

**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

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Elizabeth A. Brown  
Clerk of Supreme Court

**RESPONDENTS' MOTION  
FOR PERMISSION TO FILE A  
REPLY EXCEEDING PAGE  
LIMIT**

Respondents, 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 (collectively, "Wolfram and Wilkes"), by and through their counsel of record, hereby move to file an overlength reply in support of their Motion for Sanctions (the "Motion"). Wolfram and Wilkes's reply is eight (8) pages.

**I. INTRODUCTION AND FACTUAL BACKGROUND**

The litigation between Appellant Pardee and Respondents Wolfram and Wilkes arose from Pardee's failure to keep Wolfram and Wilkes

appropriately informed concerning the development of Coyote Springs—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.) Pardee filed its appeal after Wolfram and Wilkes not only successfully prosecuted all three of their claims—(1) accounting, (2) breach of contract, and (3) breach of the implied covenant of good faith and fair dealing—but also defeated Pardee’s counterclaim for breach of the implied covenant of good faith and fair dealing before the district court.

The Opening and Answering briefs were timely submitted to the Court after the Court granted each side a 30-day extension to submit their respective briefs. Pardee’s reply brief was timely submitted after the Court permitted Pardee to file an overlength Reply brief.

Wolfram and Wilkes then timely filed a Motion for Sanctions based on Pardee’s blatant misrepresentation of the record and the presentation of an argument in the Reply brief that Pardee’s counsel was ethically prohibited from making. Pardee’s Response to the Motion for Sanctions, in addition to restating the misrepresentations that were the subject of the Motion for Sanctions, made further misrepresentations of the record and raised issues that were outside the scope of the initial moving brief. As such, Wolfram and

Wilkes are now moving to file an overlength reply in support of the Motion for Sanctions. As detailed below, it is impossible to reply properly without an additional three (3) pages, due to Pardee: (1) raising multiple issues that were not part of the initial Motion for Sanctions; and (2) making multiple material misstatements in its Response. Appropriate treatment of these matters requires an overlength reply.

## **II. ARGUMENT**

### **A. Legal Standard**

The Court is familiar with the standard governing motions seeking permission to exceed page-limits on motions, oppositions, and replies. Indeed, “Although not specifically allowed in the NRAP, the appellate courts routinely grant motions to file an overlength motion, opposition or reply that is filed in conformance with NRAP 32[(a)](7)(C)-(D).” Nevada Appellate Practice Manual, 2016 Edition Ch. 7, 7-4.<sup>1</sup>

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<sup>1</sup> The Nevada Rules of Appellate Procedure do not contain the same restrictions and admonitions on motions to file overlength motions, oppositions, and replies as those that exist for motions to file overlength briefs under NRAP 32(a)(7). Nevertheless, Wolfram and Wilkes have attached the Declaration of James M. Jimmerson, Esq. (the “Jimmerson Declaration”) which explains why the relief sought is necessary and that counsel have been diligent in their efforts to comply with the page limits, all of which would satisfy the requirements of NRAP32(a)(7). Further, a copy of this page from the Nevada Appellate Practice Manual is attached hereto as **Exhibit 1**.

**B. An Eight-Page Reply is Necessary to Properly Brief the Court on the Motion for Sanctions and the Response Thereto**

Good cause exists to permit the filing of an overlength reply in support of the Motion for Sanctions. Indeed, as explained in the Jimmerson Declaration, an overlength reply brief is necessary because in its Response Pardee: (1) raised multiple issues that were not part of the initial Motion for Sanctions; and (2) made multiple material misstatements that require correction. (Jimmerson Decl. at ¶ 7.) In its Response to the Motion, Pardee argued, erroneously, that Wolfram and Wilkes do not have standing to raise the ethical issues present in the Motion for Sanctions, and that NRAP 38 does not support the issuance of sanctions for ethical breaches. (*Id.*) Pardee also misstated the procedural history of this case and improperly omitted key language from the district court record in its Response. (*Id.*) The foregoing are just examples of the matters that must be addressed on reply, and proper treatment of the same requires excess space. (*Id.* at ¶ 9.)

Wolfram and Wilkes have diligently attempted to keep the reply brief within the page limit pursuant to NRAP 27(d)(2). Counsel have drafted and redrafted the reply in an effort to keep the reply under the page limit. (*Id.* at ¶ 6.) However, due to the number of new matters raised and material misstatements made in Pardee's Response, Wolfram and Wilkes cannot appropriately brief the Court on the Motion for Sanctions without being

granted leave to file an overlength reply. (*Id.* at ¶ 7.) Wolfram and Wilkes should be allowed to file an overlength reply of eight pages.<sup>2</sup>

### **CONCLUSION**

For the foregoing reasons, Wolfram and Wilkes respectfully request that the Court find that good cause has been shown to permit them to file an overlength reply and grant this Motion.

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<sup>2</sup> Attached to the Motion as **Exhibit 2** is a true and accurate copy of the reply.

## **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 24<sup>th</sup> day of July, 2018.

THE JIMMERSON LAW FIRM, P.C.

By: /s/ James M. Jimmerson, Esq.  
James J. Jimmerson, Esq.  
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*Attorneys for Respondents*

**DECLARATION OF JAMES M. JIMMERSON, ESQ.  
IN SUPPORT OF RESPONDENTS' MOTION FOR PERMISSION  
TO FILE REPLY EXCEEDING PAGE LIMIT**

JAMES M. JIMMERSON, ESQ., pursuant to NRS 53.045, under penalty of perjury, does hereby declare:

1. I am an associate with The Jimmerson Law Firm, P.C., counsel of record for Respondents, 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 (collectively, "Respondents" or "Wolfram and Wilkes") in the *Pardee Homes of Nevada, Inc. v. Wolfram et al.* appeal (Case No. 72371). I make this Declaration in support of Respondents' Motion for Permission to File Reply Exceeding Page Limit (the "Motion").

2. I have personal knowledge of the subject matter of this Declaration and I am competent to testify thereto.

3. I have attached a true and correct copy of page 7-4 of the Nevada Appellate Practice Manual, 2016 Edition to the Motion as **Exhibit 1**.

4. I have attached a true and correct copy of Respondents' Reply in Support of Their Motion for Sanctions to the Motion as **Exhibit 2**.

5. Respondents' Reply is eight (8) pages, three (3) pages longer than the page limit for replies under NRAP 27(d)(2).

6. James J. Jimmerson, Esq., the supervising partner on this matter, and I have worked diligently on briefing the reply in support of Respondent's Motion for Sanctions. Ever since Pardee Homes of Nevada, Inc. ("Pardee") filed and served their Response to Respondents' Motion for Sanctions, we have diligently drafted and redrafted the reply in an effort to keep the reply under the page limit.

7. Despite our best efforts to limit the reply to five (5) pages, it is impossible to do so without materially harming Wolfram and Wilkes's ability to appropriately address the matters raised by Pardee in its Response.

8. An overlength reply brief is necessary because Pardee, in its Response: (1) raised multiple issues that were not part of the initial Motion for Sanctions; and (2) made multiple material misstatements that require correction. As detailed in the reply brief, Pardee argued, erroneously, that Wolfram and Wilkes do not have standing to raise the ethical issues present in the Motion for Sanctions, and that NRAP 38 does not support the issuance of sanctions for ethical breaches. Pardee also misstated the procedural history of this case and improperly omitted key language from the district court record.



10. Accordingly, Wolfram and Wilkes seek permission to file the attached reply.

I declare under the penalty of perjury and laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Dated this 24<sup>th</sup> day of July 2018.



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JAMES M. JIMMERSON, ESQ.

## **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 brief complies with the page-limitations of NRAP 27 and 32 as it contains 5 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 24<sup>th</sup> day of July, 2018.

THE JIMMERSON LAW FIRM, P.C.

By: /s/ James M. Jimmerson, Esq.  
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*Attorneys for Respondents*

## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of The Jimmerson Law Firm, P.C., and on the 24<sup>th</sup> 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

# EXHIBIT 1

# EXHIBIT 1

**[7:8] PRACTICE TIP:** Although not specifically allowed in the NRAP, the appellate courts routinely grant motions to file an over-length motion, opposition or reply that is filed in conformance with NRAP 32(7)(C)-(D).

- d. **[7:9] Opposition to motion.** Any party may file a response to a motion. NRAP 27(a)(3)(A).
  - i. **[7:10] Form and content.** The content and format of a response is governed by the same rules as motions. NRAP 27(a)(3)(A); *see also* NRAP 27(a)(2).
  - ii. **[7:11] Time to file.** A response to a motion must be filed within seven days after service of the motion, unless the court shortens or extends time. NRAP 27(a)(3).
  - iii. **[7:12] Request for affirmative relief.** A response to a motion may also include an affirmative motion for relief. NRAP 27(a)(3)(B). A request for affirmative relief must be included in the title of the opposition. *Id.* The time to respond to a new motion that is included in a response to a motion is seven days. NRAP 27(a)(3).
- e. **[7:13] Reply in support of motion.** The moving party may file a reply to any response but must not present new matters that do not relate to the response. NRAP 27(a)(4). A reply in support of a motion must be filed within five days of service of the opposition. *Id.*

## 2. **[7:14] Contents of Motion**

A motion must state succinctly and with particularity “the grounds for the motion, the relief sought, and the legal argument necessary to support it.” NRAP 27(a)(2). The motion and the argument in

# EXHIBIT 2

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# IN THE SUPREME COURT OF THE STATE OF NEVADA

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Respondents.

Case No.: 72371

Eighth Judicial District Court  
Case No.: A-10-632338-C

## **RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR SANCTIONS**

### **I. INTRODUCTION**

Throughout this appeal, Pardee has repeatedly made material misrepresentations of the facts and, on Reply, raised improper arguments to the Court. Pardee's Response (the "Response") to Respondent's Motion for Sanctions (the "Motion") not only doubles down on earlier misstatements, it makes new misrepresentations to the Court.<sup>1</sup> This misconduct warrants the issuance of sanctions.

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<sup>1</sup> Pardee's Response to the Motion is a microcosm of this entire case. It contains material misstatements; it ignores controverting case law; and it projects upon Wolfram and Wilkes Pardee's own motives on how to conduct litigation. The significance of Pardee's misconduct has compelled the filing of this extraordinary Motion for Sanctions.

## **II. PARDEE'S MISREPRESENTATIONS MERIT SANCTIONS**

Pardee's blatant misrepresentations made to the Court on this appeal warrant sanctions. While the Motion addressed misrepresentations in the Reply brief concerning (1) the offer of judgment, and (2) statements made during a hearing before the district court, it also stated that the rampant misstatements made in the Opening brief justify sanctions as well.<sup>2</sup>

As detailed in the Motion, Pardee misrepresented the nature of the offer of judgment in stating that it was for \$1.8 million. (Mot. at 8-9).<sup>3</sup> In its Response, Pardee falsely claims, once again without any explanation, that the offer of judgment was for \$1.8 million, insisting that it "required Pardee to accept a condition that would have triggered additional commissions." (Resp. at 8.) The Response deliberately ignores Wolfram and Wilkes's citation to the term of the offer of judgment stating that the condition at issue applied to "purchases...made in the future..." (and therefore the condition

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<sup>2</sup> Pardee did not specifically challenge Wolfram and Wilkes's statement that there were "egregious" misstatements of the record in the Opening brief which justify the Court's award of sanctions. (Mot. at 3.)

<sup>3</sup> In the Response, Pardee did not dispute (and thus conceded) the Motion's description of the procedural history of case, that Pardee's papers before the district court never once claimed that the offer of judgment was for \$1.8 million, but instead stated that the offer was for \$149,000.00. (Mot. at 9, n. 13); *Ozawa v. Vision Airlines*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009).



could not create any amount then due and owing). (Mot. at Exhibit 5 at 2:8; 2:21-22.) Pardee's omission is deceptive, misleading, and sanctionable.

Pardee cites the offer of judgment, stating that "all purchases of real property... shall be deemed Option Property," claiming (falsely) that this condition would apply to past purchases. (Resp. at 8.) In so doing, Pardee uses ellipses to omit the critical phrase immediately preceding "shall be deemed Option Property." Stated accurately, the offer of judgment provides, "all purchase of real property... **made in the future** shall be deemed Option Property." (Mot. at Exhibit 5 at 2:8; 21-22 (emphasis supplied).) Excluding that key phrase is a blatant attempt to mislead the Court, meriting sanctions. *See Paulik v. Rizkalla*, 796 F.2d 456, 460 (Fed. Cir. 1986) (issuing sanctions for use of ellipses to create "flagrant misrepresentations of the record").<sup>4</sup>

Second, Pardee falsely claimed that Wolfram and Wilkes stated post-trial that if the Court accepted their theory of breach that they would be entitled to \$1.8 million. As detailed in the Motion, Pardee improperly and intentionally omitted any citation to the 18 instances in the August 15, 2016 hearing transcript which definitively refute Pardee's false claim. (Mot. at 10.)

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<sup>4</sup> Pardee suggests that "cit[ing] to the appendix so that the court could conduct its independent analysis of McDonald Carano's argument" is sufficient. (Resp. at 8.) Pardee is wrong. "A court should not have to pore over an extensive record as an alternative to relying on counsel's representations." *In re Boucher*, 837 F.2d 869, 871 (1st Cir. 1988).

This Court does not permit such improper misrepresentations of the record. *See, e.g., Sobol v. Capital Management Consultants, Inc.*, 102 Nev. 444, 447, 726 P.2d 335, 337 (1986). Pardee's Response does not address this issue at all, but instead attempts to reframe it as being about whether or not Wolfram and Wilkes sought money damages at trial. (Resp. at 9.)<sup>5</sup> In failing to respond to Wolfram and Wilkes's analysis in the Motion, Pardee concedes the merits of the same. *See Ozawa*, 125 Nev. at 563.

Finally, the Response contains another material misrepresentation to the Court, warranting sanctions. Pardee claims that Wolfram and Wilkes argued that an accounting constituted a mandatory injunction for the first time on appeal, stating, "It is Wolfram and Wilkes, not McDonald Carano, who argued for the first time in their answering brief that their accounting cause of action was for mandatory injunctive relief..." [and that Pardee] "responded to it only after Wolfram and Wilkes asserted it." (Resp. at 4.)<sup>6</sup> That is demonstrably false.

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<sup>5</sup> In so doing, Pardee also falsely claims that Wolfram and Wilkes "argue that they never sought money damages in this case." (Resp. at 9, notably without a citation to any of Wolfram and Wilkes's brief or papers.) Wolfram and Wilkes not only never made that argument, but they were the only ones to correctly describe to this Court the relief they sought at trial. (Answering Br. at 40-47.)

<sup>6</sup> Pardee also falsely alleges that Wolfram and Wilkes misrepresented how the district court awarded damages. (Resp. at 4.) To the contrary, the

Both Wolfram and Wilkes's Answering Brief and Motion detailed how Wolfram and Wilkes maintained their position that an accounting is, by its very definition, a mandatory injunction throughout this action. (Answering Br. at 59-60, n. 34; Mot. at 5, n. 5.) Indeed, **Wolfram and Wilkes raised this issue on five separate occasions before the district court (before and after trial), without any response from Pardee.** See Reply Exhibit 1.<sup>7</sup> This is why Wolfram and Wilkes brought it to the Court's attention in their Answering Brief—because it would be improper for Pardee to address the issue for the first time on Reply. (Answering Br. at 59-60, n. 34.) In a desperate effort to rescue its argument, Pardee falsely represents to the Court that this issue was only first raised in the Answering Brief on appeal. Such misrepresentations cannot be tolerated.

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Answering Brief precisely describes how the district court awarded damages in this case. (Answering Br. at 58.)

<sup>7</sup> Attached hereto as Reply Exhibit 1 is a true and accurate copy of the relevant portions of the following: [1] Plaintiffs' Reply in Further Support of Motion to File Second Amended Complaint (16 JA 2518 n. 10); [2] Transcript from April 26, 2013 hearing (16 JA 2531:8-17; 2564:13-2565:2—**the latter is the argument from Pardee's counsel explicitly referencing this issue and yet conspicuously failing to argue that an accounting is not a claim for injunctive relief**); [3] Plaintiffs' Supplement to Motion for Leave to File a Second Amended Complaint (16 JA 2639:5-13); [4] Plaintiffs' Opposition to Pardee Homes of Nevada's Motion to Amend Judgment and Countermotion for Attorney's Fees (65 JA 10224:17-10225:10); and [5] Plaintiffs' Opposition to Defendant, Pardee Homes of Nevada's, Motion to Amend Judgment and Plaintiffs' Countermotion for Attorney's Fees and Costs Pursuant to NRS 18.010 and EDCR 7.60 (81 JA 12826:13-20).

### **III. PARDEE'S COUNSEL IS POSITIONALLY CONFLICTED**

Pardee's counsel has a positional conflict. Prior to filing the Reply Brief in this appeal, Pardee's law firm asserted (and continues to assert) accounting claims for which their clients are requesting attorney's fees as special damages in various trial courts. Pardee's new position on Reply, that an accounting is not injunctive relief for which attorney's fees as damages would be available, if successful, would materially harm (if not outright destroy) the position that its firm is taking on behalf of its other clients in other Nevada proceedings. Not only is such a positional conflict prohibited, it demonstrates Pardee's willingness to say and do almost anything to attempt to reverse the well-reasoned orders and decision of the district court.

Pardee's argument that there is no positional conflict is paper thin (it is two sentences long). The Response claims, without warrant or explanation, that this appeal "is not implicated in the cases Wolfram and Wilkes cite involving other McDonald Carano clients... [and that] nothing in those pleadings suggest[s] McDonald Carano is asserting those accounting claims as mandatory injunctions." (Resp. at 5.) Such unwarranted claims are demonstrably false.

The Response does not explain the basis for the other clients' entitlement to attorney's fees as damages, which is necessary for the Court

to understand how it could be proper for such diametrically opposite arguments to be maintained. This silence is deafening. The complaints in district court demonstrate that Pardee's counsel's other clients' claims for fees as damages are premised on the correct legal position that an accounting constitutes injunctive relief for which fees could qualify as special damages.<sup>8</sup>

Instead of explaining how a positional conflict does not exist, Pardee dedicated most of its Response to erroneously arguing technical issues: that NRAP 38 doesn't allow for sanctions on ethical issues,<sup>9</sup> that Wolfram and Wilkes do not have standing to raise this issue, and that Wolfram and Wilkes are "weaponizing" the Nevada Rules of Professional Conduct.<sup>10</sup>

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<sup>8</sup> The *Dumon Financial Group* complaint seeks fees as damages on an accounting claim—not on a claim for breach of contract or slander of title (which Pardee is claiming are the only other types of cases, outside of claims for injunctive relief, where fees are eligible as damages). (Mot. at Exhibit 2.)

<sup>9</sup> Pardee's argument at issue is prohibited by NRPC 1.7 and therefore deployment of the same on appeal is both frivolous and a misuse of the court's appellate processes. NRAP 38 permits the imposition of sanctions for the conduct at issue. *See Sobol*, 102 Nev. at 447 ("disregard of rules and professional standards" warrants sanctions); *Thomas v. City of North Las Vegas*, 122 Nev. 82, 95-96, 127 P.3d 1057, 1066-1067 (2006) (imposing sanctions for "violations of ethical duties"); *SEC v. Loving Spirit Foundation*, 392 F.3d 486, 496 (D.C. Cir. 2004) ("Rules 38 and 46 of the Federal Rules of Appellate Procedure, however, give us independent authority to ensure compliance with ethical standards in this court.").

<sup>10</sup> Wolfram and Wilkes are not "weaponizing" the Rules of Professional Conduct. Pardee and its counsel were not permitted to make the argument they did and the dearth of explanation as to how they could be permitted to do so under the Rules of Professional Conduct is proof of the same.

Pardee is wrong. Wolfram and Wilkes have standing to raise this issue. Notwithstanding Pardee's erroneous reliance on *Beazer Homes Holding Corp. v. Dist. Ct.*, 128 Nev. 723, 731, 291 P.3d 128, 133 (2012), which did not involve ethical issues at all, the Nevada Supreme Court held in *Liapis v. Dist. Ct.*, 128 Nev. 414, 420, 282 P.3d 733, 737 (2012), that a nonclient has standing to raise ethical issues, including conflicts of interests, when the misconduct "infects the litigation... and impacts the nonclient moving party's interest in a just and lawful determination of [its] claims..." *Id.*

Wolfram and Wilkes have standing because, by its very definition, a positional conflict strikes at the substance of a dispute and impacts the just and lawful determination of the matter. The ethical breach before the Court directly infects the substance and merits of the appeal as the argument at issue could not have been permissibly raised by Pardee's counsel. While Pardee's other clients are aggrieved parties, so too are Wolfram and Wilkes who must respond to an improperly raised an utterly meritless argument.<sup>11</sup> Sanctions should issue.

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<sup>11</sup> Unlike more common conflicts of interest involving disputes with current or former clients, where the clients are likely to be aware of the proceeding where the conflict arises, a positional conflict is one where the affected clients are not likely to be aware of the problem and thus it is not practicable to limit standing to raise a positional conflict to the clients themselves.

## **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 24th day of July, 2018.

THE JIMMERSON LAW FIRM, P.C.

By: /s/ James M. Jimmerson, Esq.  
James J. Jimmerson, Esq.  
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*Attorneys for Respondents*

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this reply complies with the formatting, typeface, and type-style requirements of NRAP 27 and 32 because this reply was prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font, Georgia style.

This reply does not comply with the page limit of NRAP 27(d)(2) because it exceeds five (5) pages (*see* contemporaneously-filed Motion for Permission to File a Reply Exceeding Page Limit) and is eight (8) pages.

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Pursuant to NRAP 28.2, I hereby certify that I have read this reply, 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 reply 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 24th day of July, 2018.

THE JIMMERSON LAW FIRM, P.C.

By: /s/ James M. Jimmerson, Esq.  
James J. Jimmerson, Esq.  
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ks@jimmersonlawfirm.com  
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*Attorneys for Respondents*

## **CERTIFICATE OF SERVICE**

I hereby certify that I am an employee of The Jimmerson Law Firm, P.C., and on the 24th 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

**REPLY EXHIBIT 1**

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

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

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

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

1 before you is whether or not the facts as pled establish  
2 the necessity and the proximate nature of these  
3 attorneys' fees.

4 And as Sandy Valley explains, there are just  
5 one or two different types of cases. So it's not a case  
6 of an insurance company breaching their duty to defend  
7 or someone trying to recover real property. Including  
8 those two, there's also one more type of case  
9 Sandy Valley explicitly talks about, and that is cases  
10 appealing for injunctive or declaratory relief.

11 An accounting is exactly that. It is a  
12 mandatory injunction, you compelling a party to produce  
13 records, produce summaries, and, if necessary, to  
14 account for any difference in monies owed. So  
15 ultimately it is an equitable form of relief that only  
16 you can grant. No one else can give our clients the  
17 information that they are owed. Okay.

18 Furthermore, as to getting other information to  
19 establish the basis, okay, to prove that they actually  
20 did not do what they were supposed to do, to get the  
21 information they were owed, we're allowed, under the  
22 discovery rules, to subpoena third parties, request for  
23 production from the defendant. And these are only  
24 things that you can get after you employ an attorney and  
25 file suit.

1 MS. LUNDVALL: In Sandy Valley, when they begin  
2 to talk about attorneys' fees, and right after as far as  
3 they speak to the fact that if a party is forced to file  
4 a suit does not mean that they are entitled to an award  
5 of special damages.

6 THE COURT: I understand that completely. I  
7 think that is true.

8 MS. LUNDVALL: The Court goes on to give  
9 examples of when, in fact, attorneys' fees may be  
10 awarded. They talk about third-party legal disputes.

11 THE COURT: This is the section I just read to  
12 you. Right.

13 MS. LUNDVALL: Section number 2 is clarifying  
14 or removing a cloud on title. We know that that's not  
15 the case. Declaratory or injunctive relief, when  
16 necessitated -- now, it's not just declaratory or  
17 injunctive relief. It says when necessitated by the  
18 opposing party's bad faith conduct.

19 And the point that we made in our opposition  
20 was while they tried to bootstrap themselves into  
21 injunctive or declaratory relief claiming their  
22 accounting claim is a claim for declaratory or  
23 injunctive relief, they don't go so far as to plead  
24 anything that claims that were necessitated by the  
25 opposing party's bad faith conduct. There has been not

1 a whiff of allegation in this case that somehow Pardee  
2 engaged in bad faith conduct.

3 We have two parties --

4 THE COURT: Are there any claims for bad faith?  
5 I thought there was. One is saying no. One is saying  
6 yes. So let me --

7 MS. LUNDVALL: There's a claim for --

8 THE COURT: Good faith and fair dealing.

9 MS. LUNDVALL: -- the covenant of good faith  
10 and fair dealing. There is a whole world of difference  
11 between good faith and fair dealing versus bad faith  
12 conduct. And there's an entire line of cases.

13 THE COURT: Okay. I don't have that in front  
14 of me.

15 MS. LUNDVALL: There's an entire line of cases  
16 that discuss the difference between breach of a covenant  
17 of good faith and bad faith conduct.

18 In this particular case you've got two parties  
19 who have got differing interpretations of a single  
20 contract, but there have been no allegations that  
21 somehow Pardee has engaged in bad faith conduct. And  
22 even if you scour their proposed Second Amended  
23 Complaint, you don't get any allegations of bad faith.

24 THE COURT: What's the opposite of -- honestly,  
25 if you breach good faith and fair dealing, what is the

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

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

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

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

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



1 which was subsequently proven at trial. *See* Exhibits “3, 11.”

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

15 Furthermore, Plaintiffs’ claims involves a breach of the implied covenant of good faith and  
16 fair dealing, as well as equitable or injunctive relief regarding the accounting, all stemming from  
17 Defendant’s bad faith. Under *Sandy Valley*, “actions for declaratory or injunctive relief may  
18 involve claims for attorney fees as damages when the actions were necessitated by the opposing  
19 party's bad faith conduct.” *Sandy Valley*, 117 Nev. at 958. Nevada law is clear that claims for  
20 breaches of the implied covenant of good faith and fair dealing are “bad faith” claims no matter if  
21 they are claims founded on contract principles or tort principles. Plaintiffs fully briefed these  
22 issues and hereby attaches these court filings as if fully incorporated herein. *See Plaintiffs*  
23 *Supplement to Motion For Leave to File A Second Amended Complaint Pursuant to the Court’s*  
24  
25  
26  
27  
28

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

11 Over the course of a three (3) week trial, in which the Court took the matter under  
12 submission, Plaintiffs proved the above allegations, resulting in an award of \$135,500 in attorney's  
13 fees as special damages as set forth in the Court's June 25, 2014 FFCLC. In the face of these  
14 findings, the Court made a determination that Plaintiffs were owed a Judgment in the amount of  
15 \$141,500, composed of \$6,000.00 of time that Mr. Wolfram expended at a reasonable rate of  
16 \$75.00 per hour, for over eighty (80) hours that he spent to communicate with Pardee in an effort  
17 to obtain information that Defendant was contractually obligated to provide, but failed to do so, as  
18 the Court so found. In addition, the Court heard the testimony of Plaintiffs' counsel, Mr.  
19 Jimmerson, who testified that the efforts directly associated with Mr. Jimmerson's law firm to  
20 acquire the information from Pardee, and the Court found the sum of \$135,000 to be reasonable  
21 and necessary. *See* Exhibit "11." The Court's specific findings were based on BOTH *Sandy Valley*  
22 and *Liu*, and therefore, this Court has already considered and addressed the *Liu* decision when  
23 awarded Plaintiffs' attorneys fees as special damages, making Defendant's entire motion to amend  
24 in this regard vexatious and frivolous.  
25  
26  
27  
28

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

13 Plaintiffs' claims set forth in their original Complaint and the subsequent Amended  
14 Complaints involved a breach of the implied covenant of good faith and fair dealing, as  
15 well as equitable or injunctive relief regarding the accounting, all stemming from Pardee's  
16 bad faith. Under *Sandy Valley*, "actions for declaratory or injunctive relief may involve  
17 claims for attorney fees as damages when the actions were necessitated by the opposing  
18 party's bad faith conduct." See *Sandy Valley*, 117 Nev. at 958. Nevada law is clear that  
19 claims for breaches of the implied covenant of good faith and fair dealing are "bad faith"  
20 claims, no matter if they are claims founded on either contract or tort principles.

21 Over the course of a three (3) week trial, after which the Court took the matter  
22 under advisement, Plaintiffs proved the above allegations, resulting in an award of  
23 \$135,500.00 in attorney's fees as special damages as set forth in the Court's FFCLO. In  
24 the face of these findings, the Court made a determination that Plaintiffs were owed a  
25 Judgment in the amount of \$141,500.00, composed of \$135,500.00 in attorney's fees as  
26 special damages and \$6,000.00 of time that Mr. Wolfram expended at a reasonable rate  
27 of \$75.00 per hour, for over eighty (80) hours that he spent to communicate with Pardee  
28 in an effort to obtain information that Pardee was contractually obligated to provide, but