IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No. 72371

PARDEE HOMES OF NEVADA, INC.

Appellant,

v.

JAMES WOLFRAM; ANGELA L. LIMBOCKER-WILKES, AS TRUSTEE OF THE WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, A NEVADA TRUST,; AND WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, A NEVADA TRUST

Respondents.

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

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 16.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

None of the Respondents represented by the undersigned counsel, namely James Wolfram ("Wolfram"), Walter Wilkes, ("Wilkes"), and Angela L. Limbocker-Wilkes ("Limbocker-Wilkes"), as trustee of the Walter D. Wilkes and Angele L. Limbocker-Wilkes Living Trust, a Nevada Trust, and the Walter D. Wilkes and Angele L. Limbocker-Wilkes Living Trust, a Nevada Trust, are corporate or business entities and therefore have no corporate parents.

The Jimmerson Law Firm, P.C. (formerly Jimmerson Hansen, P.C.) and John W. Muije & Associates are the law firms that have appeared on

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behalf of Wolfram, Wilkes, and Limbocker-Wilkes.

Dated this 30th day of April, 2018.

THE JIMMERSON LAW FIRM, P.C.

By: */s/ James M. Jimmerson, Esq.*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

JURISDICTIONAL STATEMENT

While this appeal is properly before this Court, Appellant Pardee Homes of Nevada, Inc.'s ("Pardee") Jurisdictional Statement is materially incomplete, in that Pardee makes no reference therein to the first judgment issued in this case on June 15, 2015. (52 JA 8151-53.) This first judgment was stricken pursuant to the district court's order issued on April 26, 2016. (71 JA 11385-88.) This omission is significant as detailed below.

ROUTING STATEMENT

Pardee is also incorrect in that this appeal is "presumptively assigned to the Court of Appeals." (Br. at 1.)[1] This case does not fall into any of the categories designated in NRAP 17(b), in particular, this is not a "tort case" where judgment is less than $250,000.00, excluding interest, attorney's fees, and costs. NRAP 17(b)(2). In light of the issues presented, particularly the attorney's fees as damages question, this appeal would benefit from the Supreme Court's review and decision.

[1] Appellant's Opening Brief is cited herein as "Br. at __."

STATEMENT OF THE ISSUES

Pardee improperly comingles legal and factual assertions with the statements identifying the issues on appeal. For example, Pardee improperly characterizes one of Wolfram and Wilkes's claims as "an ordinary two-party breach of contract claim." (Br. at 2.) As discussed below, for the purposes of an attorney's fees as damages analysis, this case is not properly categorized as an "ordinary two-party breach of contract claim." Further, Pardee falsely states, "Wolfram and Wilkes demanded millions of dollars in additional commissions from Pardee, which was the case's most substantial issue." (*Id.*) This is simply untrue as the facts below demonstrate.

Excluding the extraneous, improper, and false material, the issues on appeal are best stated as follows: (1) did the district court err in awarding Wolfram and Wilkes as special damages their attorney's fees; and (2) did the district court err in finding that Wolfram and Wilkes were the prevailing parties and therefore entitled to recover their attorney's

fees under the Commission Agreement between Wolfram, Wilkes, and Pardee.[2]

STATEMENT OF THE CASE

Wolfram and Wilkes were the real estate brokers who brokered the 2004 Option Agreement between Pardee and Coyote Springs Investment, LLC ("CSI") for the purchase of land designated for single family homes in Coyote Springs. The dispute between Pardee and Wolfram and Wilkes arises from Pardee's failure to keep Wolfram and Wilkes informed as required by the September 1, 2004 Commission Agreement ("Commission Agreement"). (27 JA 4289-92.)

Despite receiving repeated requests for information from Wolfram and Wilkes, Pardee not only refused to provide the requested information, it affirmatively instructed third parties to withhold the

[2] For the sake of clarity, the following are not issues on appeal as Pardee did not raise them in its opening brief: (1) the district court's judgment finding in favor of Wolfram and Wilkes for their three causes of action: (a) accounting, (b) breach of contract, and (c) breach of the implied covenant of good faith and fair dealing (including the findings of fact in support thereof); (2) the district court's judgment ordering an accounting by Pardee; (3) the district court's judgment finding in favor of Wolfram and Wilkes on Pardee's counterclaim for breach of the implied covenant of good faith and fair dealing; and (4) the reasonableness of the attorney's fees awarded to Wolfram and Wilkes.

information from Wolfram and Wilkes. (48 JA 7470 at ¶ 21.) This forced Wolfram and Wilkes to file suit to gain the information. (*Id.*)[3] In their Complaint, Wolfram and Wilkes set forth three causes of action: (1) accounting, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. (1 JA 1-6.) Wolfram and Wilkes's first prayer for relief was "[f]or the documents promised to them including, but not limited to, an accurate parcel map with Assessor's Parcel numbers, and an accounting of all transfers [of] titles or sales." (*Id.* at 6.) The Complaint was amended shortly after the action had been filed, wherein the allegations and the claims for relief were identical to the Complaint. (1 JA 7-12.) It was further amended in June 2013. (16 JA 2670-77.)

In response to the Second Amended Complaint, Pardee asserted a counterclaim against Wolfram and Wilkes for breach of the implied covenant of good faith and fair dealing. (16 JA 2678-87.) In its Counterclaim, Pardee specifically asserted, "Plaintiffs harassed Pardee for further information and documents to which they were not entitled

[3] As will be repeated throughout this brief, Pardee falsely claims that this action was filed because Wolfram and Wilkes, "believ[ed] that Pardee failed to pay them millions of dollars in commissions." (Br. at 3.)

and subject to confidentiality obligations." (16 JA 2684 at ¶ 17.)[4] Wolfram and Wilkes replied to the Counterclaim. (16 JA 2724-31.)

The case proceeded to a bench trial, after which the district court issued its Findings of Fact, Conclusions of Law, and Order. (48 JA 7457-74.) **The district court found in favor of Wolfram and Wilkes on all of their claims and against Pardee on its counterclaim**. (48 JA 7473-74.) The district court not only awarded Wolfram and Wilkes $141,500.00 in damages (including compensatory damages and attorney's fees as special damages), it also set a schedule for issuing an order granting an accounting. (*Id.*) The district court's decision meant Wolfram and Wilkes prevailed in a rout.

After issuing its decision at trial, the district court issued its Findings of Fact and Conclusions of Law and Supplemental Briefing re Future Accounting (the "Order on Accounting"). (49 JA 7708-11.)[5] In so doing, the district court ordered Pardee to provide to Wolfram and Wilkes

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[4] Pardee conspicuously omitted any mention of its Counterclaim in its opening brief. Not only does the Counterclaim further undermine Pardee's argument that the case was not about information, but it is another issue on which Wolfram and Wilkes prevailed. (48 JA 7474 at ¶ 2.)

[5] Pardee's opening brief completely fails to mention the Order on Accounting and the substantial relief it provided to Wolfram and Wilkes.

information that had previously been withheld. (32 JA 4937:11-24; 49 JA 7650-51.)

Subsequent to the issuance of the Order on Accounting, Pardee submitted to the district court a judgment purporting to find in favor of Pardee, specifically that Pardee had prevailed on a non-existent claim for $1.8 million in damages. (52 JA 8151-53.) The district court unwittingly entered the judgment on June 15, 2015, believing that all parties had approved the same. (*Id.*; 70 JA 11017:21-11021:7.)

After substantial briefing, motion practice, and a hearing on January 15, 2016, the district court entered an order on April 26, 2016 striking the earlier June 15, 2015 judgment. (71 JA 11385-88.) The Court then entered judgment fully in favor of Wolfram and Wilkes on May 16, 2016, finding in their favor on their claims for (1) accounting, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. (71 JA 11389-91.) It also found in Wolfram and Wilkes's favor and against Pardee on Pardee's counterclaim for breach of the implied covenant of good faith and fair dealing. (*Id.*)

After the judgment was issued, both sides moved for their attorney's fees and costs pursuant to the Commission Agreement's

prevailing party provision. (72 JA 11590-614; 12115-82.) Pardee also moved to amend the judgment concerning the award of attorney's fees as damages. (72 JA 11455-589.) The district court granted Wolfram and Wilkes's motion for fees and costs and denied Pardee's motion for the same, finding Wolfram and Wilkes to be the prevailing party. (86 JA 13616-18; 13619-21.) The district court entered an amended judgment on October 12, 2017 including the Order on Accounting and all monetary awards. (88 JA 14118-29.) Pardee's appeal followed.

STATEMENT OF FACTS

Respondents James Wolfram and Walt Wilkes were licensed real estate brokers working in Southern Nevada and the surrounding area for over 35 years. In or around late 2003/early 2004, Wolfram and Wilkes successfully represented Pardee in Pardee's effort to enter into an agreement with CSI for the acquisition of land in Coyote Springs. (32 JA 4869:17-4870:2.)

A. The Option Agreement Between Coyote Springs Investment LLC and Pardee Homes of Nevada

In May 2004, Pardee and CSI came to an agreement to begin the development of Coyote Springs. (23 JA 3545-3625). This agreement, entitled Option Agreement for the Purchase of Real Property and Joint

Escrow Instructions (the "Option Agreement"), then governed Pardee's purchase of property at Coyote Springs for the development of single family homes. (*Id.*) At the time the Option Agreement was executed, CSI was only selling to Pardee land for single-family homes. (48 JA 7458-59 at ¶ 8.)

Pursuant to the Option Agreement, Pardee was obligated to purchase a certain amount of property (approximately 3600 acres in Clark County) for the construction of single family homes for a price of $66 million, defined in the Agreement as the "Purchase Property Price." (23 JA 3545-47.) Second, the Option Agreement gave Pardee the option to purchase the balance, or a portion thereof, of the property in Coyote Springs designated for single family home development for a certain price per acre reflected by a price schedule in the Agreement. (*Id.*)

Consistent with this two-pronged structure, the Option Agreement classified the property subject to purchase as either "Purchase Property" or "Option Property." (23 JA 3545.) The Purchase Property is defined in the Option Agreement as "Parcel 1 as shown on Parcel Map 98-57 recorded July 21, 2000 in Book 2000072, as Document No. 01332, Official Records, Clark County, Nevada (containing approximately 3,605.22

acres)." (23 JA 3545.)[6] The Option Property is defined in the Option Agreement as "the remaining portion of the Entire Site which is or becomes designated for single-family detached production residential use." (*Id.*) Essentially, the Option Property is the rest of the property at Coyote Springs designated for single family homes.

Two amendments to the Option Agreement were executed in 2004: the first on July 28, 2004 (23 JA 3632-34) and the second on August 31, 2004 (24 JA 3644-69). Two principal changes were effected by these amendments as pertaining to Wolfram and Wilkes. First, the Purchase Property Price was increased from $66 million to $84 million. (24 JA 3645.) And second, the amendments provided certain exhibits, including maps of the Entire Site, the Purchase Property, and the Option Property, which were not included in the Option Agreement. (24 JA 3644.)

B. The Commission Agreement

Wolfram, Wilkes, and Pardee entered into a commission agreement whereby, in exchange for services rendered by Wolfram and Wilkes, Pardee agreed to (1) pay to them certain commissions for land purchased from CSI, and (2) send to Plaintiffs notices and other

[6] A map of Parcel One is found at 28 JA 4455-4462 and 24 JA 3656.

information concerning the real estate purchases made under the Option Agreement and the corresponding commission payments (the "Commission Agreement"). (27 JA 4289-92.) [7]

The specific terms of the Commission Agreement are several. First, the Commission Agreement explicitly refers to and relies upon the Option Agreement as it states that all of the capitalized terms used in the Commission Agreement have the same meaning as those defined terms in the Option Agreement. (27 JA 4289.)

Second, the Commission Agreement provided for the payment of "broker commission[s]" to Wolfram and Wilkes based upon different formulas depending on whether the property purchased was Purchase Property or Option Property. (*Id.*)

Third, the Commission Agreement requires Pardee to provide Plaintiffs with notifications and information concerning future transactions between Pardee and CSI. Specifically, the Commission Agreement states, "In addition Pardee shall keep each of you reasonably

[7] At that time, Wolfram and Wilkes signed the Commission Agreement on behalf of Award Realty Group Inc. and General Realty Corp. Since then, Award Realty Group and General Realty each assigned to Mr. Wolfram and Mr. Wilkes, respectively, all rights, title and interest under the Commission Agreement. (48 JA 7458 at ¶ 2.)

informed as to all matters relating to the amount and due dates of your commission payments." (27 JA 4290.)

Fourth, the Commission Agreement provides for the recovery of attorney's fees in the event one party successfully brings or defends an action against the other party under the Commission Agreement. (*Id.*)

C. Pardee Fails to Satisfy Its Obligations To Wolfram and Wilkes

After the Commission Agreement was executed, Pardee and CSI continued the development of Coyote Springs. During that development Pardee breached its obligation to keep Wolfram and Wilkes informed as required under the Commission Agreement. (48 JA 7469-70 at ¶¶ 16-20.) Indeed, despite entering into several additional agreements concerning the purchase and development of single family homes, Pardee only provided Wolfram and Wilkes the Amended and Restated Option Agreement from May 2005. (48 JA 7465-66 at ¶ 39.) Pardee withheld the eight subsequent amendments to the Amended and Restated Option Agreement, as well as the information contained therein, which was necessary for Wolfram and Wilkes to confirm the accuracy of their commissions. (*Id.*; 7469 at ¶ 16.)

The information was vital for two reasons: first, the Option Agreement had a 40-year term, well beyond Wolfram and Wilkes' life

expectancy and so the information would be critical for their children to track the purchases and their commissions. (23 JA 3550 at 2(c); 37 JA 5540:2-22.) Second, the information was necessary in order to explain the development since the boundaries of Purchase Property and Option Property were changing from the time the agreements were provided to Wolfram and Wilkes in 2004/2005. (*cf.* 24 JA 3654-59 with 27 JA 4326; 28 JA 4339; 4353-58; 4379-97.)[8]

Wolfram and Wilkes repeatedly asked Pardee for information, but Pardee did not send them the information as was required. (48 JA 7466 at ¶ 40.). Forced to look elsewhere, Wolfram contacted the title companies asking for information. (29 JA 4693:10-4696:23.) In response, Pardee instructed the title companies to withhold the information and instead lie to Wolfram telling him that he has "everything." (27 JA 4125.) Wolfram even spent hours looking for answers in public records to no avail. (48 JA 7470 at ¶ 20.)

[8] The Court found that the boundaries of Purchase Property and Option Property would change (48 JA 7460 at ¶ 12; 7468 at ¶ 12.) However, that the boundaries could (and did) change further supports the need to keep Wolfram and Wilkes informed.

Left with no other choice, Wolfram and Wilkes hired an attorney to seek the information. Their attorney made several phone calls and sent several letters to Pardee requesting the information. (34 JA 5238-40; 5252-5254; 5261-6334.) The information was still never provided. (48 JA 7469 at ¶ 16.) After years of having the information withheld, Wolfram and Wilkes were forced to file suit to get the information. (*Id.*)

D. Wolfram and Wilkes File Suit to Enforce Their Right to Information

In December 2010, Wolfram and Wilkes filed their Complaint, wherein they alleged three claims for relief: (1) accounting, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. (1 JA 1-6.) The Complaint revolved around the need for information. (*Id.*) All subsequent pleadings did as well. (1 JA 7-12; 16 JA 2670-77.) The first prayer for relief in every pleading was for an order for Pardee to provide the requested information and an accounting. (*Id.* at 4.) None of the pleadings asserted a claim for unpaid commissions (*Id.*)

In addition to the requested accounting, Wolfram and Wilkes sought attorney's fees as damages. (*Id.*) Contrary to Pardee's assertion that years after the filing of the Complaint were attorney's fees as

damages pled in a Second Amended Complaint (Br. at 3), in both the Complaint and Amended Complaint, attorney's fees were sought to be recovered under each cause of action. (1 JA 4-6; 10-12.) In order to avoid all doubt about the propriety of Wolfram and Wilkes's entitlement to attorney's fees as damages, Wolfram and Wilkes successfully moved to file their Second Amended Complaint. (16 JA 2662-64.)

The Second Amended Complaint once again contained the three aforementioned claims for relief and its principal prayer for relief was for the requested documents and an accounting. (16 JA 2670-77.) In response, Pardee asserted a counterclaim against Wolfram and Wilkes for breach of the implied covenant of good faith and fair dealing. (16 JA 2678-87.)

In its opening brief, Pardee incorrectly characterizes Wolfram and Wilkes's lawsuit, stating, "Wolfram and Wilkes Sue Pardee Seeking Additional Commissions." (Br. at 17.) Any review of the Complaint or any of the subsequent amended pleadings reveals this statement to be outright false. However, Pardee's opening brief and case appeal statement is rife with repeated misstatements about the events at issue,

and the proceedings before the district court. The following contains examples of just a few of the misstatements:

Claim by Pardee	Fact
"Pardee provided Wolfram and Wilkes with all information (including the Confidential Agreements) during discovery, well before trial began." (Br. at 34.)	At no point before, during, or after trial did Pardee produce Amendments 1-8 to the Amended and Restated Option Agreement. During trial the parties stipulated that CSI, **not Pardee**, produced those amendments. (32 JA 4937:11-24.)
Wolfram further believed he was also entitled to a commission on any land Pardee bought from CSI, contrary to the express terms of the Commission Agreement." (Br. at 17.)	Wolfram testified to the exact opposite. He testified that he was not "entitled to commissions on the commercial lands, the multifamily lands, or the golf course." (41 JA 6117:20-6118:1.)
"the bench trial was nearly exclusively about Wolfram and Wilkes claiming additional commissions for Pardee's alleged purchase of Option Property." (Br. at 34.)	This statement is demonstrably false.[9] Considering the hundreds of cites to the trial transcript concerning information, it is unsurprising that the word "information" appears 714 times in the trial transcript.

[9] The following is a non-exhaustive list of citations to the trial transcript concerning the subject of information (and exceeds the amount of citations to the entire appellate record in Pardee's opening brief): **22 JA 3225:16-24**; 3225:15-3226:7; 3232:5-9; 3232:10-15; 32332:16-21; 3233:8-22; 3233:23-3234:8; 3236:5-12; 3236:22-25; 3237:8-12; 3237:18-24; 3239:2-13; 3239:14-24; 3240:7-13; 3241:19-24; 3241:25-3242:8; 3242:9-14; 3243:8-11; 3246:12-14; 3246:19-23; 3268:7-11; 3275:24-3276:5; 3276:13-

25; 3278:23-3279:8; 3283:1-4; 3304:3-6; 3307:3-10; 3326:25-3327:19; 3328:7-15; 3328:16-3329:10; 3329:16-3330:3; 3331:12-24; 3331:25-3332:10; 3334:15-23; 3371:16-22; **29 JA 4471:2-7**; 4472:16-19; 4499:23-4500:3; 4505:24-4506:3; 4546:12-4547:7; 4549:4-13; 4626:8-9; 4683:2-24; 4684:20-4685:17; 4685:20-4686:19; 4686:22-4687:17; 4687:20-4688:18; 4688:21-4689:20; 4689:23-4690:22; 4690:25-4691:24; 4693:10-19; 4695:2-20; 4698:1-6; 4700:16-19; 4703:9-11; **30 JA 4718:7-14**; 4727:8-20; 4734:15-21; 4738:9-4739:4; 4743:6-7; 4749:21-4750:21; 4751:2-4752:18; **32 JA 4854:8-13**; 4858:17-4859:7; 4859:20-4860:2; 4860:3-8; 4862:11-18; 4865:10-4866:2; 4870:17-22; 4870:23-4871:16; 4871:21-4872:12; 4872:13-25; 4890:6-17; 4934:11-4936:13; 4937:11-24; 4961:13-17; 4962:14-4963:13; 4970:2-6; 4973:8-25; 4978:11-17; 4978:18-24; 4979:2-8; 4981:1-8; 4981:23-4982:15; 4991:23-4993:1; 5031:9-13; 5033:2-9; 5034:18-5035:13; 5038:9-13; 5043: 14-20; 5048:20-5049:5; 5052:15-5053:13; 5060:4-5062:13; 5064:21-25; 6065:1-3; 5067:14-16; 5068:3-5069:17; 5078:5-7; 5083:2-12; 5084:3-9; 5085:25-5086:8; 5089:15-23; 5092:2-21; 5093:3-12; 5093:13-5094:2; 5094:11-24; 5096:19-5097:16; **33 JA 5098:2-5099:13**; 5099:14-24; 5100:5-25; 5101:15-5102:9; 5103:20-5104:3; 5106:2-16; 5107:1-18; 5112:9-25; 5113:7-11; 5115:8-20; 5116:24-5119:14; 5120:11-5121:12; 5122:6-11; 5125:14-5130:11; 5139:1-12; 5152:11-16; 5153:25-5154:21; 5159:9-15; 5165:23-5169:15; **35 JA 5276:3-7**; 5277:13-5278:4; 5281:4-9; 5285:9-16; 5299:17-22; 5313:19-5314:5; 5336:1-5; 5249:8-12; 5351:16-5352:1; 5357:10-22; 5358:18-5359:15; 5378:6-14; 5381:4-24; 5391:20-5392:7; 5394:8-12; 5398:17-5399:15; 5411:16-22; 5428:5-10; 5430:18-21; 5431:19-21; 5432:1-5; 5433:2-4; 5433:11-14; 5433:24-5434:1; 5434:11-13; 5436:16-20; 5439:14-16; 5440:16-19; 5448:25-5454:2; 5454:12-17; 5454:18-22; 5454:23-5455:5; 5455:15-23; 5457:5-10; 5461:14-5462:3; 5463:6-9; **37 JA 5521:7-5523:18**; 5524:7-20; 5524:24-5527:1; 5530:10-16; 5531:3-12; 5534:9-5535:2; 5535:3-11; 5536:4-5537:2; 5538:5-14; 5539:8-18; 5540:2-22; 5546:3-23; 5549:13-19; 5565:3-11; 5566:20-5567:10; 5569:13-18; 5580:6-16; 5586:23-25; 5587:25-5588:24; 5605:17-5606:25; 5610:8-13; 5616:4-17; 5621:8-5622:1; 5623:10-19; 5624:12-5625:7; 5626:13-5628:24; 5629:6-14; 5631:3-5632:2; 5643:8-17; 5650:15-5651:14; 5652:2-18; 5669:11-5676:10; 5677:19-5679:3; 5685:8-11; 5685:16-5686:10; 5688:2-20; 5690:17-22; 5691:4-5693:6; 5693:14-5695:9; 5696:21-5698:7; 5699:11-5703:11; 5700:10-18; 5702:19-5703:5; 5704:4-5708:5; 5709:5-9; 5710:13-5711:4; 5711:15-5714:8; 5716:2-17; 5718:1-12;

5721:9-5722:12; 5725:16-5726:11; 5726:23-5727:20; 5727:6-9; 5728:22-24; 5729:25-5730:18; 5731:2-24; 5744:25-5745:21; 5750:1-25; 5754:8-18; 5758:24-5760:20; **38 JA 5763:8-19**; 5765:5-11; 5765:12-5766:9; 5768:3-5769:21; 5773:4-5774:13; 5778:14-5784:6; **40 JA 5835:8-11**; 5846:24-5848:12; 5874:11-5875:6; 5890:8-12; 5896:12-5897:17; 5902:6-18; 6906:6-10; 5907:6-5909:22; 5910:6-15; 5937:19-23; 5993:5-12; 5993:21-25; 6001:1-7; 6014:25-6015:6; 6050:14-17; **41 JA 6096:5-9**; 6101:11-15; 6102:4-24; 6103:19-6105:7; 6105:9-23; 6114:17-6115:12; 6116:16-19; 6120:24-6121:15; 6122:2-17; 6123:6-6124:10; 6125:6-16; 6126:9-25; 6129:12-6130:2; 6130:11-6132:19; 6134:9-19; 6136:1-10; 6136:18-6137:9; 6137:24-6138:23; 6139:13-20; 6140:23-6141:11; 6142:3-6143:3; 6145:17-22; 6146:13-6147:16; 6148:10-6149:14; 6148:23-6149:4; 6150:8-9; 6152:5-19; **42 JA 6195:25-6196:2**; 6196:16-20; 6198:23-6199:25; 6200:6-6201:3; 6201:10-14; 6202:22-25; 6203:10-22; 6205:10-25; 6207:9-12; 6213:11-18; 6215:20-6216:9; 6216:15-6217:20; 6218:9-6220:6; 6220:11-6221:10; 6222:10-16; 6224:20; 6227:15-16; 6230:10-24; 6233:14-6234:19; 6237:6-21; 6238:12-17; 6240:2-10; 6240:14-24; 6241:7-25; 6277:8-6278:7; 6280:3-12; 6280:24-6281:12; 6281:16-6282:12; 6283:12-6284:14; 6284:19-6286:15; 6287:9-6293:24; 6294:16-6296:4; 6300:2-5; 6301:9-18; 6302:5-11; 6303:19-6305:16; 6309:5-23; 6313:8-12; 6314:1-18; 6315:22-6316:3; 6318:15-6321:6; 6322:7-6323:20; 6331:8-14; 6333:22-6334:7; 6335:24-6336:4; 6340:3-10; 6340:22-6341:13; 6343:4-9; 6344:1-11; 6345:2-6; 6345:16-6346:9; 6349:3-10; 6352:3-12; 6354:1-15; 6355:7-21; 6356:2-6357:4; 6386:7-6387:21; 6418:11-6419:14; 6418:20-25; 6421:9-24; 6425:14-6429:1; 6430:10-17; 6433:2-15; 6433:9; **43 JA 6469:2-6480:9**; 6630:2-11; 6632:22-6639:1; **47 JA 7119:19-7120:2**; 7120:8-21; 7124:13-16; 7139:10-23; 7156:20-7158:11; 7158:22-7159:22; 7162:25-7163:6; 7165:22-7166:9; 7167:9-24; 7168:2-7169:10; 7191:7-7192:6; 7194:16-23; 7196:11-7197:20; 7198:21-7199:6; 7199:12-7200:4; 7201:10-7203:7; 7315:14-19; 7319:10-22; 7324:6-13.

"After a Bench Trial, the District Court Finds That Pardee Prevails On the Most Substantial Issue Tried, Specifically Finding That Pardee Did Not Owe Any Additional Commissions..." (Br. at 19.)	The district court made no such finding. Instead, the district court found that the most substantial issue in the case was Wolfram and Wilkes' quest for information. The court stated, "I find that the plaintiffs—the most substantial issue in plaintiffs' case pre-litigation through litigation was to get the information and to get the accounting…" (86 JA 13520:19-22; *see also* 13620:4-13.)
"Only during post-trial briefing did Wolfram and Wilkes argue that the case was not about commissions but instead about Wolfram and Wilkes seeking information from Pardee to verify their commissions paid were accurate." (Br. at 34.)	Not only did the Court expressly find, "the impetus, the only reason for the first [sic] lawsuit was an accounting to get information…" 70 JA 11055:21-23), but Pardee admitted before and during trial that Wolfram and Wilkes were principally seeking information. (16 JA 2478:11-13; 2555:5-12; 37 JA 5728:2-24.)

"They [Wolfram and Wilkes] also demanded an accounting of 'all transfers of real property from CSI to Pardee governed by the Option Agreement' so they could determine the amount of additional commissions owed." (Br. at 17., citing to the Complaint).	Pardee cites to the Complaint to support this statement, however the Complaint never states "so that they could determine the amount of additional commissions owed." (1 JA 4 at ¶ 17-18.) In fact, the Complaint makes no statement that commissions are owed, but instead asserts, "Plaintiffs have requested documents promised to them by Defendant in the Commission Letter Agreement and have not received them." (*Id.* at ¶ 17.)
"Consistent with their pre-litigation letters, Wolfram and Wilkes alleged Pardee owed additional commissions as money damages." (Br. at 17, citing to the Second Amended Complaint)	Once again Pardee cites to a pleading that does not support its assertion. The Second Amended Complaint to which Pardee cites makes no such claim for unpaid commissions, but instead repeatedly references the requests for information that necessitated the lawsuit. (16 JA 2670-77.)

"This included over $1.8 million in additional commissions…Both Wolfram and Wilkes confirmed this disclosure at trial when they testified that Pardee owed them additional commissions." (Br. at 18.) "Wolfram and Wilkes filed this suit alleging that Pardee breached the Commission Agreement by failing to pay them millions in dollars in commissions due and owing…" (Pardee Homes of Nevada's Case Appeal Statement at 3:16-18.)	The NRCP 16.1 disclosure presented a hypothetical damage calculation based on the potential "loss of future commissions from future sales or takedowns…" (76 JA 12075-76.) There was never any claim that such commissions were due and owing. Pardee's counsel admitted as much in her unsworn declaration characterizing them as "future commissions." (49 JA 7724.) Further, there was no demand or even a reference to $1.8 million in damages at trial. The district court expressly found the same and, when asked about this fact, counsel for Pardee did not dispute it. (70 JA 11062:3-11064:8.)

"The district court found that Pardee provided Wolfram and Wilkes with '[a]ll information' regarding Pardee's purchase of land from CSI designated for single-family detached production residential homes and that Pardee had informed them of the amount and due dates of the commission owed." (Br. at 19.)	This is false. Pardee cites the phrase "all information" completely out of context. The Court stated, "all information provided was limited to single family production property acquisitions," not that Pardee provided all information about the sale of single-family land. (48 JA 7466 at ¶ 40.) Indeed, the Court found to the contrary, that, "Amendments Nos. 1 through 8 to the Amended and Restated Option Agreement ***were not*** provided to Plaintiffs until after commencement of this litigation" (*id.* at ¶ 39, emphasis supplied), and further found, "without access to the information regarding the type of land designation that was purchased by Pardee as part of the separate land transaction with CSI, Plaintiffs were not reasonably informed as to all matters relating to the amount of their commission payments…" (*Id.* at ¶ 42; *see also* ¶¶ 39, 41.)

"[Jimmerson] sent several pre-litigation letters demanding additional commissions and information under the Commission Agreement." (Br. at 19, n. 9.)	No pre-suit demand was every made for unpaid commissions. Indeed the April 23, 2009 letter Pardee cites spends two pages dedicated to explaining the request and need for information. (34 JA 5261-63.) The closest that letter came to a demand was the statement, "There is real concern by Mr. Wilkes and Mr. Wolfram that they have not been paid commissions that they are due" (*Id.* at 5263)—hardly a demand for unpaid commissions. Confirmation that the pre-suit letters concerned requests for information are found in Mr. Jimmerson's subsequent August 26, 2009 letter, where he begins his letter, "Respectfully, your letter ignores my clients' request for written documentation…" (34 JA 5252-5254.) Mr. Jimmerson's final pre-suit letter from May 17, 2010 further confirms the same. (34 JA 5238-40.)

"the district court found much of the information about Pardee's land purchases was available in the public record…" (Br. at 20.)	The district court never stated that "much of the information" was public record. Indeed, the district court stated "although ***certain*** documents were public record regarding the development of Coyote Springs, the documents referencing internally set land designations for certain land in Coyote Springs were not available to Plaintiffs." (48 JA 7564 at ¶ 30; emphasis supplied.)

E. Wolfram and Wilkes Prevail at Trial and Are Awarded Significant Equitable and Monetary Relief

The case proceeded to a bench trial, after which the district court issued its Findings of Fact, Conclusions of Law, and Order, finding in favor of Wolfram and Wilkes on all of their claims and against Pardee on its counterclaim. (48 JA 7473-74.) The district court not only awarded Wolfram and Wilkes $141,500.00 in damages (including compensatory damages and attorney's fees as special damages), it also set a schedule for issuing an Order on Accounting. (*Id.*)

In support of its decision, the district court found, *inter alia*, that: (1) Wolfram and Wilkes fully satisfied their obligations to Pardee; (48 JA 7469 at ¶ 18); (2) Wolfram and Wilkes "reasonably imparted special confidence in Pardee to faithfully inform them of the developments at

Coyote Springs…" (48 JA 7463 at ¶ 27); (3) "Pardee should have known that [Wolfram and Wilkes] needed to have access to information specifying the designation as to the type of property being purchased by Pardee from CSI…" (*id.* at ¶ 29); (4) "from the documents in [Wolfram and Wilkes's] possession provided by Pardee, [Wolfram and Wilkes] were unable to verify the accuracy of any commission payments that may have been due and owing…" (48 JA 7465-66 at ¶ 39); (5) [Wolfram and Wilkes] did not receive amendments 1 through 8 to the Amended and Restated Option Agreement, which contained information necessary to verify the accuracy of the commission payments (48 JA 7469 at ¶ 16); and (6) Pardee did not keep Wolfram and Wilkes reasonably informed as to all matters relating to the amount of their commission payments (*id.* at ¶ 17).

The only relief the district court denied to Wolfram and Wilkes was approximately $30,000.00 in unpaid commissions that were sought after a mid-trial discovery concerning certain re-designation of land. (70 JA 11062:18-22.) This can hardly be considered a victory for Pardee compared to the substantial equitable and legal relief awarded to Wolfram and Wilkes.

After issuing its decision at trial, the district court issued its Order on Accounting. (49 JA 7708-11.)[10] In so doing, the district court ordered Pardee to provide to Wolfram and Wilkes, *inter alia*, (1) an affidavit and/or unsworn declaration confirming the post-trial representations made by Pardee's counsel concerning Pardee's corporate status and the impact it had on the development of Coyote Springs, (2) all future amendments to the Amended and Restated Option Agreement, and (3) various documents, maps, and payment records in the event of certain purchases of property in Coyote Springs. (*Id.*) This Order on Accounting required Pardee to provide information to Wolfram and Wilkes that it had never given to them before the action commenced. (32 JA 4937:11-24; 49 JA 7650-51.)

F. Pardee Thereafter Attempts to Hijack the District Court's Judgment

After the Order on Accounting was issued, Pardee submitted to the district court a judgment purporting to find in favor of Pardee—specifically that Pardee had prevailed on a non-existent claim for $1.8

[10] Pardee's opening brief completely fails to mention this Order on Accounting and the substantial relief it provided to Wolfram and Wilkes.

million in damages. (52 JA 8151-53.)[11] The district court unwittingly entered the judgment on June 15, 2015, believing that all parties had approved the same. (*Id.*; 70 JA 11017:21-11021:7.) In fact, Pardee submitted the proposed judgment, without the express approval of Wolfram and Wilkes (*id.*), and did so in contravention of the district court's standing orders concerning such submissions (70 JA 11012:7-18; 11014:1-11016:4.) When this was brought to the district court's attention, the district court not only expressed discomfort with the portions of the judgment finding in favor of Pardee, stating that it "was very uncomfortable with some of these sections on Page 2…" (70 JA 11018:16-17), the district court corrected Pardee's counsel when she claimed, "We had taken your orders and we had reduced them to a judgment," by replying, "No, your version of a judgment, I can see that very much." (70 JA 11021:10-13.)[12]

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[11] Pardee's opening brief fails to directly inform the Court about this first judgment, its contents, or how it came to be stricken. Indeed, the opening brief conspicuously omits any citation to the record concerning the dispute about the stricken judgment (between volumes 52 and 70). These ongoing attempts to recast Wolfram and Wilkes's claims in an effort to be deemed the prevailing party was and continues to be improper.

[12] The district court repeatedly stated that the action was about Wolfram and Wilkes's search for information and certainly not about a claim for $1.8 million in damages. (14 JA 2246:2-19; 2274:10-11; 70 JA 11055:4-24;

G. The District Court Enters Judgment in Favor of Wolfram and Wilkes

After a hearing on January 15, 2016, the district court entered an order striking the earlier June 15, 2015 judgment. (71 JA 11385-88.) The district court then entered judgment fully in favor of Wolfram and Wilkes on May 16, 2016. (71 JA 11389-91.) That judgment, which came directly from the district court (as it was issued on the district court's pleading paper), found in favor of Wolfram and Wilkes on their claims for (1) accounting, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing. (*Id.*) It also found in Wolfram and Wilkes's favor on Pardee's counterclaim for breach of the implied covenant of good faith and fair dealing. (*Id.*) Most notably, **nowhere in that judgment did the district court make any finding in favor of Pardee, and, in fact, it made no reference to any claim by Wolfram and Wilkes for unpaid commissions.** (*Id.*)

After the judgment was issued, both sides moved for their attorney's fees and costs pursuant to the Commission Agreement's

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11062:5-11063:15; 11070:3-12; 11077:21-24; 11093:24-11094:6; 86 JA 13520:18-13522:10.)

prevailing party provision. (72 JA 11590-614; 12115-82.)[13] Pardee also moved to amend the judgment concerning the award of attorney's fees as damages. (72 JA 11455-589.) The district court granted Wolfram and Wilkes's motion for fees and costs and denied Pardee's motion for the same. (86 JA 13616-18; 13619-21.)[14] The district court found "the most substantial issues in Plaintiffs' case, from pre-litigation through Trial, this case was fundamentally filed and maintained in order to obtain information [from] Defendant, Pardee Homes of Nevada," and that "Plaintiffs were the prevailing party and were successful on the most substantial issues in the matter, obtaining information and an

[13] In this round of motion practice, Pardee again asserted that it was the prevailing party presenting the same arguments about a non-existent claim for $1.8 million in damages as it did when attempting to preserve the stricken judgment. (72 JA 11590-614.) While Pardee argued in its opening brief on appeal that "only during post-trial briefing did Wolfram and Wilkes argue that the case was not about commissions but instead about Wolfram and Wilkes seeking information from Pardee…" (Br. at 34), in Pardee's reply brief in support of its motion for attorney's fees, it made a different erroneous characterization of Wolfram and Wilkes's case, that they "attempt[ed] to change the entire theory of the case at trial…" (82 JA 13184:5-6.) Such inconsistency in Pardee's versions of events illustrates the frailty of Pardee's appeal.

[14] The district court granted Wolfram and Wilkes's motion for attorney's fees based on the prevailing party provision in the Commission Agreement, and not base on Wolfram and Wilkes's offer of judgment that Pardee did not accept. (86 JA 13617.)

accounting…" (86 JA 13620:5-8; 21-23.) The district court also indicated it would award Wolfram and Wilkes both pre- and post-judgment interest, after further briefing. (86 JA 13618:6-12.) The district court entered an amended judgment on October 12, 2017 including all monetary awards and the Order on Accounting. (88 JA 14118-29.) Pardee's appeal followed.

SUMMARY OF THE ARGUMENT

The district court properly granted judgment in favor of Wolfram and Wilkes, finding that they (1) were the prevailing party, and (2) were entitled to certain attorney's fees as damages. The judgment should be affirmed.

The district court properly entered judgment in favor of Wolfram and Wilkes on every single one of their claims for relief, granted them the most important relief they sought (the Order on Accounting), and found that they had defeated Pardee's counterclaim. Wolfram and Wilkes were correctly found to be the prevailing party for the purposes of awarding attorney's fees and costs. Indeed, it would be outrageous for Pardee to be deemed the prevailing party when it suffered defeat on every cause of action at issue.

Pardee erroneously argues that because the district court did not award Wolfram and Wilkes damages for unpaid commissions that Pardee should have been the prevailing party. Pardee is wrong. This case has always been principally and primarily a dispute over information, and thus the relief granted to Wolfram and Wilkes renders them the prevailing party under Nevada law. Failing to recover an additional $30,000.00 in commissions does nothing to change that result. Pardee's arguments to persuade Court otherwise are unfounded.

Furthermore, the district court properly awarded Wolfram and Wilkes certain attorney's fees as damages. As the district court found, it was necessary and foreseeable for Wolfram and Wilkes to file suit to seek the documents to which they were entitled to from Pardee. Attorney's fees as damages are therefore appropriate under *Sandy Valley Assoc. v. Sky Ranch Estates Owners Ass'n,* 117 Nev. 948, 35 P.3d 964 (2001). In seeking injunctive/equitable relief due to Pardee's improper conduct, Wolfram and Wilkes's action falls under one of the three categories of cases for which attorney's fees should be awarded as damages. Pardee's attempt to argue otherwise and categorize this claim as a routine two-party contract dispute should fail.

The district court properly found in favor of Wolfram and Wilkes on all of their claims. They are the prevailing party. Further, because Wolfram and Wilkes's action satisfied the *Sandy Valley* criteria, it was appropriate for them to be awarded their attorney's fees as damages. The judgment should be affirmed in its entirety.

ARGUMENT

A. Standard of Review

Generally, an award of attorney's fees is reviewed for abuse of discretion. *LVMPD v. Blackjack Bonding*, 131 Nev. Adv. Op. 10, 343 P.3d 608, 614 (2015); *Nelson v. Peckham Plaza Partnerships*, 110 Nev. 23, 26, 866 P.2d 1138, 1139-40 (1994) ("Unless there is a manifest abuse of discretion, a district court's award of attorney's fees will not be overturned on appeal."). Indeed, appellate review of a district court's determination of the prevailing party for the purposes of awarding attorney's fees pursuant to contract is for abuse of discretion. *See Blackjack Bonding*, 343 P.3d at 614-15; *Nelson*, 110 Nev. at 26; *ParksA America, Inc. v. Harper*, No. 66949, 2016 WL 4082312 *2 (Nev. July 28, 2016) (reviewing determination of prevailing party and order of attorney's fees based on contract provision for abuse of discretion);

Rainbow Commercial, LLC v. Griego, Nos. 68164, 71000, 2017 WL 2945521, *3 (Nev. App. June 29, 2017) (same); *Jones v. Jones*, No. 66632, 2016 WL 3856487, *6 (Nev. July 14, 2016) (same). Pardee's assertion to the contrary is erroneous. (Br. at 24.)[15]

Notwithstanding the foregoing, the proper standard of appellate review of an award of attorney's fees as special damages is *de novo*. *Liu v. Christopher Homes, LLC*, 130 Nev. Adv. Op. 17, 321 P.3d 875, 878 (2014); *Horgan v. Felton*, 123 Nev. 577, 581, 170 P.3d 982, 985 (2007).

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[15] Pardee's reliance on *Davis v. Beling*, 128 Nev. 301, 278 P.3d 501 (2012) is misplaced. There, the Court was left to interpret two separate attorney's fees provisions and decide whether a fee award is authorized under the same. Conversely, here, (1) there is no dispute that attorney's fees to the prevailing party are authorized under the Commission Agreement; and (2) there is no argument that the district court interpreted the attorney's provision incorrectly. Pardee instead argues that the district court erred in rendering a determination of prevailing party. Proper review of the district court's determination of prevailing is for abuse of discretion. *See e,g.*, *McDaniel v. Cty. of Schenectady*, 595 F.3d 411, 416 (2d Cir. 2010) ("Abuse of discretion—already one of the most deferential standards of review—takes on special significance when reviewing fee decisions because the district court, which is intimately familiar with the nuances of the case, is in a far better position to make such decisions than is an appellate court, which must work from a cold record.").

B. The District Court Properly Awarded Wolfram and Wilkes Their Attorney's Fees and Costs

Wolfram and Wilkes were correctly awarded their attorney's fees and costs after trial as (1) they were the prevailing party entitled to their attorney's fees and costs under the Commission Agreement; and (2) they suffered compensable attorney's fees as damages pursuant to *Sandy Valley*, and its progeny. As detailed below, Pardee's characterization that Wolfram and Wilkes's award of fees constituted a "depart[ure]" from the American Rule is in error. (Br. at 25.)

1. The District Court Properly Found Wolfram and Wilkes to be the Prevailing Party, and Awarded Them Their Attorney's Fees

The district court found in favor of Wolfram and Wilkes on all three of their causes of action as well as in their favor on Pardee's sole counterclaim. (71 JA 11389-91.) As a result, Wolfram and Wilkes were awarded the equitable relief they sought (the Order on Accounting) and also money damages. (*Id.*) Consequently, the district court found Wolfram and Wilkes to have been the prevailing party in this action, and awarded them their attorney's fees pursuant to the Commission Agreement. (86 JA 13462-64.) Notwithstanding the significant relief awarded to Wolfram and Wilkes, and Pardee's failure to succeed on any

cause of action, Pardee erroneously maintains that it was the prevailing party.

a. Nevada Law and the Prevailing Party Provision in the Commission Agreement

Nevada law permits an award of attorney's fees pursuant to contract. *Sandy Valley*, 117 Nev. at 956. An attorney's fees provision is construed just like any other agreement. *Davis*, 128 Nev. at 321. "The initial focus is on whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Id.* The attorney's fees provision in this action is a garden-variety prevailing party provision, which states, "In the event either party brings an action to enforce its rights under this Agreement, the prevailing party shall be awarded reasonable attorney's fees and costs." (27 JA 4290.)

Knowing that the term "prevailing party" is not expressly defined in the Commission Agreement, Pardee argues that the attorney's fees provision reflects the parties' intent that the prevailing party is the one that succeeded on the "**case's most substantial issue.**" (Br. at 30, emphasis in original.)[16] Pardee then proceeds to cite to Florida and

[16] Pardee argues that "the parties did not contemplate that the Commission Agreement's prevailing party provision would allow Wolfram and Wilkes to recover attorney's fees and costs despite losing on

California decisions in support of this interpretation of the attorney's fees provision. (*Id.* at 30-31.) Pardee's approach and interpretation of the provision is incorrect. The Commission Agreement provides that its terms shall be construed under the laws of the State of Nevada. (27 JA 4290.) Therefore, Nevada law will determine the meaning of "prevailing party."

In Nevada, "[a] party prevails if it succeeds on ***any significant issue*** in litigation which achieves some of the benefit it sought in bringing suit." *Blackjack Bonding*, 343 P.3d at 614-15 (citations omitted, emphasis in original). Furthermore, "to be a prevailing party, a party need not succeed on every issue." *Id.*, citing *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933 (1983); *see also Hornwood v. Smith's Food King No. 1*, 105 Nev. 188, 192, 772 P.2d 1284, 1287 (1989). Accordingly, it is error to conclude, as Pardee does, that the prevailing party is the one who succeeds on the case's most substantial issue. Instead, the Court should

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the case's most substantial issue." (Br. at 34-35.) This argument has no merit. Not only is there no citation to support such an allegation, but Pardee's argument ignores Nevada's black letter law on contract interpretation—if the terms are unambiguous (which they are in this instance), they will be enforced as written. Nevada law is contrary to Pardee's preferred definition of "prevailing party."

find that the prevailing party is the one who prevails on any significant issue that achieves some benefit sought in bringing the action—in this case, Wolfram and Wilkes.

This Court has repeatedly held that a plaintiff need not succeed on every claim or every issue in order to be deemed the prevailing party. For example, in *Hornwood*, the Court found that the plaintiff was the prevailing party as it "achieved a benefit in bringing [the] suit," despite only succeeding on one of its three damage theories. 105 Nev. at 192. Similarly, in *Bentley v. State, Office of State Eng'r*, No. 64773, 2016 WL 3856572, at *11 (Nev. July 14, 2016), this Court held that despite abandoning half of their initial claims, the intervenors were properly deemed the prevailing party as they succeeded on the other half of the claims that were tried and went to judgment. *Id.*; *see also Terry v. Cruea*, No. 71930, 2017 WL 4618615, *2 n. 1 (Nev. Oct. 13, 2017) (finding that the prevailing party was one who succeeded on a single issue, even when the bulk of the dispute had been settled).

Blackjack Bonding is particularly persuasive on this issue. There, the Court found that the order compelling the Las Vegas Metropolitan Police Dept. to produce certain requested records demonstrated that

Blackjack Bonding "succeeded on a significant issue and achieved at least some of the benefit that it sought." 343 P.3d at 615. The Court remanded the dispute back to the district court for an order awarding Blackjack Bonding attorney's fees and costs. In this case, the district court ordered Pardee to produce the records sought and also granted Wolfram and Wilkes monetary damages. Clearly, Wolfram and Wilkes "succeeded on a significant issue and achieved at least of the benefit that it sought," and thus the district court properly found them to have prevailed. (71 JA 11389-91.)

b. The Most Significant Issue in this Action Was the Claim for Accounting—Not a Claim for Unpaid Commissions

Notwithstanding this significant success, Pardee claims to be the prevailing party because it was not ordered to pay any commissions to Wolfram and Wilkes after they, according to Pardee, filed suit seeking $1.8 million in unpaid commissions. (Br. at 32.) Indeed, Pardee's entire appeal rests on convincing this Court as to a complete falsehood.[17]

[17] While Pardee is also seeking to reverse the district court's decision on the award of attorney's fees as damages, if Pardee does not succeed in reversing the district court's finding that Wolfram and Wilkes were the prevailing party, Wolfram and Wilkes will still be able to recover those attorney's fees as costs of litigation under the attorney's fees provision in the Commission Agreement.

This action, from the very outset, was about acquiring information that was being wrongfully withheld from Wolfram and Wilkes by Pardee. The Complaint, and every amendment thereto, makes no claim for or allegation as to any unpaid commissions. (1 JA 1-6; 7-12; 16 JA 2670-77.) Indeed, the allegations entirely center on Wolfram and Wilkes's attempts to get information from Pardee and Pardee's failure to provide them the information. (*Id.*) Consequently, the first claim for relief and the first prayer for relief is for an accounting. (*Id.*)

During discovery, Wolfram and Wilkes both stated that the reason they filed suit was to get information. (3 JA 367:11-368:17; 547:14-548:1.)[18] In their Opposition to Pardee's Motion for Summary Judgment, Wolfram and Wilkes explain at length the importance of their quest for information. (2 JA 325:11-327:2) ("It is the latter duty—the requirement to keep Plaintiffs reasonably information as to all matters related to the commission, and, in particular, to provide Plaintiffs with copies of Option Notices when Pardee acquires Option Property from CSI—that Pardee

[18] Mr. Wilkes also testified that he thought he was owed an unspecified amount in commissions, but the bulk of his answer to the question about what he hopes to recover from the lawsuit is information and documents. (3 JA 558:8-16.)

has shirked, compelling Plaintiffs' action.") In their pre-trial brief, Wolfram and Wilkes further expound upon the need for information which formed the basis for their lawsuit. (31 JA 4818-4847.)

During trial, counsel for Wolfram and Wilkes in his opening statement explained that Wolfram and Wilkes commenced this suit to get information. (32 JA 3225:16-3226:7.) Counsel for Pardee even commented on this in her opening statement, declaring "he [counsel for Wolfram and Wilkes] seems to focus on that we did not give information to which the plaintiffs were entitled…" (32 JA 3276:2-3; 3283:1-4) Wolfram and Wilkes both testified that the case was first and foremost about information. (37 JA 5540:2-22; 5685:8-11; 5700:10-18.) Mr. Wolfram specifically testified, "my whole, whole lawsuit is about information, not money." (41 JA 6150:8-9.) Wolfram even testified that he wasn't looking for more money. (41 JA 6108:16-20.) Consequently, at trial, the word "information" was used 714 times (this is distinct from similar words such as inform, informs, informed, or evidence that would contain information such as documents, records, or maps). The Court has even been provided hundreds of citations to the trial record where

there is testimony or argument concerning information. *See* footnote 10, *supra*.

After trial, the district court repeatedly found that this case was principally about information and not one for unpaid commissions. (70 JA 11055:4-24; 11062:5-11063:15; 11070:3-12; 11077:21-24; 11093:24-11094:6; 86 JA 13520:18-13522:10.)[19] This is hardly the record of a case where the plaintiffs were seeking millions in commission payments as Pardee wrongly and wrongfully suggests.

To be faithful to the record and forthright with this Court, it is true that issues of commissions were raised during this action, but they were never the central issue in the dispute. Wolfram and Wilkes believed that because Pardee was purchasing land outside of Parcel One, that such land constituted Option Property, which was subject to a different calculation for commission payments than the formula for Pardee's acquisition of land inside Parcel One (Purchase Property). The

[19] The district court's finding as to who was the prevailing party is reviewed for abuse of discretion. *See Blackjack Bonding*, 343 P.3d at 614-15. The evidence conclusively establishes that the district court did not abuse its discretion in finding that Wolfram and Wilkes were the prevailing party.

differences in the two formulas were slight,[20] but in light of the 40-year horizon on the Option Agreement between Pardee and CSI, getting complete information on purchases and development at Coyote Springs was critical to Wolfram and Wilkes for posterity's sake. (48 JA 7473 at ¶ 6.)

Notwithstanding how Wolfram and Wilkes understood the agreement, the Court found that the commission payments should be based on the boundaries of Purchase Property and Option Property under the amendments to the Amended and Restated Option Agreement, and not on the boundaries at the time the Commission Agreement was executed, thereby avoiding the task of having to recalculate the commission payments. (48 JA 7459 at ¶ 11; 7464 at ¶¶ 33, 36.)[21]

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[20] Under romanette two (ii) of the Commission Agreement, Wolfram and Wilkes would get 1.5% of the Purchase Property Price over $50,000,000.00 and under romanette three (iii) Wolfram and Wilkes would get 1.5% of the amount of acres of Option Property purchase times $40,000.00 per acre. (27 JA 4289.) As the per acre price of Purchase Property was very close to $40,000.00 per acre (40 JA 5931:15-18), any difference in commission amounts would be limited.

[21] This is the reason that several of the statements made at trial specifically referenced the formula for how commissions were to be paid. In its opening brief, Pardee actually cites to one such example from 47 JA 7128. (Br. at 32.) There, counsel for Wolfram and Wilkes stated, "construction which would lead to different calculations of commission

During trial, Wolfram and Wilkes discovered that Pardee had purchased certain land and re-designated it for single-family homes (the designation that would make Wolfram and Wilkes eligible for a commission). (44 JA 6537:26-6580:20; 47 JA 7201:1-4.) That land, identified at trial as "Res-5" was not land for which Wolfram and Wilkes were paid a commission. (47 JA 7164:3-21.) Therefore, during closing arguments, Wolfram and Wilkes asked for $30,000.00 in unpaid commissions. (47 JA 7200:5-17; 7204:9-18.) In its decision, the Court found that such re-designation was permitted without the payment of an additional commission and did not order Pardee to pay Wolfram and Wilkes any additional commissions. (48 JA 7467 at ¶ 44.) Aside from the $30,000.00 sought at the close of trial, Wolfram and Wilkes did not request any other amount as payment for unpaid commissions during trial. (47 JA 7200:5-17; 7204:9-18.) The district court found the same. (70 JA 11062:18-22.)

Pardee would have the Court believe none of the foregoing is true. Pardee argues that "Wolfram and Wilkes claimed Pardee owed them $1.8

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because of the fact that Option Property is paid on a different formula than Purchase Property was paid." (47 JA 7128:6-8.)

million in commissions" (Br. at 32); that "the bench trial was nearly exclusively about Wolfram and Wilkes claiming additional commissions" (*id.* at 34); and that "only during post-trial briefing did Wolfram and Wilkes argue that the case was not about commissions but instead about Wolfram and Wilkes seeking information from Pardee…" (*id.*)—all in an effort to argue that the "most significant issue in the case" was on unpaid commissions. **However, all of that is fiction.**

Wolfram and Wilkes never testified that they were owed $1.8 million in unpaid commissions. Indeed, the basis of Pardee's allegation comes from a hypothetical damage calculation if Pardee ever bought 3,000 acres, did not appropriately inform Wolfram and Wilkes of such purchases, and pay them to what they would be entitled. (55 JA 7819.)

On October 26, 2012, nearly two years after the action had been filed, Wolfram and Wilkes served on Pardee their Fifth Supplement to NRCP 16.1 Disclosure of Witnesses and Documents, which was the first disclosure referencing the hypothetical future commission damage calculation. (55 JA 8713-27.) As the Court can readily discern, the disclosure discusses hypothetical future damages—not present damages due and owing—when the disclosure states in pertinent part, "If 3,000

acres were purchased by Pardee under this scenario, Plaintiffs would be entitled to $1,800,000.00 in commissions." (55 JA 7819.) The purpose of the disclosure was to demonstrate how significant it would be if Pardee were to make such purchases and circumvent the Commission Agreement. Nothing about it suggested that such a sum was presently due and owing as Pardee's Case Appeal Statement and Opening Brief wrongly assert.[22]

Now Pardee attempts to bootstrap every reference to commissions in the appellate record to this statement in this disclosure. For example, in the opening brief Pardee argues, "Both Wolfram and Wilkes confirmed this disclosure at trial when they testified that Pardee owed them additional commissions." (Br. at 18.) However, neither Wolfram nor Wilkes ever testified that they were owed millions in unpaid commissions—or any figure for that matter (Pardee's citation to Wolfram and Wilkes's testimony is objectively weak support for this assertion).

Moreover, Pardee does not and cannot cite to any portion of the trial transcript where the $1.8 million figure (or any similar amount) was

[22] Even Pardee's counsel characterized them as "future commissions" in her unsworn declaration before the district court. (49 JA 7724.)

mentioned by anyone. That is because it was never raised at trial. The district court expressly found the same and, when asked about this fact, counsel for Pardee did not dispute it (and, like now, is trying to side-step it). (70 JA 11062:3-11064:8.)[23] In fact, every citation to the trial transcript in Pardee's opening brief is one where no commission amount is specified.[24] It is simply a fact that Wolfram and Wilkes did not claim $1.8 million in unpaid commissions as damages at trial.

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[23] A similar argument was made before the district court as the one presently being made when counsel for Pardee claimed in her unsworn declaration, "I estimate that 90% of Pardee's incurred attorney's fees and costs related to that defense against plaintiffs' claim to lost future commissions." (49 JA 7724.) The falsity of this statement was proven mathematically as Pardee had incurred 19% of its attorney's fees even before the October 26, 2012 disclosure concerning $1.8 million had been served. (51 JA 8113.)

[24] Pardee could have cited to the trial transcript where a specific commission amount was denominated, but doing so would have revealed just how false its appellate arguments are about $1.8 million in claimed unpaid commissions. For example, in his closing, counsel for Wolfram and Wilkes asked for $30,000.00 in unpaid commissions for what had been discovered during trial as 50 acres that had been re-designated from multi-family land to production residential property. (47 JA 7200:5-17; 7204:9-18.) While Pardee provides four citations in support of its argument that "in closing argument, Wolfram and Wilkes' counsel requested additional commissions," it conspicuously omits citing to any portion of the argument where a specific number was provided. (Br. at 32.) This omission is as telling as it is damning.

Pardee argues that if this case were really about information, "there was no need for a trial because Pardee provided Wolfram and Wilkes with all information (including the Confidential Agreements) during discovery, well before trial began." (Br. at 34.) Again, Pardee's statement of fact is wrong. Pardee never provided Amendments 1-8 to the Amended and Restated Option Agreement, and Pardee affirmatively admitted as much when at trial the parties stipulated that CSI, not Pardee, produced those documents to Wolfram and Wilkes. (32 JA 4937:11-24.) The trial was necessary to get the Order on Accounting to require Pardee to produce information to Wolfram and Wilkes as Coyote Springs developed going forward—an order Pardee never mentioned or cited in its opening brief (and which was the most important relief sought).

The law does not support Pardee's attempt to rewrite history and claim that this case was about money and not information—effectively ignoring the events at trial in favor of a statement made in discovery. The Second Circuit held as much in *LeBlanc-Sternberg v. Fletcher*, 143 F.3d 748, 761 (2d Cir. 1998). There, the Second Circuit reversed the trial court's finding that the plaintiffs were not the prevailing party, reasoning that the plaintiffs were primarily seeking equitable relief at trial and

thus it was improper to find the defendant the prevailing party simply because the plaintiffs did not receive a significant monetary award. The Second Circuit found that the determination of prevailing party was to be determined based on the relief sought at trial, not based on discovery matters that were never presented to the trial court. *Id.* The plaintiffs in *LeBlanc* responded to an interrogatory and claimed over $1,000,000.00 in monetary and punitive damages. However, at trial, the plaintiffs never sought $1,000,000.00 and disavowed "extravagant monetary claims." *Id.* Like here, the plaintiffs were primarily seeking equitable relief, which they received. The Second Circuit found that the plaintiffs should have been found to be the prevailing party, and that, "if significant equitable relief was granted, an award of fees is proper even if the court is not persuaded that that equitable relief was the plaintiff's 'primary' goal." *Id.* at 758. Between *Blackjack Bonding* and *LeBlanc*, the Court should find that the equitable relief received supports the district court's finding that Wolfram and Wilkes were the prevailing party, regardless of the amount of the monetary award.[25]

[25] The law is clear that equitable relief, without any monetary award, is sufficient to confer upon a party the status of prevailing party. *See Hare v. Potter*, 549 F. Supp.2d 698, 702 (D. Nev. 2008) (finding that plaintiff

Pardee's opening brief completely ignores the substantial equitable relief Wolfram and Wilkes received, and instead erroneously considers this action in monetary terms only. Citing to California and Ninth Circuit caselaw, in *Hsu v. Abbara*, 9 Cal.4th 863, 39 Cal.Rptr.2d 824, 891 P.2d 804 (Cal. 1995) and *Berkla v. Corel Corp.*, 302 F.3d 909, 920 (9th Cir. 2002), Pardee argues that Wolfram and Wilkes prevailed "on less than 8% of their disclosed damages." (Br. at 33.)[26] However, the reasoning in *Berkla* (and its reliance on *Hsu*), **supports** Wolfram and

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who did not recover any monetary damages, but obtained equitable relief to be the prevailing party); *Friend v. Kolodzieczak*, 72 F.3d 1386, 1390 (9th Cir. 1995) (same); *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000) (same); *Karraker v. Rent-A-Center, Inc.*, 492 F.3d 896, 898 (7th Cir. 2007) (same); *Ackerley Communications of Mass., Inc. v. City of Cambridge*, 135 F.3d 210, 215 n. 5 (1st Cir. 1998) (same); *Brittingham v. Jenkins*, 968 F.2d 1211, at *5 (table) (4th Cir. 1992) (affirming post appeal attorney's fees award where all equitable relief sought was granted and despite reduction in monetary damages awarded).

[26] Pardee also cites to *Friedman v. Friedman*, No. 56265, 2012 WL 6681933 (Nev. Dec. 20, 2012), which is improper under NRAP 36(c)(3) as it is an unpublished disposition. However, to the extent that the Court considers *Friedman*, the Court should find that it supports Wolfram and Wilkes, in recognizing that the district court's determination of the prevailing party is reviewed for abuse of discretion, even when the basis for attorney's fees lies in contract. *Id.*, 2012 WL 6681933, *6 ("The district court did not abuse its discretion by finding that Abbie was the prevailing party…").

Wilkes when determining the key issues at trial. Citing to *Hsu*, the *Berkla* court stated:

> In deciding whether there is a "party prevailing on the contract," the trial court is to compare the relief awarded on the contract claim or claims with the parties' demands on those same claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening statements, and similar sources.

302 F.3d at 920, citing *Hsu*, 39 Cal.Rptr.2d at 833.

Looking at those exact same sources from *Berkla*, the Court should find that the primary issue for Wolfram and Wilkes was their claim for information. Indeed, the Complaint (and all amendments thereto) focused exclusively on the need for information and made no claim for or allegation as to any unpaid commissions. (1 JA 1-6; 7-12; 16 JA 2670-77.) In their trial brief, Wolfram and Wilkes explain that the case is about acquiring information to which they are entitled. (31 JA 4818-4847.) And at trial, counsel for Wolfram and Wilkes explained that the primary relief was for an order for Pardee to provide the information. (32 JA 3225:16-3226:7; 47 JA 7191:7-7192:6; 7198:21-7199:6; 7315:14-19.)

Wolfram and Wilkes' offer of judgment from April 29, 2013 further informs the Court as to how they viewed the case. (77 JA 12148-12153.)[27] The offer of judgment was for $149,000.00 (inclusive of attorney's fees and interest), but exclusive of costs,[28] and for the production of several items of information concerning future land transactions. Indeed, the offer of judgment is four pages long with all of the specified information to be provided. (*Id.*) At all times, Wolfram and Wilkes were most interested in information.

When the Court considers the entire record on appeal, the only conclusion the Court should reach is that Wolfram and Wilkes pursued this case to get the information to which they were entitled. Because (1)

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[27] Pardee failed to mention or address Wolfram and Wilkes's offer of judgment in its opening brief.

[28] The $149,000.00 was based on the $135,000.00 in attorney's fees as damages, $6,000.00 in compensatory damages, plus costs. The $149,000.00 represented a significant reduction and compromise on Wolfram and Wilkes's actual attorney's fees incurred. (46 JA 7057:25-7058:15; 48 JA 7385-7409.) What was not compromised was the information sought from Pardee (the conditions concerning information was the reason the district court found the offer of judgment ineffective, (86 JA 13617:9-12)). Wolfram and Wilkes were willing to effectively pay for the information needed from Pardee by forgoing full repayment of their attorney's fees under the prevailing party provision in the Commission Agreement if the offer was accepted. Clearly the information was the most important issue in their dispute with Pardee.

they received the Order on Accounting requiring Pardee to provide the requested information; (2) they were awarded judgment on all three of their claims for relief; and (3) they were awarded judgment on Pardee's counterclaim, they were the prevailing party. It would be manifestly unjust to find otherwise and have Wolfram and Wilkes, the innocent parties, pay the attorney's fees and costs of the party found liable: Pardee. *See Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 333 (Col. 1994) ("[I]t unjustly enriches the breaching party where the non-breaching party is required to pay the attorney fees of the breaching party." citing Farnsworth on Contracts §§ 12.8, 12.18, vol. III (1990 & 1994 Supp.)). The district court's decision should be affirmed.

2. The District Court Appropriately Awarded Wolfram and Wilkes Attorney's Fees as Damages

The district court received multiple rounds of briefing and oral argument on the availability of attorney's fees as damages. After consideration of all of the arguments made by all parties, the district court properly concluded that Wolfram and Wilkes were entitled to recover attorney's fees as damages. Now, Pardee seeks reversal of the district court's judgment granting Wolfram and Wilkes certain attorney's fees as damages, arguing that this action was "an ordinary

two-party breach of contract case…" that does not qualify for attorney's fees as damages. (Br. at 27.) Pardee is in error.

a. *Sandy Valley* and the Proper Basis for Attorney's Fees as Damages

Sandy Valley is clear that the test governing the availability of attorney's fees as damages is whether the fees are the "natural and proximate consequence" of a defendant's conduct. 117 Nev. at 957. The Court repeats itself no fewer than three times in enunciating this criteria, stating, "they must be the natural and proximate consequence of the injurious conduct;" "the fees were proximately and necessarily caused by the actions of the opposing party;" and "the fees were a reasonably foreseeable consequence of the breach or conduct." *Id.*

To be sure, this general criteria for establishing a claim for attorney's fees as damages is not commonly satisfied. Indeed, the Court explained:

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

> is insufficient to support an award of attorney fees as damages.

Id.

To illustrate the types of cases where attorney's fees may be available as damages, the Court provided three examples of categories of claims where attorney's fees would qualify as damages, stating:

> [1] Attorney 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 or tortious conduct by the defendant. The fees incurred in defending or prosecuting the third-party action could be damages in the proceeding between the plaintiff and the defendant…
>
> [2] Attorney fees may also be awarded as damages in those cases in which a party incurred the fees in recovering real or personal property acquired through the wrongful conduct of the defendant or in clarifying or removing a cloud upon the title to property. [3] Finally, actions for declaratory or injunctive relief may involve claims for attorney fees as damages when the actions were necessitated by the opposing party's bad faith conduct.

Id., 117 Nev. at 957-58.

b. Wolfram and Wilkes are Entitled to Attorney Fees as Damages—Their Action is One for Declaratory or Injunctive Relief Necessitated by Pardee's Improper and Bad Faith Conduct

Wolfram and Wilkes were properly awarded attorney's fees as damages as the fees were incurred in a "lawsuit for declaratory or

injunctive relief where the defendant's bad faith conduct required such actions," one of the three express categories of cases identified in *Sandy Valley*. *Id.* It has never been disputed that Wolfram and Wilkes's claim for an accounting is a claim for injunctive relief (specifically mandatory injunctive relief). *See State ex rel. Delhi Tp. v. Wilke*, 27 Ohio App. 3d 349, 351-352, 501 N.E. 2d 97, 99 (Ohio Ct. App. 1986) ("the complaint was by its very terms an action for… a mandatory injunction enforcing an accounting."); *Lichtenstein v. Anvan Co.*, 62 Ill. App. 3d 91, 378 N.E. 2d 1171 (Ill. App. Ct. 1978) (action for mandatory injunction requiring accounting). In issuing the Order on Accounting, the district court issued a mandatory injunction over Pardee, where Pardee was affirmatively required to not only act while the lawsuit was pending, but also after the action concluded. (49 JA 7708-11.)

As the district court found, that mandatory injunction was necessary because Wolfram and Wilkes were being wrongfully denied the information to which they were entitled. Not only was the information owed under the Commission Agreement, (48 JA 7469 at ¶ 15), but Pardee also had an independent duty to provide the information as a result of the special relationship of trust between Wolfram and Wilkes on the one

hand, and Pardee on the other (48 JA 7473 at ¶ 6). Pardee's failure to appropriately discharge its aforementioned duties to Wolfram and Wilkes sounds in both tort and contract.[29]

Pardee wrongfully withheld the information owed to Wolfram and Wilkes, and improperly instructed third parties to do the same. (48 JA 7470 at ¶ 21.) Further adding to Pardee's improper conduct, when Pardee was giving these wrongful instructions to the third party, Pardee was also ordering the same third party to lie to Wolfram and Wilkes and tell them they were provided "everything." (27 JA 4125.) In making these findings, the district court expressly found that Pardee did not act in good faith toward Wolfram and Wilkes (48 JA 7472 at ¶¶ 5-6) and failed to satisfy the special relationship of trust it had with them in repeatedly refusing to provide the required information to them. (48 JA 7466-67 at ¶ 43.)[30]

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[29] As the Court knows, the breach of a confidential relationship is tortious. *See e.g.*, *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995).

[30] The district court took note of the inconsistency in Pardee's excuse for not providing the information to Wolfram and Wilkes. The district court found that Pardee claimed that it withheld the documents from Wolfram and Wilkes because the documents had confidentiality provisions. (48 JA 7466 at ¶ 40.) However, the district court also noted that the Option Agreement, Amendments Nos. 1 and 2 thereto, and the Amended and Restated Option Agreement (the latter was executed after the

Pardee's improper conduct was sufficient to warrant attorney's fees as damages because the remedy for such improper conduct required injunctive or equitable relief.[31] For example, in *City of Las Vegas v. Cragin Industries, Inc.*, 86 Nev. 933, 940-941, 478 P.2d 585, 590 (1970), this Court held that attorney's fees would have been appropriate as damages in a case where the defendant was successful in seeking injunctive relief necessitated by plaintiff's "improper conduct." *Id.* This conclusion was reached despite no finding of "fraud, malice, or wantonness." *Id.* In other words, the Court held that attorney's fees as damages could be appropriate when the opposing party's misconduct rises to the level of improper, but not necessarily fraudulent, malicious, or wanton. *Cf. Southern Nevada Homebuilders Ass'n, Inc. v. City of North Las Vegas*, 112 Nev. 297, 303, 913 P.2d 1276, 1280 (1996) (holding

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Commission Agreement) also had confidentiality provisions but those records had been provided to Wolfram and Wilkes by Pardee. (*Id.*) Pardee's excuse for failing to provide Wolfram and Wilkes the necessary information was a red herring.

[31] The district court expressly found that due to Pardee's misconduct, "[Wolfram and Wilkes] had no alternative but to file suit, use the litigation process to obtain the requisite information, and request and equitable remedy from this Court to obtain information in the future." (48 JA 7470 at ¶ 21.) This finding has never been challenged by Pardee and is not challenged in the appeal.

that attorney's fees as damages would not be appropriate where defendant acted in good faith). Pardee's improper and bad faith conduct toward Wolfram and Wilkes left them no choice but to file suit and seek a mandatory injunction for an accounting to get the information to which they were entitled. This fits squarely within the categories listed in *Sandy Valley* (specifically category number three listed above and in Pardee's opening brief) for which attorney's fees as damages are available. (Br. at 26.)

Pardee erroneously argues that because this action is not a breach of contract action where the non-breaching party must defend against a third-party claim, Wolfram and Wilkes are not entitled to their attorney's fees as damages. (*Id.* at 27.) In so arguing, Pardee is attempting to reframe Wolfram and Wilkes's claims without regard to the proceedings below or the findings of the district court. Wolfram and Wilkes's claim for injunctive and/or equitable relief is based upon Pardee's improper conduct and, thus, the availability of attorney's fees as damages is not extinguished simply because they also have a breach of contract claim.[32]

[32] For example, a trademark infringement claim may sound in both tort and contract (alleging a breach of a license agreement). The availability of a contract claim would not eliminate the right to seek attorney's fees

Furthermore, Pardee's argument that the "district court's judicially created exception for Wolfram and Wilkes swallows the American Rule," is facially defective. (Br. at 28.) Pardee fails to explain how the district court's reasoning (1) is outside of the three categories of cases enunciated in *Sandy Valley*, or (2) "makes special damages for attorney's fees the default award in ordinary breach of contract cases." (Br. at 29.) Pardee appears to rely exclusively on the location of the district court's reasoning in the award of attorney's fees as damages in the bench trial decision to support its claims. That is not an adequate legal basis upon which the award of attorney's fees as damages may be vacated.[33]

Pardee continues to ignore Wolfram and Wilkes's position concerning their entitlement to attorney's fees as damages as well as the

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as damages for trademark infringement. *See Horgan v. Felton*, 123 Nev. 577, 587, 170 P.3d 982, 989 (2007) (J. Maupin, concurring).

[33] The district court was clearly contemplating the injunctive relief exception enunciated in *Sandy Valley* in rendering its findings. (48 JA 7470 at ¶ 21.) Just because that finding was included with the conclusions of law for the breach of contract claim does not somehow eliminate the district court's express findings relating to Wolfram and Wilkes's action seeking "equitable relief," (*Id.*) Individual findings or conclusions are not read in isolation, but as a whole, all together. *See e.g.*, *Elrick Rim Co. v. Reading Tire Mach. Co.*, 264 F.2d 481, 486 (9th Cir. 1959).

district court's findings concerning the same. Pardee's failure to address Wolfram and Wilkes's position that the award of attorney's fees as damages was appropriate because they brought an action for equitable relief necessitated by Pardee's improper conduct should be fatal to Pardee's appeal on this issue.[34]

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[34] It is axiomatic that an argument not put forth before the trial court may not be used on appeal. *See McKenna v. State*, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998). While Pardee argued against the award of attorney's fees as damages in post-trial motions, Pardee never responded to Wolfram and Wilkes's analysis concerning the action seeking injunctive relief necessitated by Pardee's improper conduct. Indeed, in response to Pardee's first motion to amend judgment filed on July 2, 2015, Wolfram and Wilkes maintained that their claim for injunctive and/or equitable relief arose from Pardee's bad faith conduct. (65 JA 10224:17-10225:10.) In its reply, Pardee did not address this position at all, but instead merely restated its argument that this is a "routine breach of contact case[]…" (69 JA 10949:20.) Pardee again ignored this issue in its second motion to amend judgment filed on June 1, 2016. There, Pardee erroneously claimed, "[n]or did the Plaintiffs seek declaratory or injunctive relief because of bad faith conduct…" ignoring the multiple times Wolfram and Wilkes explained their position on this issue. (72 JA 11465-66.) In opposition, Wolfram and Wilkes restated their argument that that their claim for injunctive and/or equitable relief arose from Pardee's bad faith conduct. (81 JA 12826:13-20.) Just as in its first motion to amend judgment, Pardee's reply never addressed Wolfram and Wilkes's position concerning a claim for injunctive relief caused by Pardee's improper conduct, but instead simply argued that their claim was "a routine breach of contract." (82 JA 13184:9.) Now, in its opening brief, Pardee is restating its argument concerning attorney's fees as damages, and for the third consecutive time, Pardee is not directly addressing Wolfram and Wilkes's position on their claim for injunctive relief necessitated by Pardee's misconduct. At this point, any response

c. The District Court's Award of Attorney's Fees as Damages Was Proper—The Attorney's Fees Were the Necessary and Foreseeable Result of Pardee's Misconduct

The district court appropriately found that the attorney's fees awarded to Wolfram and Wilkes "were necessary and foreseeable to obtain the requisite information regarding the land designations," and that "[Wolfram and Wilkes] had no alternative but to file suit, [and] use the litigation process to obtain the requisite information." (48 JA 7470 at ¶ 21.) Accordingly, the district court appropriately found that Wolfram and Wilkes were entitled to attorney's fees as damages.

Notably, Pardee does not take issue with these findings by the district court. Nowhere in the opening brief does Pardee dispute the district court's conclusion that the attorney's fees awarded were necessary and foreseeable. Therefore, Pardee's appeal must fail because Wolfram and Wilkes satisfied the *Sandy Valley* general requirement for attorney's fees as damages.[35]

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by Pardee on reply would be improper. Indeed, Pardee may not file a "thin" opening brief as a "toe in the door for a more substantive reply." *U.S. v. Diaz*, No. 2:13-cr-00148, 2014 WL 1668600, *10 (D. Nev. Apr. 25, 2014); *Ryan v. City of Detroit*, No. 11-cv-10900, 2015 WL 1345303, *6 (E.D. Mich. March 25, 2015); *see also* NRAP 28(c).

[35] Wolfram and Wilkes's entitlement to attorney's fees as damages does not "drastically expand[] the scope of cases" where parties may seek

d. Pardee Misinterprets *Sandy Valley* as Placing a Fixed Limitation on the Categories of Cases Where Attorney's Fees as Damages May Be Available

In its opening brief, Pardee erroneously suggests that the language identifying the three categories of cases that would be entitled to potential attorney's fees as damages serves as a hard limitation on the types of actions for which attorney's fees may be available as damages. (Br. at 26.) However, nothing in *Sandy Valley* or its progeny suggests that the only actions qualifying for attorney fee damages are limited to

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attorney's fees as damages, as Pardee claims. (Br. at 28.) Indeed, it does not expand it at all. As explained by the district court, Wolfram and Wilkes (a) were entitled to information, (b) were improperly denied that information, and (c) had only one way to get the information—by filing suit and getting an order for the production of the information (now and in the future). This is completely different than virtually every claim for money damages, including conventional breach of contract actions that Justice Gibbons discussed in his dissent in *Liu*. 321 P.3d at 881. Inherent in the *Sandy Valley* analysis is the fact that money is fungible and, thus, it is not "necessary" to file suit to recover monies one may be owed. While a defendant may owe a plaintiff a sum certain, that defendant is not the only source of money. That same plaintiff can acquire funds in any number of ways without filing a lawsuit. Conversely, Wolfram and Wilkes could only get the information they were entitled to and that was improperly denied by filing suit to get the same. (48 JA 7470 at ¶ 21.) Indeed, as the district court found, Pardee is the only party that could appropriately provide the information to which Wolfram and Wilkes were entitled. (*Id.*) Wolfram and Wilkes' circumstances are much closer to a plaintiff seeking relief from slander of title, or trademark infringement than a routine breach of contract. In the former examples, only a court can grant the necessary relief, whereas in the latter, money may be acquired from any number of sources.

those specifically listed therein. Indeed, the Court's repeated reference to the test governing the availability of such damages is whether the fees are the "natural and proximate consequence" of a defendant's conduct, belies Pardee's argument. 117 Nev. at 957.

Furthermore, *Sandy Valley*, in footnote 7, cites eleven decisions involving issues relating to attorney's fees as an element of damages (and not fees considered pursuant to agreement, rule, or statute). *Id.* at 955, n. 7. Out of these eleven cases, ten fall within the scope of the categories listed in the body of *Sandy Valley* (that is they are suits for injunctive/declaratory relief; for recovery of personal or real property; or fees caused by litigation with a third party). However, one case, *Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1989), does not involve claims listed in *Sandy Valley* and the citation to *Works* further suggests that the Court was not limiting the availability of attorney fee damages to the causes of action it specifically identified. In *Works*, the Court granted fees "to defray the expenses and costs that respondents have incurred in retaining counsel to represent them…" in an appeal concerning claims for breach of accord and satisfaction and malicious

prosecution. *Works*, 103 Nev. at 69.[36] As the Court is surely aware, the two types of claims in *Works* are not listed in the body of the opinion in *Sandy Valley*, yet the *Sandy Valley* Court cited the *Works* fee award as special damages. If the Court in *Sandy Valley* intended to restrict the causes of action qualifying for attorney fee damages, it would not have cited *Works* as it did.

Likewise, the four Nevada cases citing or interpreting *Sandy Valley* on the issue of attorney's fees as damages, *Horgan*, *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 124 P.3d 530 (2005), *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, Inc., 255 P.3d 268, 127 Nev. Adv. Op. 26 (2011), and *Liu*, all support Wolfram and Wilkes's position. In *Shuette*, the Court reaffirmed the *Sandy Valley* test, stating that for attorney's fees to be awarded as damages, "claimants have the arduous task of proving [that the fees] were a natural and proximate consequence of the injurious conduct." 121 Nev.

[36] While the *Works* Court cites N.R.A.P. 38(b) for support for the fee award, the Court in *Sandy Valley* is clear that this was a case concerning fees as damages, and any language suggesting that the award was made pursuant to agreement, rule or statute, is disapproved. 117 Nev. at 955, n. 7.

at 863. *Shuette* never referenced the three categories of cases lists in *Sandy Valley*. In *Horgan*, the Court reversed *Sandy Valley* on the limited issue of the availability of fees as damages for claims for removing clouds of title. 123 Nev. at 586. No suggestion is made in *Horgan* that the general *Sandy Valley* criteria for attorney fee damages has been limited to the examples of claims listed in *Sandy Valley*. This is confirmed by the *Reyburn* decision.

The court in *Reyburn* again reaffirmed *Sandy Valley's* test for the propriety of fees as damages, stating, "attorney fees that are considered special damages are fees that are foreseeable arising from the breach of contract or tortious conduct." *Reyburn*, 255 P.3d at 279, n. 11. Most recently, *Liu* reaffirmed that attorney's fees may be recovered as damages when they "are a natural and proximate consequence of the injurious conduct." *Liu*, 321 P.3d at 878.[37]

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[37] Contrary to Pardee's claim that "*Liu* further explained the three exceptions" (Br. at 27), *Liu* did not recite the three categories of cases listed in *Sandy Valley*, and instead addressed only [1] breach of contract claims involving a third-party lawsuit and [2] slander of title claims. *Liu's* incomplete recitation of the three categories from *Sandy Valley* suggests that all attorney's fees as damages cases do not have to fit neatly into one of the three categories listed in *Sandy Valley*, otherwise the rule concerning attorney's fees as damages would simply be the three categories, and not the oft-repeated statement that the attorney's fees,

Finally, Justice Maupin's concurrence in *Horgan* further supports the conclusion that *Sandy Valley* did not limit the availability of attorney's fees as damages to the cases listed therein. Justice Maupin explained:

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

123 Nev. at 587 (J. Maupin concurring).[38] Accordingly, for the reasons set forth above, the Court should find that Wolfram and Wilkes were appropriately awarded attorney's fees as damages.

CONCLUSION

The district court properly entered judgment in favor of Wolfram and Wilkes. This dispute has always centered on Pardee's failure to provide information to Wolfram and Wilkes. Pardee's statements to the

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must be "the natural and proximate consequence of the injurious conduct." *Sandy Valley*, 117 Nev. at 957.

[38] Justice Maupin, one of the three Justices on the panel delivering the per curiam opinion in *Sandy Valley*, is confirming that "*Sandy Valley* does not preclude the prosecution of claims for attorney fees as damages in other contexts…" *Id.*

contrary are simply false. Because the district court found that Wolfram and Wilkes prevailed on every one of their claims for relief as well as defeating Pardee's counterclaim, Wolfram and Wilkes were properly found to be the prevailing party for the purposes of awarding attorney's fees and costs. Likewise, the district court properly found that Wolfram and Wilkes were eligible for attorney's fees as damages under *Sandy Valley* and its progeny. The Court should affirm the district court's judgment.

AFFIRMATION

Pursuant to NRS 239B.030 the undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

Dated this 30th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief was prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font, Century style. I further certify that this brief complies with the type-volume limitation of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 13,560 words.

Pursuant to NRAP 28.2, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions if this brief is not in

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conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of The Jimmerson Law Firm, P.C., and on the 30th day of April, 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/ Shahana Polselli
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