses, yada,

10 yada, yada.

11 THE COURT: So this CSI planning area most

12 likely will not be available, you're telling Pardee

13 most likely, if it all works?

14 THE WITNESS: But if things are going really

15 well, we might drop you off over here, which, your

16 Honor, in time, there was considerable negotiation as

17 to whether we could get some single-family homes,

18 right, because Pardee was in the business of buying,

19 and we were in the business of trying to sell.

20 BY MR. J. J. JIMMERSON:

21 Q. Just a question, where is the 822?

22 A. Right here and right here.

23 Q. Okay.

24 THE COURT: And the 822 is part of the 1,950?

25 MS. LUNDVALL: Can I see that again?

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1 THE WITNESS: Yes. The 822 is in here, and

2 the 1,950 is all in here.

3 THE COURT: Because the 822 included the golf

4 course?

5 THE WITNESS: Yes.

6 Well, but it wasn't -- you have to subtract

7 it out.

8 THE COURT: Exactly, so the jellybeans --

9 BY MR. J. J. JIMMERSON:

10 Q. But here's the question: Is the 822, the way

11 you explained it, I understood it being the 822 is out

12 of the 1,950; is that correct?

13 A. No.

14 Q. It's part of the 1,950?

15 A. Yes, it is, sir.

16 THE COURT: So the 822 is part of the 1,950.

17 I had that right, all right.

18 BY MR. J. J. JIMMERSON:

19 Q. And you indicated there were some other

20 concessions that were important to CSI, including not

21 having to do certain infrastructure, remember, that

22 Exhibit C had shown early on, and then there's this

23 joint and financed improvements where you're having a

24 sharing relationship with Pardee?

25 A. This is the most important document between

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1 CSI and Pardee with respect to -- and this shows the

2 level of trust, hundreds and hundreds of millions of

3 dollars of improvements that Pardee is putting in and

4 knows that CSI is going to have to pay a percentage of

5 these down the road.

6 So this document, while it looks like, Oh,

7 it's just one page, is extraordinarily significant,

8 because it literally involves hundreds of millions of

9 dollars.

10 Q. Got it.

11 As it has turned out, did this project end by

12 virtue of the economic downturn?

13 A. I believe that Coyote Springs will succeed.

14 There has been, there have been reports of lawsuits

15 between Pardee and the successor owner members in CSI,

16 and I believe that those disputes, as well as the

17 economic realities, have caused the parties not to

18 advance construction on certain facilities.

19 Q. And the last three years, four years, as I

20 recall, 2009 to the present?

21 A. I would say that really, things started to

22 come to a grinding halt the summer of 2010.

23 Q. Okay.

24 A. Through today.

25 Q. And when did you lose your interest in CSI,

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1 if you have lost your interest at all? I don't know if

2 you have.

3 A. Your Honor, the terms of my settlement

4 agreement with the Seenos is confidential.

5 Q. I just want to know the year when it. Ended

6 I don't want to know the terms.

7 THE COURT: We don't want to know that.

8 That's not relevant to our issues.

9 BY MR. J. J. JIMMERSON:

10 Q. I want to know when does your personal

11 knowledge of these amendments end?

12 THE COURT: That's what we're looking for.

13 BY MR. J. J. JIMMERSON:

14 Q. I'm sorry.

15 A. Fair enough.

16 I retired from Coyote Springs in March of

17 2011, and I resolved my disputes in probably January of

18 '12.

19 BY MR. J. J. JIMMERSON:

20 Q. Very good. Thank you.

21 MS. LUNDVALL: January 2012?

22 THE WITNESS: I think so, yes.

23 MS. LUNDVALL: You resolved your disputes

24 with the Seenos in 2012?

25 THE WITNESS: Yes, ma'am.

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1 MS. LUNDVALL: January?
2 THE WITNESS: Yes, ma'am.
3 BY MR. J. J. JIMMERSON:
4 Q. Let's turn to the next exhibit.
5 A. My brain could be wrong on that, but I'm
6 giving you the best estimate.
7 MS. LUNDVALL: Was it this year or last year?
8 THE COURT: January of this year or last
9 year?
10 THE WITNESS: '13. Thank you.
11 THE COURT: I think she's refreshing your
12 recollection.
13 THE WITNESS: She did.
14 THE COURT: Okay. She doesn't want to
15 suggest --
16 THE WITNESS: It is.
17 THE COURT: -- it was this year, and we are
18 in 2013.
19 MR. J. J. JIMMERSON: It was one of the
20 greatest non-suggestions there ever was.
21 THE COURT: I get confused on 2012 and 2013.
22 THE WITNESS: I had totally missed that.
23 THE COURT: That's all right.
24 Okay, Mr. Jimmerson, where are we at now?
25 / / /

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1 BY MR. J. J. JIMMERSON:
2 Q. Turn now to Exhibit 7.
3 A. Exhibit 7, okay.
4 Q. This is called Exhibit 2, 2 of 8, so you have
5 the superceding restatement document in March 2005,
6 Exhibit 5, now we have the second of the two
7 amendments. There's gonna be eight.
8 Number 2, this is -- now, follow along if I'm
9 reading the date right. I think it's September the
10 30th, 2006, so this is just a month and a half after
11 the previous one.
12 So what is going on with this Amendment
13 Number 2?
14 A. I needed money.
15 Q. So what is happening here? If it doesn't
16 relate to the property, I'm gonna kind of move on.
17 A. No, because again, it's everything that they
18 did related to, ultimately, the payment for property.
19 Q. Okay.
20 A. And what they did was prepay the referenced
21 installments from Paragraph 1 (b) (3) of the prior
22 agreement and prepaid \$6 million to help me at a time
23 where I needed the help.
24 Q. Did you have to give anything back, free land
25 or anything like that?

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1 A. No. We negotiated a, a, a discount at the
2 back end as a result of the prepayment, which was a
3 calculation of the interest that they would have lost
4 on it.
5 Q. Okay. A discount towards the end?
6 A. Yes.
7 Q. That's fine.
8 Let's go to the next, sir, to Exhibit 8 that
9 is Amendment Number 3 to that amended and restated
10 option agreement of March 2005, and this one is dated
11 November 22nd of 2006, so now it's about two and a half
12 months later?
13 A. Yes.
14 Q. What's going on with Amendment Number 3?
15 We're transferring the escrow from Stewart Title to
16 Chicago Title.
17 Q. What was that?
18 A. The partners had made a decision that they
19 wanted to move to Chicago Title.
20 Q. So had this essentially been a move from
21 Lisa Jones to Francis Butler or Francis Dunlap?
22 A. I don't recall.
23 Q. Do you see Francis Butler is now identified
24 as the person to receive this information in the middle
25 of the page on Paragraph 2?

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1 A. Yes, I recall it.
2 Q. Very good.
3 Let's move to Number 9 to the March -- let's
4 see, it gets to which date, December 20th of 2007.
5 Now, this is a year and a month later, 13 months later,
6 from November of 2006 to December of 2007?
7 A. Magically.
8 MS. LUNDVALL: Your Honor, and as we're
9 continuing to go through this, Exhibits 7, 8, 9, they,
10 too, have the same designation as confidential, and I'm
11 assuming the transcript then will have that same
12 confidentiality at this point.
13 THE COURT: What we'll do, when you no longer
14 want the confidentiality, let the Court and the court
15 reporter will know. We'll keep it continuing it unless
16 the court reporter is instructed something different.
17 MS. LUNDVALL: Thank you.
18 THE COURT: You're welcome.
19 THE WITNESS: So finally, magic, jellybeans
20 are accounted for, Paragraph 2.
21 THE COURT: Okay.
22 THE WITNESS: We went from the 880 number
23 down to the 810.05.
24 BY MR. J. J. JIMMERSON:
25 Q. So Paragraph 2, Page 1 of the agreement is

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1 hereby amended so that the term "Parcel Map Land"
 2 described and defined in Paragraph 2 of the first
 3 amendment shall consist of 810.05, acres and not the
 4 acreage originally stated therein, which was the 822
 5 and change?
 6 A. 882.
 7 THE COURT: So it was changed to --
 8 THE WITNESS: 810. It went down because
 9 there was adjustments.
 10 THE COURT: But the 810.05 was still part of
 11 the designated 1,950?
 12 THE WITNESS: Yes, your Honor.
 13 THE COURT: Just to make sure we're
 14 consistent.
 15 THE WITNESS: And this agreement then
 16 restates, introduces the concept of the per acre price
 17 now being reflective of that which was contained on the
 18 original exhibit, and therefore, in Paragraph 3, the
 19 price per acre was \$43,076.92.
 20 BY MR. J. J. JIMMERSON:
 21 Q. Okay. Stay in Paragraph 2.
 22 It also says, Certain land designated for
 23 development of custom lots pursuant to a separate
 24 agreement between the parties, the 250 acre parcel
 25 previously purchased by buyer at the initial closing, a

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1 portion of the first golf course to the west of Coyote
 2 Springs Parkway, and a portion of other areas
 3 designated as commercial property pursuant to the
 4 agreement which will be transferred to seller as
 5 provided in the agreement.
 6 What's happening here, the second portion of
 7 the same paragraph? We reduced 882 to 810. What's
 8 going on here?
 9 A. What you're doing here is we have created
 10 custom lots, which I showed your Honor.
 11 THE COURT: Okay. Around the golf course?
 12 THE WITNESS: Around the golf course and said
 13 by separate agreement, What do you want to do? And we
 14 negotiated and said, Okay, if you put in the
 15 infrastructure to those custom lots, we'll sell them
 16 and agree to split the proceeds in the following
 17 fashion, and I believe it was 50/50.
 18 BY MR. J. J. JIMMERSON:
 19 Q. Okay. And was there a purchase price
 20 structure? In other words, how did that work if you're
 21 gonna go 50/50 on developing and selling custom lots,
 22 and maybe you sell them to Tull Brothers or you sell
 23 them to somebody else, how do you get paid since you
 24 own them originally?
 25 A. By separate agreement when they're closing

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1 per parcel, per lot sold. There would be proceeds that
 2 would be sent to Pardee and proceeds that would be sent
 3 to CSI.
 4 Q. Earlier in the documents I saw where you
 5 retained for yourself and negotiated for Pardee what I
 6 call a custom lot enhancement or increase in price?
 7 A. Yes.
 8 Q. I thought, if my recollection was right, it
 9 was one and a half times, one and a half times if -- it
 10 was a 50 percent increase in the basic price?
 11 MS. LUNDVALL: It's not a custom lot
 12 enhancement.
 13 THE WITNESS: What we --
 14 THE COURT: Does that refresh your
 15 recollection, or do you know what he's speaking of?
 16 THE WITNESS: No, I don't recall that, but I
 17 do recall what we negotiated.
 18 THE COURT: Okay. Well, that would help us.
 19 THE WITNESS: We negotiated. We negotiated a
 20 premium on each of those lots, and we agreed with
 21 respect to some of those lots that there would be a
 22 floor so that someone other than Pardee would come in,
 23 sell the house at a stated price, and not include a
 24 view premium or course premium unfairly to deprive the
 25 original seller of the benefits of the deal.

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1 THE COURT: Of the bargain.
 2 THE WITNESS: Pardee would never do that to
 3 us, but if Pardee sold it to somebody else, they might
 4 come in and just simply say that the price of the house
 5 is 425 instead of the price of the house being 350,
 6 because as compared to everything else along the
 7 neighborhood, it was 350, and that they received a
 8 \$75,000, you know, increase.
 9 BY MR. J. J. JIMMERSON:
 10 Q. So how did you receive, if at all, how did
 11 CSI received the custom lot premium?
 12 A. We haven't yet, and we haven't received any
 13 of the premiums on the lots along the golf course,
 14 because none have been sold.
 15 Q. Okay. But what was the agreement? What was
 16 your premium increase?
 17 A. My understanding is that what we did is
 18 billed that premium increase just for that, the price
 19 of the lot, because all of those lots were under the
 20 control of Pardee and CSI.
 21 Q. All right. And then the proceeds, if and
 22 when they're sold, will go 50/50?
 23 A. Yes. That's my recollection.
 24 Q. Do you remember how many custom lots are
 25 affected on --

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1 A. I don't recall how many, but we were, what we
2 had determined was our value of the land was somewhat
3 equivalent as to the cost of infrastructure, and
4 therefore, the parties would basically, basically we'd
5 throw in the land and they would throw in the
6 improvements.
7 Q. All right. Thank you.
8 THE COURT: And that's a totally separate
9 agreement?
10 THE WITNESS: Yes, your Honor.
11 THE COURT: It has nothing do with --
12 THE WITNESS: Not anything at all.
13 THE COURT: As far as our issues, I
14 understand what you're saying, nothing do with the
15 first Option Agreement?
16 THE WITNESS: No, no, your Honor.
17 THE COURT: I wanted to clarify.
18 THE WITNESS: No. It was totally done as a
19 result of separate negotiations and separate
20 agreements.
21 THE COURT: Okay.
22 MS. LUNDVALL: While we're here, do you want
23 to cover Paragraph 6?
24 MR. J. J. JIMMERSON: You're not telling me
25 how to conduct my examination, are you?

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1 MS. LUNDVALL: I'm just trying move to things
2 along.
3 MR. J. J. JIMMERSON: I appreciate it.
4 BY MR. J. J. JIMMERSON:
5 Q. What else is being accomplished here in this
6 Exhibit Number 9, Amendment 4?
7 A. Well --
8 Q. You modified the price as reflected in
9 Exhibit E, Paragraph 3?
10 A. Uh-huh.
11 Q. And what's happening with regard to the
12 \$12 million? What's happened here?
13 A. Well, what happened, we have a modified
14 price per acre.
15 BY MR. J. J. JIMMERSON:
16 Q. Per acre.
17 A. What happened is we had calculated what the
18 additional purchase, parcel price is, and it says it's
19 \$12,641,331, which if you look at Exhibit A to the
20 Parcel 1 acreage calculation of July 30th, 2007, at
21 Bates Number 1121, your Honor.
22 THE COURT: Okay. There it is.
23 THE WITNESS: You'll see the custom lots.
24 There's a, there's total acreage, there's golf course
25 lots, there's Highway 93, there's Lake Village Park,

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1 all of these parcels, all of these specific parcels now
2 have specific acreage next to their little name.
3 THE COURT: But that's all a separate
4 agreement?
5 THE WITNESS: Well, no, this includes --
6 because, because we're including everything, your
7 Honor.
8 THE COURT: Yes.
9 THE WITNESS: We are counting everything
10 here, and the subtotal is --
11 THE COURT: I see it now.
12 THE WITNESS: If you take a look, we've
13 charged for the wash, we've charged for a park, we
14 charged for, you know, everything that -- the highway.
15 You take a look at who is who for what, and then each
16 of those calculations, John I sat down and negotiated.
17 For example, if you take a look at 93-1, the
18 number is 21,583. By my calculation, it looks like
19 it's 50 percent of the 43,000, your Honor.
20 THE COURT: I see. And that would be your
21 negotiation?
22 THE WITNESS: Yes.
23 And then you will see 30,000 down below for
24 the washes, simply because I said, John, it's not fair,
25 these are only half, let's negotiate a fair price for

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1 your obligation to pay for the washes that are
2 necessary for you to build the lots that you're
3 building on. He said, Okay, that's fair, and we agreed
4 to 30,000.
5 BY MR. J. J. JIMMERSON:
6 Q. All right.
7 a. And then the water campus you'll see is at
8 half price, and you add up all of those things on the
9 value, you come up with a subtotal of 22,964,408.
10 They've already paid \$10,000. Now, at 810.05, you see,
11 your Honor, the subtotal?
12 THE COURT: Hold on.
13 Yes.
14 THE WITNESS: Yes.
15 THE COURT: Okay.
16 THE WITNESS: And then across you'll see the
17 value of what the 810 would be in money.
18 THE COURT: 12 million.
19 THE WITNESS: And you subtract out
20 the 10 million you've already paid and then subtract
21 out a park credit, which they had already given to us,
22 so they don't pay us twice.
23 THE COURT: Right.
24 THE WITNESS: And you end up with a total of
25 \$12,641,331, which means that they're buying, as of

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1 this date, that they're ahead of us. They have paid
2 more for that the kitty than we've given them property
3 for.

4 THE COURT: The property.

5 BY MR. J. J. JIMMERSON:

6 Q. Okay. Now, a couple of questions, first, do
7 you recall that as it relates to custom lots, even
8 though you had a separate agreement here --

9 A. Uh-huh.

10 Q. -- by 2007, do you recall the custom lots
11 that were developed by Pardee were part of the
12 definition of residential lots originally in May of
13 2004?

14 A. No.

15 MS. LUNDVALL: I'm going to object to that
16 representation, because that's not the language of the
17 agreement.

18 MR. J. J. JIMMERSON: Okay.

19 THE COURT: Do you have a recollection of it?

20 THE WITNESS: I specifically do.

21 THE COURT: Okay.

22 THE WITNESS: We would never have --

23 THE COURT: Based on that objection, as long
24 as Mr. Whittemore has a recollection of what's in
25 there, I don't -- can you tell us what you recall?

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1 THE WITNESS: Yes. We had discussions, and
2 there was no chance that I was giving up the custom lot
3 business, because John knew, based upon my development
4 up in Red Hawk, that we were in the business of selling
5 custom lots on our golf courses in Northern Nevada, so
6 we specifically said no at the beginning of these
7 negotiations to have any discussions whatsoever
8 regarding custom lots. That occurred later.

9 BY MR. J. J. JIMMERSON:

10 Q. All right. Let me show you, please, Exhibit
11 2, just perhaps to refresh or correct your testimony.

12 THE COURT: Well --

13 MR. J. J. JIMMERSON: Well, your Honor --

14 MS. LUNDVALL: Come on. Come on.

15 THE COURT: Just ask the question,
16 Mr. Jimmerson, because if his recollection is wrong --

17 MR. J. J. JIMMERSON: I understand you,
18 Judge, but would you have me adopt his recollection
19 without looking at the document?

20 THE COURT: Not at all. If his recollection
21 is incorrect, Mr. Jimmerson, you should be refreshing
22 it appropriately.

23 THE WITNESS: Okay.

24 BY MR. J. J. JIMMERSON:

25 Q. Exhibit 2, second page.

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1 A. Yeah.

2 Q. All right. As in the middle of the page.

3 A. Uh-huh.

4 Q. It says, As used in this agreement --

5 THE COURT: Hold on, let me find it.

6 The middle of the page.

7 MR. J. J. JIMMERSON: 2.

8 THE COURT: I'm sorry, that's my fault.

9 As used.

10 BY MR. J. J. JIMMERSON:

11 Q. As used in this agreement, the term,
12 "production residential property," means that portion
13 of the net useable acreage as defined below that
14 encompasses all of the Purchase property and the Option
15 Property, which includes, without limitation, all
16 single-family detached production residential lots,
17 which shall include lots on which custom homes are
18 constructed by buyer, end of quote.

19 A. You read that correctly.

20 Q. Does it include construction lots for which
21 custom lots are constructed by Pardee as a buyer, you
22 said?

23 A. No. No.

24 Q. So what changes this language?

25 A. Because if you will recall, the modifications

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1 to the document in the Number 5, the amended and
2 restated agreement.

3 Q. All right.

4 A. And every single planning document referred
5 to what Pardee got as single-family production lots.

6 Q. Okay.

7 A. Not -- so because I was the person, the
8 person -- I was never going to designate the land
9 custom lots for Pardee. The custom lots were gonna be
10 retained. Just because I said, Well, if you allow us
11 to do so, we can, that's fine, but we were never -- and
12 that's why I explained it, we were never going to give
13 up the custom lots without us negotiating something
14 else for it.

15 Q. Within Exhibit 2, where does it state you
16 were never going to give them custom lots when their
17 definition in this contract that you signed speaks to
18 their residential properties including custom lots on
19 which they build houses?

20 MS. LUNDVALL: Your Honor, once again, I'm
21 gonna have to object. He keeps making reference to
22 custom lots. It's a reference to custom homes.

23 THE COURT: Homes?

24 MS. LUNDVALL: There is a difference between
25 custom homes and custom lots.

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1 MR. J. J. JIMMERSON: Judge, it says --
 2 MS. LUNDVALL: And he's not permitted to
 3 misspeak.
 4 THE COURT: I know.
 5 MR. J. J. JIMMERSON: Shall include the lots.
 6 THE COURT: Lots on custom homes.
 7 Is there a difference, Mr. Whittemore,
 8 between, at least for purposes of this case, between a
 9 custom home lot and what it says here, let's get it
 10 right, lots on which custom homes are constructed by
 11 buyer?
 12 Is there a difference?
 13 THE WITNESS: In the context of that portion
 14 of the agreement, that's not -- there's no difference.
 15 They are internally consistent. That is not what my
 16 testimony is.
 17 THE COURT: But he's asking the question: Is
 18 there a distinction?
 19 THE WITNESS: No.
 20 BY MR. J. J. JIMMERSON:
 21 Q. Here's my point, are you telling me, and I'm
 22 not fighting with you, because I don't know why you
 23 feel this way, are you telling me that the language
 24 here that I'm reading, that my clients read, that says,
 25 quote, That residential property for which they're

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1 gonna get a commission includes several items, one of
 2 which is all or one of which is lots on which certain
 3 construction -- excuse me, lots upon which custom homes
 4 are constructed by buyer got changed later on?
 5 A. I believe so.
 6 Q. Okay. Do you know which documents, of those
 7 that you've looked at, that deleted, as part of
 8 residential property, lots upon which custom homes are
 9 constructed by buyer?
 10 A. Well, I sure hope it's in the contract.
 11 Your Exhibit Number 5, it says, Amended And
 12 Restated Option Agreement.
 13 Q. Okay.
 14 A. Because the --
 15 Q. I didn't see it, but if I could call your
 16 attention to it to help you, look at Bates Number 82,
 17 Page 2 of Exhibit 5.
 18 A. That's where I was.
 19 Q. Okay. I don't see the change in the
 20 language.
 21 MS. LUNDVALL: Well, changes in language,
 22 your Honor --
 23 BY MR. J. J. JIMMERSON:
 24 Q. Can we look at it, please, together?
 25 THE COURT: Let's just let Mr. Whittemore

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1 look at it, okay?
 2 You've referenced to Page 2, Bates 082.
 3 Could you take your time and look at that?
 4 BY MR. J. J. JIMMERSON:
 5 Q. In the middle of the page, same language, As
 6 used in this agreement, are you with me?
 7 A. Yes.
 8 Q. As used in this agreement, the term
 9 "production residential property" means that portion of
 10 the net useable acres as defined below that encompasses
 11 all of the Purchase Property and Option Property, which
 12 includes, without limitation, all single-family
 13 detached production residential lots, which shall
 14 include single-family detached production residential
 15 lots on which custom homes are constructed by buyer.
 16 I don't see an amendment for that Exhibit 2,
 17 do you?
 18 A. Mr. Jimmerson, the language provides the
 19 following: If I've designated a lot, a single-family
 20 production lot, and it's on the golf course, and I give
 21 them the approval that it can become a custom lot under
 22 any sense of the word, that would be a land purchase
 23 for which your clients would be entitled a commission,
 24 based upon your statements to me that they're entitled
 25 to commissions on residential production homes.

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1 The custom homes referenced here are those
 2 which require a two step process, not a one step
 3 process.
 4 A one step process, your Honor, is I own it,
 5 I designate it as a custom, I designate it as a custom
 6 lot.
 7 THE COURT: Okay.
 8 THE WITNESS: And in the example that
 9 Mr. Jimmerson is going to, I would designate is as a
 10 single-family production lot, and he would come back
 11 and ask for my consent to come in and say, I would now
 12 like, based upon what I see, to turn these
 13 single-family production homes into custom lots. I had
 14 the absolute right to say, No, because single-family
 15 homes on custom lots was retained by me as part of the
 16 negotiations.
 17 They could, if -- just because it's an
 18 allowed use does not mean that the owner gives up his
 19 right to say, Stop, to say, Even though this is an
 20 allowed use, I'm telling you you cannot do this at this
 21 time, and that's what this process was all about, was
 22 the control that we had on designating what went on on
 23 the particular site.
 24 THE COURT: And when you say, "you," you mean
 25 CSI?

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1 THE WITNESS: CSI.
 2 BY MR. J. J. JIMMERSON:
 3 Q. Where is it in Exhibit 2, the Baseline
 4 Agreement, the right of you, having designated 1,500
 5 acres as of June 1 of 2004, that you had retained the
 6 right, even though you designated it as residential, to
 7 pull it back and say, You can't build a custom lot? I
 8 don't see any language.
 9 MS. LUNDVALL: Your Honor, once again --
 10 BY MR. J. J. JIMMERSON:
 11 Q. You're right, what I say is irrelevant.
 12 Where is it?
 13 A. Mr. Jimmerson, the designation of
 14 single-family residential by the master developer is
 15 final until the individual who purchased the property
 16 came back and got my consent to change it.
 17 For example, if, as a result of the change in
 18 market conditions, it became appropriate that they are
 19 no longer single-family detached, your Honor, but
 20 attached homes, duplexes, they would come back and say,
 21 Can we build duplexes on this land, and we would say,
 22 Yes.
 23 Now, there is a very long process,
 24 Mr. Jimmerson, that took place where we negotiated the
 25 exact number of units which could be built on a

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1 particular piece of land so that we could guarantee
 2 that it gave flexibility to Pardee but did not ruin or
 3 change the area plan we had devised.
 4 And so, your Honor, what we did, and again,
 5 this happens every day in my business, if someone comes
 6 in and says, Harvey, we planned this, we want to change
 7 it, I'm certainly not going to allow someone who pays
 8 \$43,000 an acre for a single-family home to come in and
 9 say, I'm turning it into commercial that's worth
 10 \$500,000 without me getting my little piece of the
 11 action. That's the reality.
 12 BY MR. J. J. JIMMERSON:
 13 Q. I'm with you.
 14 All I'm saying to you is that when you sold
 15 -- we know when you sold residential production
 16 residential property to Pardee?
 17 A. Yes.
 18 Q. Okay. You did not retain, at least under the
 19 terms of the agreement that I read, the ability to veto
 20 their use of, their construction of lots for custom
 21 homes?
 22 A. I, I -- Jim, Mr. Jimmerson.
 23 MS. LUNDVALL: Your Honor?
 24 THE COURT: Let him answer.
 25 THE WITNESS: I don't know whether it's, I

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1 don't know whether it's in any of the documents that
 2 you have in front of you. I don't have a clue of all
 3 the things that have been put together or haven't been
 4 put together, and I don't have any documentation in
 5 front of me that says this is the agreement that does
 6 A, B, C, D, and E.
 7 What I do know is that by agreement, Pardee
 8 and CSI agreed that no use that was designated could be
 9 changed without the approval of the other if it
 10 impacted a particular use or the valuation, because
 11 Mr. Jimmerson, can you imagine Coyote Springs
 12 controlling the commercial parts of this parcel and
 13 immediately deciding that they thought that they could,
 14 under their master plan amendments and their
 15 development agreement, to put in a pig farm?
 16 BY MR. J. J. JIMMERSON:
 17 Q. Next to custom homes, I'm with you.
 18 A. So there's zero chance that in that, in the
 19 documentation and the relationships of the parties,
 20 that you would have a circumstance where somebody could
 21 use property in a way that harmed the other or to take
 22 advantage of the other.
 23 Q. I'm with you.
 24 How many custom lots are allocated for Pardee
 25 to build?

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1 A. I believe the custom lots, I believe that the
 2 total number of lots within that area might be like 72
 3 or something.
 4 Q. I thought it was less, right.
 5 And my understanding of your testimony, they
 6 have not yet been constructed; is that right?
 7 A. They have not been sold. There has been work
 8 done on the lots, rough grading, and no, I don't know
 9 of any.
 10 Q. But no foundations and no sales?
 11 A. Nothing.
 12 MR. J. J. JIMMERSON: That's fine.
 13 Thank you very much.
 14 (End of the confidential portion of the
 15 Transcript.)
 16 THE COURT: Mr. Jimmerson? Mr. Jimmerson,
 17 who's your next witness?
 18 MR. J.M. JIMMERSON: Jim Wolfram, your Honor.
 19 THE COURT: Okay, where are my notes?
 20 THE CLERK: Please remain standing and raise
 21 your right hand.
 22 JAMES F. WOLFRAM,
 23 having been duly sworn to tell the truth, the whole
 24 truth, and nothing but the truth, was examined and
 25 testified as follows:

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1 Mr. Wolfram, you said we would need to
2 multiply the scale of one inch to 600 feet to get how
3 many feet from US Highway 93 to the easternmost edge of
4 Parcel 2?

5 A. You could be 15 and $3/8$ times the scale,
6 times the scale, and that will tell you how many feet
7 we got in there.

8 Q. Okay. Can you please tell us how many feet
9 that is, if you've got a calculator in front of you?

10 A. Go ahead and do it. You've got it in your
11 hand.

12 MR. J.M. JIMMERSON: If there's no objection?

13 THE WITNESS: It's simple math, inches times,
14 you know.

15 MR. J.J. JIMMERSON: Could we offer 9,225
16 feet, subject to defense counsel's confirmation? Six
17 times -- 9,000 plus $3/8$ of six hundred is 225, 9.225.
18 BY MR. J.M. JIMMERSON:

19 Q. Okay. Mr. Wolfram, from that calculation,
20 are you able to draw a conclusion as to whether or not
21 Parcel 2 is entirely within the bounds of Purchase
22 Property or Parcel 1 of that Map 9857?

23 A. It's outside the bounds of Parcel 1.

24 Q. How do you know that?

25 A. From yesterday, it's nearly 8,000 feet, and

1 this is over 9,000 feet.

2 Q. So if I were to subtract 9,225 from 8,000?

3 A. It would give you the number of feet to the
4 south side of the parcel.

5 Q. So approximately 1,225 feet?

6 A. Right.

7 Q. Thank you, Mr. Wolfram.

8 Mr. Wolfram, the next map, excuse me, the
9 next line below says, Parcel LP-1 of Book 138, Page 51
10 of Plats.

11 Does that mean there's a plat map entitled
12 "Book 138, Page 51"?

13 A. Let me get my bearings.

14 THE COURT: It's the second line down. It's
15 below Parcel 2 on the same map.

16 BY MR. J.M. JIMMERSON:

17 Q. I'm sorry, I'm back to Exhibit 10. I
18 apologize, Mr. Wolfram.

19 A. Oh, okay.

20 THE COURT: It has the next description.

21 THE WITNESS: That was it right there.

22 BY MR. J.M. JIMMERSON:

23 Q. Okay. Mr. Wolfram, have you looked at Plat
24 Map Book 138, Page 51?

25 A. Yes.

1 necessary.

2 THE COURT: Okay.

3 * * * * *

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5 ATTEST:

6 Full, true, and accurate transcription of proceedings.

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Loree Murray, CCR #426

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District Court IV

EXHIBIT E

DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,)	
)	
PLAINTIFF,)	
)	
vs.)	CASE NO. A-10-632338-C
)	
PARDEE HOMES OF NEVADA,)	
)	
DEFENDANT.)	
)	

TRANSCRIPT
OF
TRIAL PROCEEDINGS

BEFORE THE HONORABLE KERRY L. EARLEY
DISTRICT COURT JUDGE
HELD ON WEDNESDAY, OCTOBER 30, 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

1 in this litigation, and how can he comment about what
2 she knows we've never seen?

3 THE WITNESS: The answer is no.

4 THE COURT: Hold on, let's address the
5 objection.

6 Can't we just say, Under this Commission
7 Agreement, do you feel you are entitled to a commission
8 for multifamily property?

9 MR. J.J. JIMMERSON: That is a different
10 question, your Honor. That sounds very appropriate.

11 THE COURT: Can we ask that question? That's
12 what this whole case is about, is this Commission
13 Agreement. That's all I can deal with, because that's
14 what's in front of me.

15 THE WITNESS: I think I know what the
16 question is.

17 THE COURT: I hope so. Don't ask me to
18 rephrase.

19 THE WITNESS: I do think we're entitled to
20 other, more commission.

21 MS. LUNDVALL: No, hold on.

22 THE COURT: Based on -- I'm sorry.

23 BY MS. LUNDVALL:

24 Q. What I'm trying to ask is --

25 THE COURT: Not taking it over. I apologize.

1 Agreement that says you're entitled to commissions on
2 golf course property?

3 A. No, but it was our understanding we were
4 gonna get the whole commission.

5 Q. And is there anyplace in the Commission
6 Agreement that says that you're entitled to commissions
7 on the custom lots?

8 A. No, but that's single-family, and we should
9 get those.

10 Q. What I want to do is turn your attention then
11 back to Exhibit 17, Mr. Wilkes.

12 A. Sure.

13 17?

14 Q. Yes, sir.

15 A. So we're still in the same place.

16 I guess I'm confused here. I don't see a 17.

17 Q. And your point is well made, sir. I don't
18 want to confuse you. Let's see if I can --

19 THE COURT: 17 is -- I thought it was what's
20 on the screen.

21 THE WITNESS: I have arthritis on my whole
22 body, I can't turn my neck.

23 MR. J.J. JIMMERSON: Judge, 17 is the same as
24 AA.

25 BY MS. LUNDVALL:

1 Page 2, Mr. Wilkes.

2 A. Yes, ma'am.

3 Q. Now, at Page 2, you're gonna see a sentence
4 in that first full paragraph, and I will read it aloud.

5 As of this date, Pardee has not exercised any
6 option to purchase the Option Property.

7 Did I read that correctly?

8 A. You did.

9 Q. All right. Did you believe that?

10 A. No.

11 Q. Did you trust him?

12 A. No.

13 Q. So you didn't trust him at the beginning, and
14 you didn't trust him at this point in time either,
15 correct?

16 A. I didn't trust them from the point where they
17 tried to take the extra money from us. I thought we
18 might have money coming.

19 Q. I'm gonna go on. The second sentence reads:
20 As required by the agreement, we'll provide you with
21 copies of each written option exercise notice in a
22 timely fashion.

23 Did I read that correctly?

24 A. You read it correctly.

25 Q. Mr. Lash is making that statement to you,

1 A. I think we are, personally, okay? They've
2 gone outside of this. They've gone around, they've
3 done this, taken that right turn on the property. I
4 think that even though they've got -- I think we're
5 entitled to commission on the single lots, the
6 single-family lots, and I think we're entitled, I think
7 we should be entitled to commission on the multifamily
8 too, because we sold them the whole property.

9 Q. I understand that, and I understand kind of
10 the basis for the agreement, but under the agreement,
11 just talking about the terms of the agreement, are you
12 eligible for commissions on property that isn't
13 designated for production residential property?

14 A. Yeah, or anything else, that Option Property.

15 Q. Yes, but within Option Property, are you
16 eligible for commissions for property that is not
17 production residential?

18 A. In my opinion, yes.

19 Q. Okay. Mr. Wilkes, please flip to the
20 different, different binder, Defendant's binder for
21 Exhibit A.

22 A. This?

23 Q. Yeah.

24 A. Okay.

25 Q. Yeah.

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ATTEST:

Full, true, and accurate transcript of proceedings.

Loree Murray, CCR #426

District Court IV

Loree Murray, CCR #426

EXHIBIT F

JAMES WOLFRAM, et al.,
Plaintiffs,
vs.
PARDEE HOMES OF NEVADA,
Defendant.

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

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

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

1 sum.

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

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

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

1 MR. J.J. JIMMERSON: Thank your staff.

2 MS. LUNDVALL: Thank you, Your Honor.

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4 ATTEST: FULL, TRUE AND ACCURATE TRANSCRIPT OF
5 PROCEEDINGS.

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8 JENNIFER D. CHURCH, CCR. No. 568, RPR

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

EXHIBIT G

321 P.3d 875
Supreme Court of Nevada.

JUN LIU, Appellant,
v.
CHRISTOPHER HOMES, LLC, a
Nevada Limited Liability Company; and
Christopher Homes Ridges, LLC, a Nevada
Limited Liability Company, Respondents.

No. 61435.
|
March 27, 2014.

Synopsis

Background: Subcontractor brought action against general contractor, developer, and homeowners seeking to foreclose on its liens. Appeal from a district court judgment in a real property action. Homeowner filed cross-claim against general contractor and developer asserting breach of contract and sought attorney fees and costs incurred in defending against subcontractor's action. The District Court, Clark County, Susan Johnson, J., 2012 WL 8883479, following dismissal of subcontractor's claims after parties entered into stipulated agreement, denied homeowner's attorney fee claim. Homeowner appealed.

[Holding:] The Supreme Court, Saitta, J., held that homeowner could recover attorney fees as special damages that were purportedly sustained in defending herself against subcontractor's suit that was allegedly caused by developer's breach of contract with homeowner.

Affirmed in part, reversed in part, and remanded.

Gibbons, C.J., filed dissenting opinion.

West Headnotes (6)

- [1] **Appeal and Error**
 ❖ Cases Triable in Appellate Court
 Arguments concerning the district court's application of caselaw to claims for attorney fees are legal issues that are reviewed de novo.

3 Cases that cite this headnote

- [2] **Costs**
 ❖ American rule; necessity of contractual or statutory authorization or grounds in equity
Damages
 ❖ Elements of damages in general
 Generally, attorney fees are not recoverable absent authority under a statute, rule, or contract; but, as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.

1 Cases that cite this headnote

- [3] **Quieting Title**
 ❖ Form of remedy
 Generally, an action to clarify or remove a cloud on title is either an action in equity or an action for declaratory relief.

Cases that cite this headnote

- [4] **Damages**
 ❖ Litigation with third persons
 Homeowner could recover attorney fees as special damages that were purportedly sustained in defending herself against subcontractor's suit that was allegedly caused by developer's breach of contract to convey good and marketable title to homeowner.

1 Cases that cite this headnote

- [5] **Damages**
 ❖ Litigation with third persons
 A party to a contract may recover from a breaching party the attorney fees that arise from the breach that caused the former party to accrue attorney fees in defending himself or herself against a third party's legal action.

Cases that cite this headnote

- [6] **Appeal and Error**
 ❖ Authority to find facts

Supreme Court does not resolve matters of fact for the first time on appeal.

Cases that cite this headnote

Attorneys and Law Firms

***876** Pengilly Robbins Slater and James W. Pengilly and Craig D. Slater, Las Vegas, for Appellant.

The Hayes Law Firm and Dale A. Hayes, Jr., Las Vegas, for Respondents.

Before GIBBONS, C.J., DOUGLAS and SAITTA, JJ.

OPINION

By the Court, SAITTA, J.:

The court in *Sandy Valley Associates v. Sky Ranch Estates Owners Association* stated that when a defendant's breach of contract with a plaintiff causes the plaintiff to incur attorney fees in his or her defense in a legal dispute that is brought by another party, the plaintiff can recover from the defendant the attorney fees as damages that arose from the breach of the contract. 117 Nev. 948, 957, 35 P.3d 964, 970 (2001). The *Sandy Valley* court also stated, "Attorney fees may ... be awarded as damages in those cases in which a party incurred the fee ... in clarifying or removing a cloud upon the title to property." *Id.* The court in *Horgan v. Felton* retreated from this latter statement about the recovery of attorney fees in cloud-on-title cases, stating that "in cases concerning title to real property, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists." 123 Nev. 577, 579, 170 P.3d 982, 983 (2007). It held that slander of title was a prerequisite for a plaintiff to "recover as damages the expense of legal proceedings necessary to remove a cloud on the plaintiff's title." *Id.* at 584–85, 170 P.3d at 987.

Here the district court relied on *Horgan* in denying appellant Jun Liu's specially pleaded request to recover attorney fees from respondents Christopher Homes Ridges, LLC (CHR), and Christopher Homes, LLC (CH), concluding that because the breach of contract related to title to real property, and because Liu failed to allege and prove slander of title, she could not recover the attorney fees that she sought as special damages. We conclude that the district court erred in rejecting

as a matter of law Liu's claim for attorney fees as special damages, as *Horgan* does not apply to preclude such recovery here. Although *Horgan* held that slander of title must be pleaded as a prerequisite for a party to recover attorney fees as damages in an action to clarify or remove a cloud on title to real property, that opinion did not retreat from the portion of *Sandy Valley* which held that a party, such as Liu, may recover attorney fees incurred in defending against third-party litigation because of CHR's or CH's breach of contract. *Horgan*, 123 Nev. at 583–86, 170 P.3d at 986–88. Accordingly, we reverse the district court's judgment to the extent that it denied Liu's request for special damages and affirm all other aspects of the district court's judgment. We remand this matter to the district court for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Liu's appeal only challenges the district court's legal determinations regarding the recovery of attorney fees as special damages. Thus, our discussion of the facts is based on the district court's findings of fact, which Liu does not contest or seek to undo on appeal.

CHR was the developer of a residential community that hired CH as a general contractor for the construction of homes within its community. CH subcontracted with K & D Construction, LLC, for various construction services. One of the homes upon which K & D performed its services was Liu's. Liu had purchased the home from CHR pursuant to a contract (the Agreement), wherein CHR agreed to convey good and marketable title to Liu at the close of escrow. As K & D performed its construction services at CHR's residential community, K & D was neither timely nor fully paid. As a result, K & D recorded liens on various properties within CHR's residential community, including Liu's property.

In addition, K & D filed a civil action against CHR, CH, Liu, and other homeowners. In its complaint, K & D sought to ***877** foreclose on its liens on numerous properties, including Liu's property. Liu filed an answer to K & D's complaint and a cross-claim against CHR and CH. She asserted a breach of contract claim against CHR and CH, alleging that they breached their duty under the Agreement to deliver good and marketable title when they failed to pay the debts to K & D that resulted in a lien on her property. Under this claim, Liu tried to recover from CHR and CH the attorney fees and costs that she allegedly incurred in defending herself

against K & D's action. She also sought attorney fees that she incurred in prosecuting her claim for attorney fees.

K & D, CHR, and CH entered into a stipulated agreement that resolved the payments of the outstanding balances owed to K & D, dismissed K & D's claims against Liu, and resulted in the discharge and removal of K & D's liens. After the dismissal of K & D's claims, Liu's claims against CHR and CH remained, including the claim to recover attorney fees as damages that allegedly arose from the breach of the Agreement.

Before the district court, Liu contended that, pursuant to *Sandy Valley*, she could recover attorney fees as special damages that were caused by the breach of the Agreement by CH and CHR. The district court determined otherwise, concluding that CHR, not CH, possessed and breached a contractual duty to deliver good and marketable title to Liu when a lien was imposed on Liu's property because of unpaid debts to K & D. Relying on *Horgan*, the district court resolved that, as a matter of law, Liu could not recover attorney fees as special damages. According to the district court's interpretation of *Horgan*, Liu was required to prove slander of title in order to recover attorney fees as special damages, which the district court found that she failed to do. As a result, Liu filed this appeal challenging the district court's determinations regarding the recovery of attorney fees as special damages.

DISCUSSION

Liu argues that the district court erred in relying on *Horgan* for its conclusion that her failure to assert and prevail on a slander of title claim prevented her from recovering attorney fees as special damages in an action that related to the title to real property. She contends that *Horgan* does not bar a party from recovering attorney fees as special damages when the civil action incidentally pertains to title to real property. Liu reads *Horgan* to disallow attorney fees that stem from an action in which a claimant tries to remove a cloud on title but fails to prove slander of title. She emphasizes that she did not seek attorney fees as special damages from an action to remove a cloud on title but rather as special damages that resulted from CHR's breach of contract. Liu argues that *Sandy Valley* permits the recovery of attorney fees as special damages that arise from a breach of contract and thus her attorney fees claim below was not barred as a matter of law.

CHR and CH respond that the district court did not err in finding against Liu on her claim for recovery of attorney fees as special damages. They read *Horgan* to provide that a party, such as Liu, who fails to assert and prevail on a slander of title claim in an action relating to the title to real property cannot recover attorney fees as special damages.

[1] These arguments indicate that there is confusion over (a) *Sandy Valley*'s and *Horgan*'s effect on the law regarding the recovery of attorney fees as special damages and (b) the extent to which *Horgan* retreated from *Sandy Valley*'s discussion about the grounds for recovering attorney fees as special damages. We take this opportunity to clarify our precedent. In so doing, because the arguments concern the district court's application of caselaw to Liu's claims for attorney fees, we review these legal issues de novo.¹ See *Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) *878 (providing that a denial of attorney fees is generally reviewed for abuse of discretion but that de novo review applies when an attorney fees matter concerns questions of law).

Horgan's partial abrogation of Sandy Valley

[2] Generally, attorney fees are not recoverable "absent authority under a statute, rule, or contract." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). But, "[a]s an exception to the general rule," attorney fees may be awarded "as special damages in limited circumstances." *Horgan*, 123 Nev. at 583, 170 P.3d at 986.

The court in *Sandy Valley* made three significant statements about the grounds for recovering attorney fees as special damages. 117 Nev. at 956–57, 35 P.3d at 969–70. First, the court stated that attorney fees may be recovered as special damages when they are pleaded as such pursuant to NRCP 9(g) and are a "natural and proximate consequence of the injurious conduct." *Id.* at 956–57, 35 P.3d at 969. Second, the court explained that

[a]ttorney fees may be an element of damage in cases when a plaintiff becomes involved in a third-party legal dispute as a result of a breach of contract ... [and] [t]he fees incurred in defending ... the third-party action could be damages in the proceeding between the plaintiff and the defendant [who breached the contract].

Id. at 957, 35 P.3d at 970. Third, the *Sandy Valley* court stated the following about the recovery of attorney fees as special damages in actions concerning a cloud on title to real property: “[a]ttorney fees may ... be awarded as damages in those cases in which a party incurred the fees ... in clarifying or removing a cloud upon the title to property.” *Id.*

The *Horgan* court revisited *Sandy Valley* in addressing a matter involving the recovery of attorney fees that were accumulated in seeking declaratory relief to remove a cloud on title to real property. *Horgan*, 123 Nev. at 579–80, 583–86, 170 P.3d at 983–84, 986–88. In clarifying *Sandy Valley*, the *Horgan* court retreated from the third statement above concerning the award of attorney fees in cloud-on-title actions. *Horgan*, 123 Nev. at 579, 585, 170 P.3d at 983, 988. In doing so, it did not retreat from the *Sandy Valley* court's position regarding the recovery of attorney fees as damages that are caused by injurious conduct or a breach of contract. *Id.* Disapproving of *Sandy Valley*'s broad statement that “‘[a]ttorney fees may ... be awarded as damages in those cases in which a party incurred the fees ... in clarifying or removing a cloud upon the title to property,’ ” the *Horgan* court stated that “in cases concerning title to real property, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists.” *Id.* at 579, 583, 170 P.3d at 983, 986 (alterations in original) (second emphasis added) (quoting *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 970). When read in isolation, this statement conveys that in any action that merely relates to title, clarification of title, or removal of a cloud on title to real property, a party can recover attorney fees as special damages only if he or she asserts and prevails on a slander of title claim. *See id.* Thus, when read by itself, this statement appears to support the district court's determination that Liu could not recover attorney fees.

However, the meaning and effect of *Horgan* cannot be ascertained by reading one statement to the exclusion of the rest of the opinion. *See Orr v. Allen*, 248 U.S. 35, 36, 39 S.Ct. 23, 63 L.Ed. 109 (1918) (indicating that language in an opinion must not be taken out of context or segregated from the remainder of the opinion); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 585 (1st Cir.1979) (“Different sections of an opinion should be read as consistent with each other.”). Rather, *Horgan* “must be read as a whole, without particular portions read in isolation, [so as] to discern the parameters of its holding.” *Fisher v. Big Y Foods, Inc.*, 298 Conn. 414, 3 A.3d 919, 926–27 (2010).

The remainder of the *Horgan* court's opinion indicates that it did not hold that a party in any matter that relates to title to real property must prevail on a slander of title claim in order to recover attorney fees as *879 special damages. 123 Nev. at 583–86, 170 P.3d at 986–88. Rather, the *Horgan* court contemplated a party's ability to recover attorney fees as special damages that were incurred in a specific type of civil action that is brought by that party: an action to *clarify or remove a cloud on title*. *Id.*

The *Horgan* court stated that a “plaintiff may recover as damages the expense of legal proceedings necessary to *remove a cloud on the plaintiff's title* ” when he or she prevails on a slander of title claim. *Id.* at 584–85, 170 P.3d at 987 (emphasis added). It stated that “attorney fees are only available as special damages in slander of title actions and not simply when a litigant seeks to *remove a cloud upon title*.” *Id.* at 586, 170 P.3d at 988 (emphasis added). In asserting these conclusions, the *Horgan* court primarily relied on authorities that permit the award of attorney fees as special damages to parties who brought claims to clarify or remove a cloud on title, accrued attorney fees in bringing those claims, and prevailed on a slander of title claim. *See id.* at 584–86, 170 P.3d at 987–88 (citing: *Wright v. Rogers*, 172 Cal.App.2d 349, 342 P.2d 447, 449, 457 (1959) (providing that in an action to remove a cloud on title, the plaintiff may recover attorney fees as special damages if he or she prevails on a slander of title claim); *Price v. Tyler*, 890 So.2d 246, 248–49, 251, 253 (Fla.2004) (explaining that parties cannot recover attorney fees as special damages that were accrued in declaratory relief and quiet title actions absent a slander of title); *Rayl v. Shull Enters., Inc.*, 108 Idaho 524, 700 P.2d 567, 573 (1984) (concluding that a plaintiff who sought to remove a cloud on his title was entitled to attorney fees as special damages that arose from the slander of title); *Paulson v. Kustom Enters., Inc.*, 157 Mont. 188, 483 P.2d 708, 715–16 (1971) (remanding a matter to allow parties to recover attorney fees accrued in removing a cloud on title resulting from slander); *Den-Gar Enters. v. Romero*, 94 N.M. 425, 611 P.2d 1119, 1121, 1124 (N.M.Ct.App.1980) (providing that plaintiffs who sought to remove a cloud on title through a quiet title action could recover attorney fees under a slander of title claim); *Peckham v. Hirschfeld*, 570 A.2d 663, 667–70 (R.I.1990) (providing the same); *Dowse v. Doris Trust Co.*, 116 Utah 106, 208 P.2d 956, 958–59 (1949) (concluding that a plaintiff was entitled to special damages, including attorney fees, in an action to remove a cloud on his title because the defendant slandered it); and *Rorvig v. Douglas*, 123 Wash.2d 854, 873 P.2d 492, 494, 497–98 (1994) (providing the same)).

[3] Thus, the *Horgan* court's holding that one must prevail on a slander of title claim to recover attorney fees as special damages is one that applies to the recovery of attorney fees that are accrued from pursuing an action to *clarify or remove a cloud on title*. Generally, an action to clarify or remove a cloud on title is either an action in equity or an action for declaratory relief. See *MacDonald v. Krause*, 77 Nev. 312, 317–18, 362 P.2d 724, 727 (1961) (identifying actions to quiet title and to remove clouds on title as actions in equity); *Kress v. Corey*, 65 Nev. 1, 25–26, 189 P.2d 352, 363–64 (1948) (stating that a cloud on title may be removed by a declaratory judgment). Hence, when discussing the recovery of attorney fees as damages that arose from actions to clarify or remove a cloud on title, the *Horgan* court was not concluding that a slander of title claim is a prerequisite to recovering attorney fees as special damages in *all* civil actions that relate to title to real property. See 123 Nev. at 579, 583–86, 170 P.3d at 983, 986–88. Rather, as revealed by its language and the authorities it relied on, the *Horgan* court held that slander of title is a prerequisite to a party's recovery of attorney fees that were amassed in asserting claims to clarify or remove a cloud on title, such as declaratory or equitable relief claims. *Id.*

In explaining its analysis and conclusions, the *Horgan* court stated that when a plaintiff incurs attorney fees as a result of a defendant's intentional effort to cloud title, the plaintiff deserves the fees because he or she had no choice but to litigate. *Id.* at 585–86, 170 P.3d at 987–88. Otherwise, absent slander of title, the plaintiff shoulders the debt for the attorney fees that he or she risked accruing when deciding to clarify or remove a cloud on title by suing the defendant. See *id.*

***880** [4] Here, Liu was not a plaintiff who incurred attorney fees by asserting equitable or declaratory relief claims to clarify or remove a cloud on title. Rather, she pleaded to recover attorney fees as special damages that she allegedly incurred defending against K & D's civil action as a result of CHR's breach of the Agreement. Thus, the attorney fees that Liu incurred in her defense against K & D's action and her claim for attorney fees were not within the purview of *Horgan*'s requirement that a party who brought an action to clarify or remove a cloud on title must prove slander of title in order to recover the attorney fees that he or she incurred in the action. See *Horgan*, 123 Nev. at 583–86, 170 P.3d at 986–88.

The portion of Sandy Valley that Horgan did not overturn

[5] When revisiting and abrogating *Sandy Valley*, the *Horgan* court only overturned the analysis and conclusion in *Sandy Valley* that concerned the recovery of attorney fees that are accumulated in actions to clarify or remove a cloud on title to real property. *Horgan*, 123 Nev. at 579, 583–86, 170 P.3d at 983, 986–88. The court did not retreat from *Sandy Valley*'s conclusion that a party to a contract may recover, as special damages, the attorney fees that arise from another party's breach of the contract when the breach causes the former party to incur attorney fees in a legal dispute brought by a third party. See *Horgan*, 123 Nev. at 579, 583–86, 170 P.3d at 983, 986–88 (omitting from its discussion *Sandy Valley*'s language that concerns the recovery of attorney fees as special damages that arise from a breach of contract); *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 970. Thus, this portion of *Sandy Valley* was not undercut by *Horgan*. In unity with the various jurisdictions that have held the same, we maintain that a party to a contract may recover from a breaching party the attorney fees that arise from the breach that caused the former party to accrue attorney fees in defending himself or herself against a third party's legal action. See, e.g., *Masonic Temple Ass'n of Crawfordsville v. Ind. Farmers Mut. Ins. Co.*, 837 N.E.2d 1032, 1039 (Ind.Ct.App.2005) (providing that when the defendant's breach of contract caused the plaintiff to engage in litigation with another party, the attorney fees from that litigation “may be recovered as an element of ... damages from [the] defendant's breach of contract”); *Pac. Coast Title Ins. Co. v. Hartford Accident & Indem. Co.*, 7 Utah 2d 377, 325 P.2d 906, 907–08 (1958) (providing the same); *Fid. Nat'l Title Ins. Co. of N.Y. v. S. Heritage Title Ins. Agency, Inc.*, 257 Va. 246, 512 S.E.2d 553, 558 (1999) (concluding that attorney fees incurred in litigation caused by a party's breach of contract can be recovered as special damages); *Kremers–Urban Co. v. Am. Emp'rs Ins. Co.*, 119 Wis.2d 722, 351 N.W.2d 156, 168 (1984) (recognizing that attorney fees and expenses incurred in third-party litigation are recoverable “when they are the natural and proximate result of the breach of contract or other wrongful act” that caused the plaintiff to be involved in litigation with other parties).

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

***881** *The district court must revisit Liu's claim for attorney fees*

[6] Determining whether a party's breach of contract caused another party to incur attorney fees in defending himself or herself from a third party's complaint involves factual inquiries. *See Frantz v. Johnson*, 116 Nev. 455, 468, 999 P.2d 351, 359 (2000) (indicating that causation is an issue of fact). In our appellate capacity, we do not resolve matters of fact for the first time on appeal. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (noting that "an appellate court is not an appropriate forum in which to resolve disputed questions of fact").

When the district court determined that *Horgan* barred Liu's claim to recover attorney fees as special damages, it also found that CHR breached its contract with Liu by leaving its debts to K & D unpaid. But, because it erroneously reasoned that *Horgan* disposed of Liu's attorney fees claim as a matter of law, the district court did not resolve whether the evidence before it proved that CHR's breach of the Agreement caused Liu to accumulate the attorney fees in defending her interests against K & D's suit. We do not resolve this factual issue that the district court did not reach, as doing so would require us to inappropriately weigh the evidence and resolve questions of fact for the first time on appeal. It is up to the district court on remand to resolve these questions.

CONCLUSION

In light of our analysis and determinations above, we reverse the district court's findings of fact, conclusions of law, and

judgment on Liu's claim for the recovery of attorney fees as special damages that allegedly arose from CHR's breach of the Agreement.³ All other aspects of the district court's judgment are affirmed. We remand this matter for further proceedings that are consistent with this opinion.

I concur: DOUGLAS, J.

GIBBONS, C.J., dissenting:

As the majority notes, we concluded in *Horgan v. Felton*, 123 Nev. 577, 579, 170 P.3d 982, 983 (2007), that "in cases concerning title to real property, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists." In *Horgan*, the concurrence noted that there are other types of cases that allow attorney fees as damages, such as "actions for malicious prosecution, abuse of process, wrongful attachment, trademark infringement, false imprisonment or arrest." *Id.* at 587, 170 P.3d at 989 (Maupin, J., concurring). Breach of contract is not one of the exceptions specified in *Horgan* and should fall into the same category as actions to quiet title. This would further address our concern in *Horgan* that the scope of real property cases where attorney fees are available as special damages was "inadvertently expanded." *Id.* at 586, 170 P.3d at 988. For this reason, I conclude that the district court correctly interpreted the holding of *Horgan*, and I would affirm the district court's denial of attorney fees.

All Citations

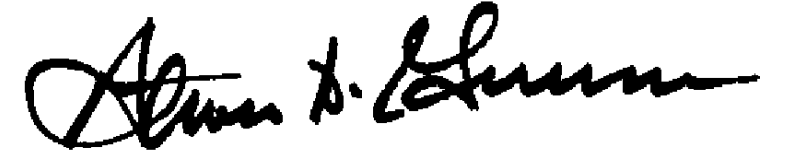
321 P.3d 875, 130 Nev. Adv. Op. 17

Footnotes

- 1 In addition to the arguments above, CHR contends that the district court rejected Liu's claim for attorney fees for reasons other than its interpretation and application of caselaw, such as insufficient evidence to support Liu's claim that the breach of the Agreement caused her to incur attorney fees in defending herself against K & D's action. This contention lacks merit because the district court rejected Liu's attorney fees claim solely as a matter of law.
- 2 It appears that Liu also relies on *Sandy Valley* for the contention that she can recover attorney fees and costs that she incurred when prosecuting her claim against CHR to recover attorney fees as special damages—in addition to the attorney fees that she incurred when defending herself against K & D's action. *Sandy Valley* does not support this contention. *See* 117 Nev. at 957, 35 P.3d at 970. It only provides for the recovery of attorney fees as special damages that are incurred in defending against third-party litigation that is caused by a breach of contract. *Id.* Because Liu has not provided any other salient authority in support of her argument, we do not address the recovery of attorney fees and costs that are incurred when prosecuting a claim for attorney fees as special damages. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n. 38, 130 P.3d 1280, 1288 n. 38 (2006) (providing that this court need not address an argument that is not cogently made).

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

EXHIBIT H



CLERK OF THE COURT

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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

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

(MIL #1)

Hearing Date:
Hearing Time:

Trial Date: April 15, 2013

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

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

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

5 McDONALD CARANO WILSON LLP

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

14 **NOTICE OF MOTION**

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

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

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

22 McDONALD CARANO WILSON LLP

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

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

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

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

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

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

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

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

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

DATED this 1st day of March, 2013.

/s/ Aaron D. Shipley
AARON D SHIPLEY

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION AND RELEVANT FACTUAL BACKGROUND**

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

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

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

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

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

9 II. LEGAL ARGUMENT

10 A. Legal Standard.

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

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

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

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

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

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

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

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

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

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

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

22 ///

23 ///

24 ///

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28 ///

1 **IV. CONCLUSION**

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

7
8 RESPECTFULLY SUBMITTED this 1st day of March, 2013.

9 McDONALD CARANO WILSON LLP

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

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

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

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

273258

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Sent: Wednesday, June 01, 2016 11:01 PM
To: Michelle Wade
Subject: Service Notification of Filing Case(James Wolfram, Plaintiff(s)vs.Pardee Homes of Nevada, Defendant(s)) Document Code:(MAMJ) Filing Type:(EFS) Repository ID(8237642)

This is a service filing for Case No. A-10-632338-C, James Wolfram, Plaintiff(s)vs.Pardee Homes of Nevada, Defendant(s)

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Document title: Pardee Homes of Nevada's Motion to Amend Judgment
Document code: MAMJ Filing Type: EFS
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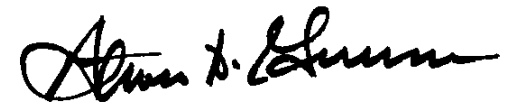
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DISTRICT COURT
CLARK COUNTY, NEVADA

JAMES WOLFRAM,
WALT WILKES

Plaintiffs,

vs.

PARDEE HOMES OF NEVADA,
Defendant.

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

**PARDEE'S MOTION FOR ATTORNEY'S
FEES AND COSTS**

Hearing Date:

Time:

AND RELATED CLAIMS

Pursuant to NRCP 54(d) and the Commission Agreement dated September 1, 2004, Defendant Pardee Homes of Nevada ("Pardee") moves the Court for an award of its reasonable attorney's fees and costs incurred in defending the above-referenced matter. Pardee achieved its principal litigation objective by successfully defending against Plaintiffs' inflated and baseless claim to additional commissions. Plaintiffs' claim to additional commissions was the case's most substantial issue, and Pardee unequivocally succeeded on it. As such, Pardee is the prevailing party in this matter. As the prevailing party under the Commission Agreement, Pardee is entitled to recover its attorney's fees incurred in achieving its principal litigation objective.

In 2004, Pardee and plaintiffs James Wolfram and Walt Wilkes (collectively "Plaintiffs") executed a Commission Agreement concerning the Coyote Springs Project.

1 The Commission Agreement broadly discussed Pardee's development on the Coyote
2 Springs Project and included a provision entitling the prevailing party in any litigation to
3 recover all reasonable attorney's fees and costs.

4 After disagreement between the parties regarding certain transactions on the
5 Coyote Springs Project, Plaintiffs brought suit and claimed over \$1.9 million in damages
6 resulting from Pardee's purported breach of the Commission Agreement, including the
7 following claimed damages:

- 8 (1) \$1.8 million in lost future commissions;
- 9 (2) \$146,000 in attorney's fees as special damages; and
- 10 (3) \$6,000 in time and effort expended searching for information regarding what
11 Pardee owed them under the Commission Agreement.

12 Perhaps realizing the frailty of these claimed damages, Plaintiffs served Pardee with an
13 Offer of Judgment for \$149,000 before trial. Pardee rejected the Offer, contending that
14 Plaintiffs were not due any lost future commissions under the Commission Agreement
15 and could not recover attorney's fees as special damages in this routine breach-of-
16 contract case.

17 When trial began on October 23, 2013, Plaintiffs spent the overwhelming
18 majority of their time advancing their lost commissions argument. Their theory for
19 recovery was centered upon their claim that Pardee had purchased "Option Property"
20 from CSI, but did not pay Plaintiffs' commissions on those purchases. At trial Plaintiffs
21 augmented that theory with a contention that Pardee had re-designated certain real
22 property purchases and Plaintiffs were entitled to additional commissions based upon
23 that re-designation. Plaintiffs made their claim concerning Option Property purchases
24 the centerpiece of both their opening and closing statements, they questioned every
25 single witness about those purported Option Property purchases, and on the last day of
26 trial they served a supplemental NRCP 16.1 damages disclosure claiming these lost
27 commissions as damages. Plaintiffs' actions pre-trial and at trial made it clear their
28 main objective in this litigation was to secure these additional commissions from

1 Pardee. According to Plaintiffs, securing these additional commissions was a two-step
2 process: first, prove that Pardee made Option Property purchases and second, once
3 the acreage of those purchases was established at trial, to seek the commission
4 amounts through their accounting claim.

5 After a full presentation of the evidence, however, the Court entirely rejected
6 Plaintiffs' claim that it had purchased Option Property and that Plaintiffs were entitled to
7 lost future commissions, finding in Pardee's favor on the issues. The Court awarded
8 Plaintiffs only \$6,000 in compensatory damages on their second theory under their
9 breach of contract and accounting claims, and \$141,000 in attorney's fees as special
10 damages on those claims. Pardee entirely prevailed on Plaintiffs' claim to lost future
11 commissions, which was the case's most significant and bitterly contested issue.
12 Therefore, pursuant to the Commission Agreement, NRCP 54, and applicable case law,
13 Pardee is entitled to its attorney's fees and costs as the prevailing party in this case.


14 This Motion is based on NRCP 54, the Commission Agreement, the pleadings
15 and papers on file, the attached Memorandum of Points and Authorities, the declaration
16 of Pat Lundvall, and any oral argument the Court may entertain at the hearing of this
17 Motion.

18 DATED this 6th day of June, 2016.

19
20 McDONALD CARANO WILSON LLP

21
22 /s/ Rory T. Kay
23 PAT LUNDVALL (NBSN #3761)
24 RORY T. KAY (NSB #12416)
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27 *Attorneys for Pardee Homes of Nevada*
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NOTICE OF MOTION


TO: All Parties and Their Counsel of Record:

PLEASE TAKE NOTICE that the undersigned will bring the foregoing
PARDEE'S MOTION FOR ATTORNEY'S FEES for hearing before the above-entitled
Court on the 11 day of July, 2016 at the hour of xxxxxx ^{In Chambers} in Department IV of
the above-entitled Court, or as soon thereafter as counsel can be heard.

MCDONALD CARANO WILSON LLP

/s/ Rory T. Kay
PAT LUNDVALL (NSBN 3761)
RORY KAY (NSBN 12416)
2300 West Sahara Avenue, Suite 1000
Las Vegas, Nevada 89102

Attorneys for Pardee Homes of Nevada

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DECLARATION OF PAT LUNDVALL IN SUPPORT OF PARDEE HOMES OF NEVADA'S MOTION FOR ATTORNEY'S FEES

Pat Lundvall declares as follows:

1. I am an attorney with the law firm of McDonald Carano Wilson LLP ("McDonald Carano"), counsel of record for Pardee Homes of Nevada ("Pardee") in Clark County, Nevada District Court Case A-10-632338-C.

2. This Declaration, which is submitted in support of Pardee's Motion for Attorney's Fees and Costs, is made of my own personal knowledge. The information contained in this declaration and the attached invoices from McDonald Carano Wilson to Pardee for this case are not intended to waive the attorney-client or work product privileges, nor should they be construed to waive those privileges.

3. I have been practicing law in Nevada since 1989. I have been an attorney with McDonald Carano Wilson since June 1994, and a partner with the firm since January 1996. I have represented clients in all aspects of commercial litigation in state court (including the Nevada Supreme Court), federal court, the Ninth Circuit of Appeals and the Supreme Court of the United States. A copy of my resume is attached as Exhibit A. I was lead counsel for Pardee in the case brought by Plaintiffs James Wolfram and Walt Wilkes. My hourly rate varied between \$465 and \$525 during Plaintiffs' case against Pardee.

4. Aaron Shipley joined McDonald Carano in 2002. He is admitted to the Bars of Nevada and Utah. McDonald Carano offered Mr. Shipley partnership in 2012, which he accepted. He has over ten years of experience litigating complex commercial matters in Nevada and federal courts. A copy of his resume is attached as Exhibit B. Mr. Shipley served as second chair in this matter, and his hourly rate varied between \$290 and \$325 during Plaintiffs' case against Pardee.

5. Rory Kay joined McDonald Carano in 2012. He is admitted to the Bars of Nevada and California. Mr. Kay is an associate at McDonald Carano, and he has three years of experience litigating complex commercial matters in Nevada and federal

1 courts, including representing Pardee in other litigation involving the Coyote Springs
2 Project. A copy of his resume is attached as Exhibit C. Mr. Kay provided limited
3 services in the post-trial phase of this case, and his hourly rate was \$240 during the
4 entire time he defended Pardee in Plaintiffs' case.

5 6. Brian Grubb and Karen Suroweic served as paralegals on this matter.
6 They helped prepare and present important documents during depositions, trial
7 preparation and the trial. They also completed relevant legal research related to
8 Plaintiffs' causes of action, helped the billing attorneys with witness preparation, and
9 assisted with various filings in the case.

10 7. All attorney's fees invoiced to Pardee were discounted 10%, pursuant to
11 an agreement with Pardee.

12 8. I am familiar with the billing rates for attorneys and paralegals in the Las
13 Vegas legal market. All of the foregoing hourly rates are fair and reasonable rates for
14 professional services by litigation attorneys and paralegals with similar levels of
15 experience and expertise within the Las Vegas legal market.

16 9. All of the work performed in this case was necessary to protect Pardee's
17 rights pursuant to the Commission Agreement and on the Coyote Springs Project.
18 Pardee's counsel handled the case from beginning to end, vigorously conducting
19 discovery, preparing for and executing the trial, and litigating the case until its final post-
20 trial judgment. Pardee also brought various meritorious motions and defeated a
21 substantial number of Plaintiffs' motions. All of the work done was consistent with civil
22 litigation practice in Las Vegas, Nevada in similar cases, especially in cases where the
23 damages sought were close to \$2 million.

24 10. In connection with the foregoing work, each attorney's work was billed on
25 an hourly basis and reflected on each attorney's time sheets, which were required to be
26 made at or about the time of the activity reflected thereon, and to accurately reflect the
27 amount of time expended on the particular activities done on Pardee's behalf. The
28 individual time sheets were entered into a billing program in McDonald Carano's

1 computer system, and sorted by client and matter number so that each client/matter
2 number received a separate accounting of the time spent by each attorney on that file
3 during the preceding month. Those entries were then prepared in a format that
4 constituted a draft of the monthly bill, with time converted to dollar amounts. Each
5 attorney and I reviewed the draft bills for accuracy. If I, as the billing attorney, believed
6 that a write down was appropriate, then the client was given a discount which was
7 never reflected on their invoice. I made such write downs to my time and other billing
8 professionals throughout the entire case. This procedure has proven to be trustworthy
9 and to render accurate and timely billing statements.

10 11. The billing statements that are attached hereto as Exhibit D are true and
11 correct copies of the billing statements generated in connection with McDonald
12 Carano's activities on Pardee's behalf in this case. All of the work identified in the
13 billing statements was reasonable and necessary, as were all of the costs. The
14 invoices were sent to the client and McDonald Carano Wilson has been paid in full on
15 those invoices.

16 12. The spreadsheet that is attached to the Motion as Exhibit E is a summary
17 of the fees and costs contained in the billing statement.

18 13. By this Motion, Pardee does not seek to recover all of its attorney's fees
19 and costs incurred in defending against Plaintiffs' claims. Instead, Pardee only seeks to
20 recover its reasonable attorney's fees and costs incurred in defending against the lost
21 future commissions portion of plaintiffs' breach of contract claim, which was the most
22 significant and bitterly contested portion of the case.

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14. I estimate that 90% of Pardee's incurred attorney's fees and costs relate to that defense against plaintiffs' claims to lost future commissions. Thus, consistent with Exhibit E, Pardee requests a total award of **\$642,236.39** for its reasonable attorney's fees and costs, which is equal to \$622,767.20 for its incurred fees and \$19,559.19 for its incurred costs.

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

Executed this 6th day of June, 2016.

/s/ Pat Lundvall
Pat Lundvall

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MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS.

A. Plaintiffs and Pardee Execute the Commission Agreement.

In 1990s, Harvey Whittemore formed Coyote Springs Investment, LLC (“CSI”) and began developing the Coyote Springs Project (the “Project”), a 43,000 acre development just northeast of Las Vegas, Nevada. The Project straddled both Clark and Lincoln Counties. See Findings of Fact and Conclusions of Law at 2:9-12, on file with the Court. As licensed real estate brokers, Plaintiffs began tracking Whittemore’s Project in 2002, and shortly thereafter, they contacted Jon Lash, Pardee’s executive responsible for land acquisition, to see if he was interested in purchasing land and/or developing homes on the Project. See *id.* at 1:27-2:18. Lash agreed to allow Plaintiffs to represent Pardee as a potential purchaser, and Plaintiffs arranged a meeting between Pardee and Whittemore to discuss Pardee’s interest in the Project. See *id.* at 2:24-3:8. At this meeting, Pardee indicated it only wanted to purchase the land designated as single-family detached production residential. See *id.*

After the initial meeting, Pardee and CSI informed Plaintiffs that their services were no longer needed because Pardee and CSI could negotiate the land sales between themselves. See *id.* at 3:9-12. Accordingly, Plaintiff and Pardee began negotiating Plaintiffs’ broker commissions related to the Project and Plaintiffs’ introduction of Whittemore and Lash. See *id.* at 3:9-12. The end result of those negotiations was a Commission Agreement, which Pardee and James Wolfram executed on September 2, 2004 and Walt Wilkes executed on September 6, 2004. See *id.* at 4:24-26.

The Commission Agreement sets forth the parties’ rights concerning Pardee’s land purchases on the Project. See *generally* Commission Agreement Dated September 1, 2004, attached as Exhibit F. The only provision relevant to this Motion is the one that details the prevailing party’s right to attorney’s fees and costs if litigation arose to enforce the Commission Agreement:

In the event either party brings an action to enforce its rights under this Agreement, the prevailing party shall be awarded reasonable attorneys' fees and costs.

Id. at p .2 (emphasis added).

B. Pardee Purchases Land on the Project and Pays Plaintiffs' Commissions Pursuant to the Commission Agreement.

After the parties executed the Commission Agreement, Pardee purchased relevant land from CSI that was covered by the Commission Agreement. See Findings of Fact and Conclusion of Law at 8:6-9. Pursuant to the Commission Agreement, Pardee also paid Plaintiffs \$2,632,000.00 in commissions. See *id.* at 8:19-20. These were the only commissions due under the Commission Agreement, and Pardee had made no other purchases from CSI that would require them to pay Plaintiffs any commissions under the Commission Agreement. See *id.* at 8:21-11:3.

C. Plaintiffs Demand \$1.8 Million in Additional Commissions and File Suit Against Pardee.

Nevertheless, Plaintiffs insisted that they were due additional commissions from Pardee and filed the current case on December 29, 2010. See Complaint, on file with the Court. In their operative Complaint, Plaintiffs alleged causes of action for accounting, breach of the Commission Agreement, and breach of the implied duty of good faith and fair dealing. See *generally* Second Amended Complaint. Plaintiffs claimed over \$1.9 million in damages, including \$1.8 million in purportedly lost commissions, \$146,000 in attorney's fees, and \$6,400 in time and effort expended related to the accounting cause of action. See Plaintiffs' Thirteenth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents at 10:17-11:9, attached as Exhibit G. The dominant theory giving rise to Plaintiffs' lawsuit was that Pardee purportedly reclassified certain land purchases on the Project from "Option Property,"¹ thereby

¹ Pursuant to the Commission Agreement between the parties, Pardee was to pay Plaintiffs a commission for certain Option Property that Pardee purchased on the land. If Pardee purchased no such land, Plaintiffs were not owed any additional commission.

1 “robbing” Plaintiffs of \$1.8 million in future commissions. *See id.* at 8:27-9:14. The \$1.8
2 million in future commissions were 92% of Plaintiffs’ claimed damages. *See id.*

3 D. The Suit Proceeds to Trial and the Court Entirely Rejects Plaintiffs’ Claim
4 to Additional Commissions.

5 During trial, Plaintiffs spent considerable time advancing this lost commissions
6 theory. For example, Plaintiffs’ counsel immediately began questioning Plaintiff James
7 Wolfram about how he earned commissions and how Pardee was to pay him those
8 commissions based on its purchased Option Property. *See* October 23, 2013
9 Transcript (“10/23 Trans.”) at 75:9-76:20 and 88:16-24, attached as Exhibit H. Wolfram
10 testified that it was not “fair” that Pardee and CSI reclassified certain land on the
11 project, which purportedly influenced and reduced Plaintiffs’ commissions. *See id.* at
12 95:3-17. During this questioning, Plaintiffs’ counsel offered parcel maps as
13 demonstrative exhibits to allegedly show how Pardee and CSI reclassified land on the
14 project, and Wolfram stated that Plaintiffs were “most certainly” entitled to additional
15 commissions because of this reclassification. *See id.* at 125:11-151:17; *see also*
16 October 24, 2013 Transcript (“10/24 Trans.”) at 249:25-250:1, attached as Exhibit I.

17 Plaintiff Walt Wilkes also testified that Plaintiffs “were entitled to other, more
18 commissions” and that their “understanding [was] we were going to get the whole
19 commission” had Pardee and CSI not purportedly reclassified land. October 30, 2013
20 Transcript (“10/30 Trans.”) at 98:19-20 and 100:3-4, attached as Exhibit J. Wilkes
21 stated that Pardee “tried to take the extra money from [Plaintiffs]” and that Pardee and
22 CSI went “outside of [the boundaries]” in reclassifying certain land. *Id.* at 102:16-18
23 and 136:1-8.

24 Plaintiffs also heavily questioned CSI’s founder and former principal Whittemore
25 about the purported reclassification of Option Property on the project. Whittemore
26 testified that he believed the case was about “past due brokerage commissions”
27 because it was the “impression that [he] took from [his] deposition” due to Plaintiffs’
28 counsel’s questioning. Exh. I, 10/24 Trans. at 10:12-15. During that same day at trial,

1 Plaintiffs' counsel spent almost the entire day asking numerous questions about
2 reclassification of land on the project and the contractual definition of Option Property.
3 *See generally id.* at 35:14-216:13. Whittemore testified that Pardee and CSI had not
4 conspired to deny Plaintiffs any commissions by reclassifying certain land on the
5 project, but rather that the parties needed "the greatest degree of flexibility to allow the
6 parties to ultimately get the best plan" for the entire project. *Id.* at 83:21-84:4.

7 Plaintiffs' counsel's opening and closing arguments similarly focused on
8 Plaintiffs' claims to additional commissions on the project. Counsel opened by stating
9 that the case largely "hinge[d]" on whether Pardee's purchases were considered
10 Purchase Property or Option Property, and that the evidence would "show that
11 [Pardee's] commission payments were inaccurate, [and] were not properly calculated."
12 Exh. H, 10/23 Trans. at 14:8-15:1 and 20:3-4. Counsel's closing argument again
13 focused on this purported reclassification, as he claimed that "it is . . . a breach of
14 contract to think that [Pardee] can adversely affect [Plaintiffs'] rights to a commission by
15 making a later deal between the parties that would change defined terms and
16 entitlement to money." December 13, 2013 Transcript ("12/13 Trans.") at 153:1-8,
17 attached as Exhibit K. Counsel claimed that he was suggesting to the Court "the legal
18 principle that . . . [Pardee] cannot adversely affect the rights of [Plaintiffs] to a
19 commission." *Id.* at 153:17-154:10.

20 But after a full bench trial beginning on October 23, 2013, the Court rejected
21 Plaintiffs' claim to additional commissions. *See generally* Findings of Fact and
22 Conclusions of Law, on file with the Court. The Court noted that Pardee had paid
23 Plaintiffs \$2.6 million in commissions pursuant to the Commission Agreement for all
24 land purchases that Pardee made on the Project. *See id.* at 8:19-20. The Court also
25 explained that "Pardee as of the present time does not owe any commission to Plaintiffs
26" *See id.* at 8:25-9:4. According to the Court, Plaintiffs' dominant theory that
27 Pardee reclassified certain land purchases on the Project and "robbed" Plaintiffs of \$1.8
28 million in future commissions had no basis in law or in fact. *See id.* at 12:16-13:9. The

1 Court did award Plaintiffs \$6,000 in time and effort expended to research accounting
2 matters related to their commissions and \$135,500 in special damages for attorney's
3 fees and costs, suggesting that Plaintiffs were entitled to additional information from
4 Pardee to verify that they had been accurately paid. See *id.* at 14:7-15:3 and 17:25-
5 18:2. The Court's total award of \$141,500 was even less than Plaintiffs' pre-trial Offer
6 of Judgment. See Plaintiffs' Offer of Judgment, attached as Exhibit L.

7 Because Pardee entirely prevailed on Plaintiffs' demand for lost future
8 commissions, which was the case's most significant and bitterly contested issue,
9 Pardee now moves for the portion of its attorney's fees and costs incurred in defending
10 against that argument. Pardee does so pursuant to the Commission Agreement as the
11 prevailing party in this litigation.

12 II. ARGUMENT.

13 A. Legal Standard.

14 1. Prevailing Party Analysis Pursuant to Contract.

15 NRCP 54 permits a party to claim attorney's fees by motion, based on a "statute,
16 rule or other grounds entitling the movant to the award." NRCP 54(d)(2). Thus, a
17 district court may award attorney's fees if authorized to do so by statute, rule or
18 contract, and parties "are free to provide for attorney fees by express contractual
19 provision." See *Davis v. Beling*, 128 Nev. Adv. Op. 28, 278 P. 3d 501, 515 (2012).
20 Pardee seeks recovery of a portion of its attorney's fees based upon the contract
21 provision found in the Commission Agreement. The goal in "interpreting an attorney
22 fees provision, as with all contracts, is to discern the intent of the contracting parties."
23 *Id.* The Court should be mindful that contractual provisions for fees and costs "provide
24 an incentive to settle and reduce litigation" rather than pressing forward with trumped
25 up claims or damages. *Dimick v. Dimick*, 112 Nev. 402, 405, 915 P.2d 254, 256
26 (1996). In this matter, the parties' agreement calls for attorney's fees for the "prevailing
27 party" in "an action to enforce its rights under this Agreement." Exh. F, Commission
28 Agreement at p. 2.

The term “prevailing party” is “broadly construed” to encompass both plaintiffs and defendants. *Valley Elec. Ass’n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005); see also *Moritz v. Hoyt Enterprises, Inc.*, 604 So. 2d 807, 810 (Fla. 1992). Because the term “prevailing party” is a “legal term of art,” the Nevada Supreme Court has never provided an exact definition of prevailing party in the contractual context. *Cleverley v. Ballantyne*, No. 2:12-CV-00444-GMN, 2014 WL 317775, at *2 (D. Nev. Jan. 28, 2014) (noting “Nevada case law does not define prevailing party in the contractual context”). Nevertheless, it has explained that, with respect to contractual attorney’s fees provisions, a party prevails if it “succeeds on any substantial aspect of the case.” *Davis*, 128 Nev. Adv. Op. 28, 278 P. 3d at 515; see also *Moritz*, 604 So. 2d at 810 (“[T]he party prevailing on the significant issue in the litigation is that party that should be considered the prevailing party for attorney’s fees.”).

Davis and *Friedman v. Friedman* are particularly instructive regarding this analysis. In *Davis*, homeowners sought to recover attorney’s fees against their former real estate agent for successfully defending against the agent’s claims of breach of the listing agreement between the parties. See 128 Nev. Adv. Op. 28, 278 P. 3d at 506. In writing for the Nevada Supreme Court, Justice Saitta noted that the matter was straightforward:

[B]ecause the [homeowners] successfully defended against [the agent’s] breach of contract action[], pursuant to the clear language of the[] agreements, the [homeowners] were entitled to recover reasonable attorney’s fees incurred in the defense of those particular claims.

Id. at 515. Justice Saitta affirmed these attorney’s fees and costs even though the agent had recovered \$115,455 against the homeowners on a related unjust enrichment cause of action. *Id.* at 507. She did so because under a common sense meaning of “prevailing party,” the homeowners won on the major issue of the case even though they lost on another secondary issue.

Friedman also embraces the pragmatic principle of awarding contractual attorney’s fees to a defendant who successfully defeats a plaintiff’s predominant legal

theory. *Friedman* was a divorce case in which the district court heard numerous issues related to the divorcing parties' assets. See 2012 WL 6681933 (Nev. Dec. 20, 2012) (unpublished). The plaintiff filed a motion to compel against his former wife, arguing that she had failed to comply with the terms of the parties' marital settlement agreement and asking for his attorney's fees pursuant to that agreement. See *id.* at * 1. The defendant filed a motion for summary judgment in which she argued her former husband's arguments regarding compliance were meritless. After hearing the motions, the district court ruled in the defendant's favor and awarded her \$2,500 in attorney's fees pursuant to the contract for successfully defending against the plaintiff's claims. In affirming the award of attorney's fees to the defendant as the contractual prevailing party, the Nevada Supreme Court explained that the term "prevailing party" is not limited to the individual initiating the suit and that the former wife prevailed because she successfully defended against the plaintiff's claims "with regard to the majority of the issues that the parties litigated." *Id.* at *6. Accordingly, the fact that the district court found the wife breached "one provision" of the agreement was immaterial because, as a practical matter, she won the majority of the contested issues. *Id.* at *2.

Numerous other jurisdictions have considered and ruled on how to define a prevailing party in contractual disputes involving an attorney's fees provision. For example, California's case law is the most robust on this issue, and California courts note that a prevailing party is the one that "most accomplish[es] its litigation objective." *Maynard v. BTI Grp., Inc.*, 216 Cal. App. 4th 984, 992, 157 Cal. Rptr. 3d 148, 153 (2013). Thus the California Supreme Court explained that the analysis was a pragmatic one:

We agree that in determining litigation success, courts should respect substance rather than form, and to this extent should be guided by equitable considerations. For example, a party who is denied direct relief on a claim may nonetheless be found to be a prevailing party if it is clear that the party has otherwise achieved its main litigation objection.

1 *Hsu v. Abbata*, 9 Cal. 4th 863, 877, 891 P.2d 804, 813 (1995). That court later
2 explained that if a contract does not expressly define “prevailing party,” the court must
3 “base its attorney fees decision on a pragmatic definition of the extent to which each
4 party has realized its litigation objectives, whether by judgment, settlement or
5 otherwise.” *Santisas v. Goodin*, 17 Cal. 4th 599, 622, 951 P.2d 399, 414 (1998).

6 The Ninth Circuit has also recognized this objective-based approach, noting that
7 prevailing party analysis must be done within the “common sense meaning” of the
8 phrase and that successfully defending against a plaintiff’s argument, even by
9 technicality on voluntary dismissal, makes a litigant a prevailing party under a
10 contractual attorney’s fees provision. See, e.g., *Anderson v. Melwani*, 179 F.3d 763,
11 766 (9th Cir. 1999). In applying California law on contractual prevailing parties, the
12 Ninth Circuit has also held that a party’s failure to recover a majority of its requested
13 damages from a purported breach of contract means that it cannot be the prevailing
14 party:

15 While a plaintiff who obtains all relief requested on the only contract claim
16 in the action must be regarded as the party prevailing on the contract for
17 purposes of attorney’s fees . . . a court could also determine that a party is
18 not prevailing when it receives only a part of the relief sought.

18 *Berkla v. Corel Corp.*, 302 F.3d 909, 920 (9th Cir. 2002). In fact, although the plaintiff in
19 *Berkla* recovered \$23,502 in compensatory damages on its breach-of-contract claim,
20 the Ninth Circuit determined the plaintiff was not the prevailing party because it had
21 sought \$1.2 million in damages for the breach, and thus the defendant had successfully
22 prevailed because plaintiff only recovered “less than 3% of what he affirmatively sought
23 before the jury at trial.” *Id.* at 919-20. Because the plaintiff’s pre-litigation “demands
24 and objectives clearly involved a substantial financial payoff,” which the defendant
25 successfully defeated at trial, the “equitable considerations” in the case prevented
26 plaintiff from being the prevailing party. *Id.* at 920.

27 Thus, numerous jurisdictions, including Nevada, embrace an equitable, common
28 sense approach to evaluating the prevailing party. Under such an approach, the focus

1 is appropriately on which party achieved most of the litigation objectives it had before
2 trial.

3 2. Reasonableness of Attorney's Fees.

4 Once a litigant shows it is the prevailing party under a contract, it must also show
5 that its attorney's fees and costs are reasonable. The guiding case in this analysis is
6 *Brunzell v. Golden Gate Nat'l Bank*, which demands that the trial court consider the
7 following factors to determine reasonableness: (1) the quality of the advocate; (2) the
8 character of the work done; (3) the work actually performed; and (4) the result obtained.
9 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). NRCP 54 also requires an affidavit or
10 declaration from the movant's attorney swearing that the fees were reasonably incurred
11 and supporting documentation evidencing the fees claimed.

12 The Nevada Supreme Court has further clarified that awarded costs must be
13 reasonable, and that the parties may not simply "estimate" a reasonable amount of
14 costs. See *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. Adv. Op. 15, 345 P.3d
15 1049, 1054 (Mar. 26, 2015). Instead, the statute requires the requesting party to
16 provide a verification under oath that "to the best of his or her knowledge and belief the
17 items are correct, and that the costs have been necessarily incurred in the action or
18 proceeding." *Id.* Thus, the party must provide supporting documentation to
19 "demonstrate how such fees were necessary to and incurred in the present action." *Id.*
20 This documentation may include receipts or court records, or it may be line item entries
21 of the cost so long as they indicate "the reason for each [cost]," which is "precisely what
22 is required under Nevada law." *Id.*

23 B. Pardee is Entitled to Its Reasonable Attorney's Fees and Costs in this
24 Litigation.

- 25 1. Pardee is the "prevailing party" and is therefore entitled to its
26 attorney's fees pursuant to the Commission Agreement.

27 The significant issue in this case during trial was always Plaintiffs' claim to lost
28 future commissions under the Commission Agreement. Plaintiffs spent hour after hour
at trial trying to induce testimony regarding Pardee's purported reclassification of land.

1 See Part I(D), *supra*. As the Court no doubt recalls, Plaintiffs introduced numerous
2 demonstrative exhibits outlining the purported boundaries of Option Property, all in an
3 attempt to show that Pardee conspired with CSI to change those boundaries and
4 consequently “robbed” Plaintiffs of additional commissions. See *id.* Plaintiffs both
5 testified that they believed they were entitled to additional commissions, and CSI’s
6 founder Whittemore testified that he believed the case was about lost commissions
7 because of Plaintiffs’ counsel’s questioning at his deposition. See *id.* Plaintiffs’ counsel
8 repeatedly told the Court in his opening and closing arguments that the evidence would
9 show Pardee underpaid Plaintiffs’ commissions due and owing, and that Pardee could
10 not change the Commission Agreement’s terms and the land boundaries on the project
11 to justify that underpayment. See *id.*

12 Despite all of Plaintiffs efforts, however, the Court entirely and unequivocally
13 rejected Plaintiffs’ dominant theory about Pardee owing additional commissions. The
14 Court noted that Pardee had paid Plaintiffs \$2.6 million in commissions pursuant to the
15 Commission Agreement for all land purchases that Pardee made on the Project. See
16 Findings of Fact and Conclusions of Law at 8:19-20. The Court also explained that
17 Pardee did not owe any commission to Plaintiffs, and that Plaintiffs’ theory that Pardee
18 reclassified certain land purchases on the Project and “robbed” Plaintiffs of \$1.8 million
19 in future commissions had no basis in law or in fact. See *id.* at 8:25-9:4 and 12:16-
20 13:9. The Court’s damages award reflects this, as the Court awarded Plaintiffs nothing
21 in lost commissions. See *generally id.* This was the case’s most substantial issue, and
22 Pardee—not Plaintiffs—prevailed on it.

23 The following chart illustrates Plaintiffs’ claimed damages in this case, including
24 a breakdown of each type of damages and the percentage of total damages that the
25 type represented:

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<u>Type of Damages</u>	<u>Claimed Amount</u>	<u>Amount Awarded by the Court</u>	<u>% of Plaintiffs' Total Claimed Damages</u>	<u>% of Plaintiffs' Total Awarded Damages</u>
Lost Future Commissions	\$1,800,000.00	\$0	92.2%	0%
Time and Expense to Conduct Accounting	\$6,400.00	\$6,000	.3%	4.2%
Attorney's Fees	\$146,000.00	\$135,500	7.5%	95.8%
Totals	\$1,952,000.00	\$141,500		

See Exhibit G, Plaintiffs' Thirteenth NRCP 16.1 Supplement at 8:23-10:15; see *also* Judgment, on file with the Court. As the chart shows, Plaintiffs' claim to lost future commissions was the significant issue in the case because it comprised 92.2% of Plaintiffs' total claimed damages and also provided the very incentive for Plaintiffs to bring the lawsuit. See Letter Dated May 19, 2009 from James J. Jimmerson to Pardee ("My clients are of the belief that they have not been paid for all of the sales which they are due, and Pardee's failure to comply with its contract constitutes a material breach of this contract for which my clients will be obliged to seek appropriate legal redress for the harm your company has, and is, causing them."), attached as Exhibit M. And although Plaintiffs recovered compensatory damages for breach of contract in this case, just as the *Berkla* plaintiff did, Plaintiffs only recovered \$6,000 in compensatory damages, or .3% of their total claims damages before litigation. Consequently, Plaintiffs did not achieve their pre-litigation objectives, and so they cannot be the prevailing party in this litigation. Instead, it was Pardee who achieved its pre-litigation objective—namely defeating Plaintiffs' inflated demand for lost commissions—and accordingly Pardee is the prevailing party in this case.

2. Pardee's attorney's fees are reasonable and supported by adequate evidentiary documentation.

Brunzell's demand that the Court consider the quality of Pardee's counsel, the character of the work done, the work actually performed, and the result obtained shows the reasonableness of Pardee's claimed attorney's fees. Moreover, under *Cadle Co.*,

1 Pardee has provided sufficient supporting documentation to prove the reason for each
2 cost.

3 a. Quality of the Advocates.

4 Pardee was primarily represented by Pat Lundvall and Aaron Shipley through
5 trial, and Rory Kay performed work after the trial concluded. Ms. Lundvall, as a partner
6 in the law firm of McDonald Carano Wilson LLP ("McDonald Carano"), has over 25
7 years of experience litigating in Nevada courts, is AV rated by her peers, and has been
8 named to the Legal Elite, Super Lawyers, Best Lawyers in America, the Silver State's
9 Top 100, and Chambers USA. She is board certified by the National Board of Trial
10 Advocacy, the National Board of Civil Pretrial Practice Advocacy, and the State Bar of
11 Nevada, and was lead counsel on this matter.

12 Mr. Shipley, as one of Ms. Lundvall's partners at McDonald Carano, has 13
13 years of experience in Nevada courts, and has been recognized as a Mountain States
14 Super Lawyer. He has experience handling commercial litigation, including claims
15 similar to the ones at issue in this case, and he served as second chair throughout the
16 trial.

17 Mr. Kay is an associate at McDonald Carano, having been admitted to the
18 Nevada Bar in 2011 and the California Bar in 2013. He has experience litigating
19 complex commercial matters, including representing Pardee in other litigation regarding
20 the Project.

21 Ms. Lundvall, Mr. Shipley and Mr. Kay all charged hourly rates commensurate
22 with their experience and education, and consistent with prevailing rates in the Nevada
23 legal market.

24 b. The Character of the Work Done.

25 The work of Pardee's attorneys was necessary to protect Pardee's interests on
26 the Project and under the Commission Agreement. Pardee's counsel handled the case
27 from beginning to end, vigorously conducting discovery, preparing for and executing the
28 trial, and litigating the case until its final post-trial judgment. Pardee also brought

various meritorious motions. All of the work done was consistent with civil litigation practice in Las Vegas, Nevada in similar cases where damages sought were close to \$2 million.

c. The Work Actually Performed.

A breakdown of the work performed (including the nature of the work, the attorneys' hourly rates, and total fees incurred in connection with each task) and costs incurred is contained in Exhibits D and E.

d. The Results Obtained.

As discussed above, Pardee's counsel successfully defended Pardee on the significant issue in the case, eliminating 92.2% of Plaintiffs' total claimed damages. Moreover, Pardee's counsel successfully reduced Plaintiffs claimed damages for the other types of damages so that Plaintiffs only recovered 7.2% of their total claimed damages, an amount less than Plaintiffs' final pre-trial Offer of Judgment.

III. CONCLUSION.

The Commission Agreement grants attorney's fees and costs to the prevailing party in any litigation arising from the contract. In this case, Pardee prevailed on the most significant issue in the litigation, entirely eliminating Plaintiffs' claim to lost future earnings, which equaled 92% of Plaintiffs' total claimed damages. Only Pardee achieved its pre-litigation objective in this case and it accordingly is the prevailing party pursuant to the Commission Agreement. Pardee is therefore entitled to its reasonable attorney's fees and costs. Consistent with the *Brunzell* analysis above, Pardee

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1 respectfully requests that the Court award Pardee \$622,767.20 in attorney's fees and
2 \$19,559.19 in costs, for a total award of **\$642,236.39**.


3 DATED this 6th day of June, 2016.

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MCDONALD CARANO WILSON LLP

/s/ Rory T. Kay
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano Wilson LLP and that on the 6th day of June, 2016, I e-served and e-filed a true and correct copy of the foregoing **PARDEE HOMES OF NEVADA’S MOTION FOR ATTORNEY’S FEES AND COSTS** via Wiznet, as utilized in the Eighth Judicial District in Clark County, Nevada, on the following:

James J. Jimmerson
Lynn M. Hansen
JIMMERSON HANSEN, P.C.
415 S. Sixth Street, Suite 100
Las Vegas, Nevada 89101

Attorney for Plaintiffs

and

John W. Muije
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Co-Counsel for Plaintiffs

/s/ Michelle Wade
An Employee of McDonald Carano Wilson LLP

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