IN THE SUPREME COURT OF THE STATE OF NEVADA

PARDEE HOMES OF NEVADA, Appellant, vs. JAMES WOLFRAM; ANGELA L. LIMBOCKER-WILKES as trustee of the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST; and the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST, Respondents.	Case No.: 72371 Eighth Judicial District Court Case No.: A-10-632338-C **RESPONDENTS' MOTION FOR SANCTIONS**

Respondents, JAMES WOLFRAM, ANGELA L. LIMBOCKER-WILKES as trustee of the WALTER D. WILKES AND ANGELA L. LIMBOKER-WILKES LIVING TRUST, and the WALTER D. WILKES AND ANGELA L. LIMBOCKER-WILKES LIVING TRUST (collectively, "Wolfram and Wilkes"), by and through their counsel of record, hereby submit their Motion for Sanctions (the "Motion").

I. INTRODUCTION AND STATEMENT OF FACTS

By now the Court is aware of the facts giving rise to this dispute. The litigation between Appellant Pardee Homes of Nevada, Inc. ("Pardee") and Respondents Wolfram and Wilkes arose from Pardee's concealment of information that it was obligated to provide to Wolfram and Wilkes—a duty

that arose not only from a Commission Agreement executed by the parties, but also from the special relationship of trust between Wolfram and Wilkes on the one hand, and Pardee on the other. (48 JA 7469 at ¶ 15; 7473 at ¶ 6.)

Throughout this appeal, Pardee has repeatedly misrepresented and concealed the facts from this Court. While Wolfram and Wilkes addressed and corrected Pardee's significant misstatements of the record in their Answering Brief,[1] Pardee made further material misrepresentations of the facts as well as made new, improper arguments in its Reply Brief.[2] Such gross malfeasance in the appellate process requires the issuance of sanctions.

First, Pardee's counsel has improperly and unethically put forward a new argument on reply—that a cause of action for accounting is not one seeking injunctive relief for which attorney's fees as damages would be available. (Reply Br. at 20-21.) Pardee's argument is wrong on the law. Indeed, Pardee's law firm, in multiple cases pending in the Eighth Judicial District Court, is seeking attorney's fees as damages in connection with their clients' claims for accounting. It isn't just hypocritical for Pardee's counsel to make this argument on reply when it is taking the exact opposite position in multiple trial courts, it is also unethical.

[1] Wolfram and Wilkes's Answering Brief is cited herein as "Ans. Br. at __."
[2] Pardee's Reply Brief is cited herein as "Reply Br. at __."

The Nevada Rules of Professional Conduct prohibit positional conflicts like the one Pardee's counsel has created for itself and for its clients. While Wolfram and Wilkes do not believe that Pardee's argument has merit, by making the new argument Pardee's counsel has, it runs the risk that this Court could set precedent and defeat the position the law firm is taking on behalf of its other clients. And because those clients had taken their positions first, Pardee was ethically prohibited from making the new arguments it made on reply. Sanctions for such misconduct should issue.

Second, Pardee's entire appeal on the prevailing party issue relies on a total and complete falsehood—that this case was first and foremost about a claim for $1.8 million in unpaid commissions rather than the need for information. Pardee repeatedly misrepresented the record on this appeal, both in its Opening Brief and in its Reply Brief. While the Court can go to the record directly and confirm that Pardee is not being truthful, it should not have to. Litigants have a duty to accurately report the record before the trial court. Pardee has repeatedly shirked this duty.

While there were egregious examples in the Opening Brief for which the Answering Brief spent significant space refuting,[3] the Reply Brief went

[3] Pages 15-23 of the Answering Brief addressed several of Pardee's misstatements in its Opening Brief. Tellingly, Pardee's Reply Brief did not once cite to any portion of this section of the Answering Brief.

even further and made additional material misstatements of the record. Some of the misstatements are: (1) that the offer of judgment required Pardee to pay Wolfram and Wilkes $1.8 million (Reply Br. at 4); and (2) that post-trial, Wolfram and Wilkes admitted that they if the Court accepted their theory of breach that they would be entitled to $1.8 million (*id*. at 18).[4] The law does not condone such tactics; an order for sanctions is justified.

II. LEGAL ARGUMENT

A. Legal Standard

This Court does not permit a party to act improperly or unethically, to make material misrepresentations of the record below, or to otherwise misuse the appellate process. Pursuant to the Nevada Rules of Appellate Procedure, sanctions are issued when a party engages in such misconduct. *See* NRAP 38(b). Pardee's conduct in this appeal warrants sanctions.

B. Sanctions Should Be Ordered

1. Pardee's Arguments on Reply, if Accepted by this Court, Would Harm Pardee's Counsel's Other Clients—Pursuing Such Arguments in the Face of a Positional Conflict is Ethically Improper and Warrants Sanctions

[4] There are many others (e.g. the repeated claim that the "economic engine" of the case was unpaid commissions, which collapses on itself when the Court considers: (1) the overwhelming evidence in the Answering Brief to the contrary (Ans. Br. at 38-40); and (2) that Pardee is projecting its demonstrably improper decision-making process onto Wolfram and Wilkes for support thereof), but in an effort to be concise, this Motion particularly addresses the examples above.

For the first time in this entire litigation, in its Reply Brief, Pardee argued that an accounting did not constitute injunctive relief which could render a successful plaintiff eligible for attorney's fees as damages.[5] Specifically, Pardee argued, "Wolfram and Wilkes baldly claim that because the district court awarded them an accounting, it was issuing a mandatory injunction. This is...legally unsupportable..." (Reply Br. at 21.)

Notwithstanding that Pardee is wrong as a matter of law,[6] Pardee's argument, if successful, would materially harm Pardee's counsel's other clients as Pardee's law firm is currently asserting accounting claims for which it is requesting attorney's fees as damages for its clients. Indeed, in multiple cases currently pending in the Eighth Judicial District Court, Pardee's counsel is representing clients who are seeking attorney's fees as damages as part of their claims for accounting. Specifically, the plaintiffs in *Dumon Financial Group v. The Flynn Group, Inc.*, Case No. A-17-757167-C, and

[5] Footnote 34 (pp. 59-60) of Wolfram and Wilkes's Answering Brief explained in great detail how Pardee had not addressed the issue that the need for an accounting (injunctive relief) in this case resulted from Pardee's improper conduct at any point in either the post-trial motions or in Pardee's Opening Brief. A true and correct copy of the foregoing excerpt from the Answering Brief is attached hereto as Exhibit 1.

[6] Pardee is wrong (1) that an accounting does not constitute injunctive relief; and (2) that injunctive relief, without more, would warrant attorney's fees as damages in Wolfram and Wilkes's case (injunctive relief resulting from improper conduct, which was found, is also required). *See* Ans. Br. at 53-60.

Zaghi v. Absolute Dental Management, LLC, Case No. A-18-769584-C, are represented by McDonald Carano, LP, Pardee's counsel, and are requesting attorney's fees as damages as part of each of their claims for accounting. *See* Exhibit 2 at pp. 3-4 at ¶¶ 19-27; Exhibit 3 at pp. 20-21 at ¶¶ 192-197.[7] Setting aside the hypocrisy of Pardee's counsel's appellate arguments on this issue, Pardee's counsel was and still is ethically barred from making these arguments as it is positionally conflicted based upon the pending actions in *Dumon Financial Group* and *Zaghi*.

Nevada Rule of Professional Conduct 1.7 mandates that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," [which exists when] "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." NRPC 1.7(a); *see also* Comment 24 to the ABA Model Rule 1.7.[8] Here, Pardee's counsel may not make this **new** argument that, if successful, would materially harm (if not outright destroy) the position that its firm is taking on behalf of its other clients in

[7] Attached hereto as Exhibit 2 is a true and correct copy of the complaint in *Dumon Financial Group*. Attached hereto as Exhibit 3 is a true and correct copy of the complaint in *Zaghi*.

[8] While the ABA Model Rule comments are not specifically enacted in the Nevada Rules of Professional Conduct, they may be consulted for guidance in interpreting the same. *See* NRPC 1.0A.

other Nevada courts. Indeed, the American Bar Association has issued a specific opinion on this problem which prohibits such conduct. In Formal Opinion 93-377, the Standing Committee on Ethics and Professional Responsibility stated:

> [I]f the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm's representation of one client will create legal precedent, even if not binding, which is likely to materially undercut the legal position being urged on behalf of the other client, the lawyer should either refuse the to accept the second representation (or if otherwise permissible) withdraw from the first, unless both clients consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.

Id. at p. 3.[9] The Committee continued:

> [T]he same analysis should be followed if such a conflict emerges after the second representation has been accepted and pursued. If that analysis leads to the conclusion that the law firm should not proceed with both representations, then the law firm must withdraw from one of them.

Id. at p. 5.

Here, Pardee's counsel had a duty to protect its other clients' interests—who asserted their claims for accounting and attorney's fees as damages before Pardee made this particular argument—and refrain from making the aforementioned argument on reply. The failure to uphold its

[9] A true and correct copy of ABA Formal Opinion 93-377 is attached hereto as Exhibit 4.

ethical duties warrants the issuance of sanctions. *See, e.g., Sobol v. Capital Management Consultants, Inc.*, 102 Nev. 444, 447, 726 P.2d 335, 337 (1986).

2. Pardee Blatantly Misrepresented the Record

In its Opening Brief, Pardee shamelessly distorted the trial court record as demonstrated in detail in the Answering Brief. *See, e.g.*, Ans. Br. at 15-23. Facing overwhelming evidence from the record (including on one issue, hundreds of citations to the trial transcript), Pardee did not address those matters on reply (effectively conceding the merits thereof), but instead presented even greater distortions of the record—seemingly secure that Wolfram and Wilkes had no response brief to once again correct the misstatements. Such improper tactics must be corrected.

First, Pardee falsely claims in its Reply that had it accepted the offer of judgment, "then Pardee would be admitting to owing over $1.8 million in additional commissions." (Reply. Br. at 4, 17, 31.) This is wrong.[10] The offer of judgment was for $149,000.00—not $1.8 million. (77 JA 12149.)[11] In its

[10] Pardee makes this outlandish claim for the first time on reply (it was not raised in the Opening Brief, which is telling because, if it were true, it would lend support to Pardee's argument), and never provides any support or explanation for it. At a minimum, the Court should reject it out of hand for this reason. *See FDIC v. Rhodes*, 130 Nev. Adv. Op. 88, 336 P.3d 961, 968 n. 1 (2014) (no consideration for argument without "meaningful analysis").

[11] A true and correct copy of the offer of judgment is attached hereto as Exhibit 5.

Reply, Pardee would have this Court believe the conditions in the offer of judgment concerned "any land Pardee purchased from CSI for 'detached production residential use,'" including past purchases. (Reply Br. at 17.) However, the offer of judgment specifically states that it applies to "**purchases...made in the future**..." Exhibit 5 at 2:8; 21-22 (emphasis supplied).[12] Pardee's argument in Reply is not only false,[13] it is a wrongful misrepresentation of the record, warranting sanctions. *See Sobol*, 102 Nev. at 447 (ordering sanctions for, *inter alia*, "blatant misrepresentation" of the facts); *Thomas v. City of North Las Vegas*, 122 Nev. 82, 95-96, 127 P.3d 1057, 1066-1067 (2006) (issuing sanctions for counsel's "violations of the ethical duties of candor...").

Second, Pardee wrongly and wrongfully claims that Wolfram and Wilkes admitted post-trial that if the Court accepted their theory of breach

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[12] The conditions in the offer of judgment focused on the provision of information—the monetary portions of the conditions were a "restatement of what previously existed" under the agreements. (86 JA 13533:14-15.)

[13] Pardee's own briefing before the district court proves the falsity of this new argument, when Pardee stated, "Plaintiffs' Offer of Judgment is exactly for what it says: $149,000.00." (62 JA 9769.) Pardee never made this argument in its papers before the trial court. In fact, when first asked about the offer of judgment during the August 15, 2016 hearing, Pardee's counsel did not make this claim then either. *See* Exhibit 6, a correct copy of August 15, 2016 hearing transcript (86 JA 13445-13565) attached hereto, at 13500:8-13502:1. It was only after Pardee's counsel, Rory Kay, responded to the Court's inquiry, that Pardee's other attorney, Pat Lundvall, made this claim, and, like now, did so without explanation or support. (*Id*. at 13502:21-13503:6.)

that they would be entitled to $1.8 million. (Reply Br. at 18.) Pardee attempts to support this outrageous claim by strategically and selectively citing one set of sound bites from one hearing, while excluding any reference to Wolfram and Wilkes's true position during that same hearing. Indeed, **Pardee does not cite to the 18 examples from the same hearing where Wolfram and Wilkes clearly refute Pardee's claim and explain that the $1.8 million figure was not claimed to be due and owing**, but was instead a "theoretical" or "hypothetical" amount of "future commissions."[14] This blatant distortion of the record cannot be tolerated. A sanctions order is appropriate. *See Sobol*, 102 Nev. at 447; *Thomas*, 127 P.3d at 1066-67.

III. CONCLUSION

Wolfram and Wilkes respectfully request that sanctions be issued against Pardee for its misconduct and misuse of the appellate process.

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[14] *See* Exhibit 7, a true and correct copy of the complete transcript from the January 15, 2016 hearing before the district court (70 JA 10962-11167), at 10982:13-14; 10983:1-3; 10991:5-10; 10992:8-14; 10993:22-10994:1; 10994:16-25; 11001:3-14; 11002:4-11; 11004:23-10; 11005:19-11006:2; 11007:18-20; 11011:3-15; 11088:14-11089:16; 11091:18-24; 11093:13-11094:5; 11094:13-16; 11095:10-21; 11099:6-12. Wolfram and Wilkes respectfully encourage the Court to read that hearing transcript in full to clearly understand this issue and Pardee's attempts to revise history. In addition to the numerous examples from the January 15, 2016 hearing, more are found in the August 15, 2016 hearing transcript. *See* Exhibit 6 at 13462:2-12; 13509:18-13510:17. Like the January 15, 2016 hearing, the August 15, 2016 hearing explains the facts concerning this issue and would further enlighten the Court as to the facts of this matter.

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 6th day of July, 2018.

THE JIMMERSON LAW FIRM, P.C.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the formatting, typeface, and type-style requirements of NRAP 27 and 32 because this motion was prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font, Georgia style. I further certify that this motion complies with the page-limitations of NRAP 27 and 32 as it contains 10 pages.

Pursuant to NRAP 28.2, I hereby certify that I have read this motion, 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 motion complies with all applicable Nevada Rules of Appellate Procedure, and I understand that I may be subject to sanctions if it is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of July, 2018.

THE JIMMERSON LAW FIRM, P.C.

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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 6th day of July, 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
An employee of The Jimmerson Law Firm