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William A. Mundell, Commissioner
Arizona Corporation Commission
1200 West Washington Street
Phoenix, AZ 85007

Re: Perkins Mountain Water Co. Application for CC&N, Docket No. W020380A005-0490;
Perkins Mountain Utility Co. Application for CC&N, Docket No. SW-20379A-05-0489

Dear Commissioner Mundell:

In order to respond to your letter of February 28, 2007 with the most current status regarding litigation matters in Arizona in which Mr. Rhodes and/or any affiliated entity has been named as a party, I forwarded your request to the law firm that is representing Mr. Rhodes in those matters. Attached is the letter and attachments from Mr. Robert Greer regarding the Arizona litigation.

In response to your further request for all court dockets in which Mr. Rhodes and/or any affiliated entity has been named as a party, please see the attached response to Staff's data request BNC 1.16 and BNC 1.17 in which we provided a list of litigation matters since 1996 involving affiliates of Perkins Mountain Water Company and Perkins Mountain Utilities Company ("Companies"), the applicants in this proceeding, including Sagebrush Enterprises, Sedora Holdings, LLC, Desert Communities, Inc., American Land Management, LLC, The Rhodes Companies, LLC and Rhodes Homes Arizona, LLC. The attached list has been updated to include additional information that has come to the attention of the Companies since the data responses were provided to Staff on April 25, 2006. After a review of the March 17, 2006 transcript, we believe these responses to be consistent with that request.

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William A. Mundell, Commissioner
March 1, 2007
Page 2

Very truly yours,

Snell & Wilmer L.L.P.

Jeffrey W. Crockett (GB)

Jeffrey W. Crockett

cc: Chairman Hatch-Miller
Commissioner Gleason
Commissioner Mayes
Commissioner Pierce
Brian McNeil
Lyn Farmer
Chris Kempley
Ernest Johnson
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Parties of Record



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March 1, 2007

Mr. Jeff Crockett
Snell & Wilmer
One Arizona Center
400 East Van Buren Street
Phoenix, Arizona 85004

Re: Rhodes Homes litigation

Dear Mr. Crockett:

In response to Mr. Mundell's request of February 28, 2007, we briefly summarize the litigation in which our firm represents Rhodes Homes and affiliated entities.

American Land Management v. Arizona Department of Water Resources, Maricopa County Cause Number CV 2006-011146, is an action seeking a judicial interpretation of an ADWR rule never before construed. It has not been served, so no answer has been filed. A motion seeking additional time to complete hydrogeological studies and to attempt to resolve the question without litigation was granted. A copy of that motion and order are attached.

Rhodes Homes Arizona, LLC, v. Stanley Consultants, Maricopa County Cause Number CV2006-011358, is a dispute arising out of various contracts between Rhodes entities and Stanley Consultants. It is in the early stages. There are no pleadings filed other than the complaint, answer and counterclaim, and reply to the counterclaim. Those are also attached.

In Walnut Creek Estates v. American Land Management, Mohave County Cause Number CV 2005-026, trial is scheduled to begin July 30, 2007. Discovery has been completed. We respectfully wish to avoid extrajudicial comments upon pending litigation

Mr. Jeff Crockett

March 1, 2007

Page 2

and disclosure of depositions which may affect the outcome of the trial; the depositions are not public records and are not likely to become public. Cross-motions for summary judgment were filed by both sides and denied by the court. These motions are part of the public record, as they are attached. They describe the nature of the suit and the parties' contentions.

As you have requested, we have looked at litigation involving large land developers in Arizona. Court records in Maricopa County¹ show the following well-known developers in Arizona to be no strangers to litigation:

Developer	Beginning Year	Ending Year	# of cases
Shea Homes	1989	2007	138
Del Webb	1989	2007	110
Fulton Homes	1988	2006	73
Lennar Homes	1989	2007	49
Richmond American	1989	2007	49
Pulte Homes	1993	2006	23
Ryland Homes	1998	2007	22

This information is readily verifiable from public records.

Very truly yours,



Robert L. Greer

RLG/sw

¹<http://www.superiorcourt.maricopa.gov/docket/civil/index.asp>

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6 Robert L. Greer (005372)

7 Attorneys for plaintiffs

8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

9 IN AND FOR THE COUNTY OF MARICOPA

10 American Land Management, L.L.C., a South
11 Dakota limited liability company, Sedora
12 Holdings, L.L.C., a Delaware limited liability
13 company,

14 Plaintiffs,

15 vs.

16 Arizona Department of Water Resources, an
17 agency of the State of Arizona; H.R. Guenther
18 in his capacity as Director of Arizona
19 Department of Water Resources; and the State
20 of Arizona,

21 Defendants,

22 and

23 The Ranch at Temple Bar, L.L.C., a Nevada
24 limited liability company; Joshua Tree,
25 L.L.C., a Nevada limited liability company;
26 Arizona Acreage, L.L.C., a Nevada limited
liability company; Arizona Land
Development, Inc., a Nevada corporation;
Silver Basin, Inc., a Nevada corporation;
Cactus & Stuff, L.L.C., a Nevada limited
liability company; Flannery & Allen, L.L.C.,
a Nevada limited liability company; Gateway
Lots, L.L.C., a Nevada limited liability
company; and Smith Ranch Commercial,
L.L.C., a Nevada limited liability company,

Real parties in interest.

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GLENN M. DAVIS
SUPERIOR COURT JUDGE

Case No. CV 2006-011146

**Motion for Extension of Time to Complete
Service of Process**

(Assigned to the Honorable Glenn Davis)

1 Plaintiffs, American Land Management, L.L.C. ("ALM") and Sedora Holdings, Ltd.
2 ("Sedora"), pursuant to Rule 4(i), Ariz.R.Civ.P., move for an extension of time of 180 days within
3 which to serve the summons and complaint in this matter upon the defendants and real parties in
4 interest.

5 Plaintiffs have good cause for this motion and the court has good cause to grant an
6 extension.

7 The complaint in this matter seeks the first judicial interpretation of a rule promulgated by
8 the defendant, Arizona Department of Water Resources, which addresses priority among
9 competing applications pertaining to the use of groundwater in the same geologic basin. See
10 A.R.S. § 45-108. It approaches that question by utilizing three different procedures: declaratory
11 judgment, special action and judicial review of an administrative decision. Only the latter of those
12 three is time sensitive, i.e., an application for judicial review must be filed within 60 days of an
13 administrative decision. This action was filed on July 12, 2006, in order to meet that requirement.

14 Meanwhile, hydrological studies of the affected groundwater basin are proceeding apace.
15 The latest data suggests that earlier estimates of available groundwater in the vicinity of the
16 Plaintiffs' real property may have been too optimistic.

17 Those hydrology studies are continuing and results sufficient to make a decision to proceed
18 will not be available for another 90 to 120 days. If these studies demonstrate that there is either
19 adequate water or insufficient water then there may be no need to litigate this issue.

20 In addition, because the interpretation of the rule concerning priority to groundwater
21 between competing applications still needs to be addressed by ADWR, plaintiffs informally have
22 provided a copy of the complaint in this matter to that agency and are seeking a resolution through
23 dialogue and negotiation.

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1 It is plaintiffs' belief that formal service of process will hinder rather than help the parties
2 to arrive at a solution. Oftentimes, lawsuits polarize parties, discourage cooperative efforts and
3 impose deadlines more designed to effectuate a smooth running court system than to assist
4 litigants to arrive at a solution.

5 The informal discussions with ADWR, even if unsuccessful, will assist the parties to find
6 some common ground, better define the issues in dispute, focus discovery, and use the time of the
7 court more efficiently, when and if this case proceeds.

8 For all of these reasons, plaintiffs pray the court extend the time for service by an additional
9 180 days or by May 11, 2007.

10 Dated this 23rd day of October 2006.



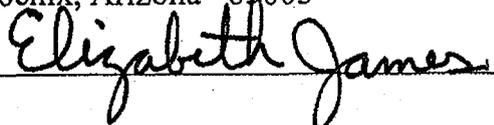
11
12 Robert L. Greer
13 *Baird, Williams & Greer, L.L.P.*
14 6225 N. 24th Street, Suite 125
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Attorneys for plaintiffs

15 Original filed this 23rd day
16 of October 2006, with:

17 Clerk of the Court
18 Maricopa County Superior Court
201 West Jefferson Street
Phoenix, Arizona 85003

19 Copy delivered this same day to:

20 The Honorable Glenn Davis
21 Maricopa County Superior Court
East Court Building, #611
201 West Jefferson Street
22 Phoenix, Arizona 85003

23 
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25
26

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-011146

11/30/2006

HONORABLE GLENN M. DAVIS

CLERK OF THE COURT
L. Muhammad
Deputy

AMERICAN LAND MANAGEMENT L L C, et al. ROBERT L GREER

v.

ARIZONA STATE DEPARTMENT OF WATER
RESOURCES, et al.

MINUTE ENTRY

The Court has reviewed and considered Plaintiffs' *Motion for Extension of Time to Complete Service of Process*.

For good cause appearing,

IT IS ORDERED extending the deadline for service in this matter to **April 20, 2007**.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

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HONORABLE RANDOLPH A. BARTLETT, PRESIDING JUDGE
DIVISION: 2
DATE: 01/05/2007

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vls

COURT RULING

WALNUT CREEK ESTATES, et al.,

CV-2005-0026

Plaintiff(s)

vs.

AMERICAN LAND MANAGEMENT LLC, et

Defendant(s).

Having taken this matter under advisement, the Court finds that there are genuine issues of material fact, and, therefore, **IT IS ORDERED** denying Plaintiff's Motion for Partial Summary Judgment and Defendant's Cross Motion for Summary Judgment.

cc
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6 Attorneys for Plaintiffs Walnut Creek Estates
 7 Development Co., LLP, McAlister Investments,
 8 and Dunton & Dunton, LLP

9 **ARIZONA SUPERIOR COURT**
 10 **MOHAVE COUNTY**

11 WALNUT CREEK ESTATES
 12 DEVELOPMENT CO., LLP, et al.,

13 Plaintiffs,

14 vs.

15 AMERICAN LAND MANAGEMENT,
 16 L.L.C., et al.,

17 Defendants.

No. CV 2005-0026

**PLAINTIFF'S MOTION FOR
 PARTIAL SUMMARY JUDGMENT**

— and —

SUPPORTING MEMORANDUM

(Hon. Randolph A. Bartlett)

(Oral Argument Requested)

18 **Motion**

19 Plaintiff Walnut Creek Estates Development Co., LLP moves for partial summary
 20 judgment against the following defendants: American Land Management, L.L.C.; Rhodes
 21 Design & Development Corp.; and Desert Communities, Inc. Ariz. R. Civ. P. 56.

22 This motion is directed at the breach of contract claim.

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Reasons to Grant the Motion

Relevant Facts.

A. Overview.

On October 28, 2004, Walnut Creek and Rhodes Design (dba Rhodes Homes) entered into an Agreement. [Statement of Facts, paras. 6-8] Under the terms of that Agreement, Rhodes Homes was to purchase nearly 6,900 acres of property, and then “arrange a simultaneous closing.” [Id. at Ex. 3] At that simultaneous closing, Rhodes Homes was to take title to all of that property, but then, immediately sell approximately 5,000 of those acres to Walnut Creek. [Id.] The Agreement also obligated Rhodes Homes to “deposit \$700,000 into an escrow account to secure the property,” and further, required Walnut Creek to pay Rhodes Homes \$350,000 “within ten business days of Rhodes Homes opening escrow.” [Id.]

- Rhodes Homes did not arrange a simultaneous closing. [Statement of Facts, para. 13] Instead, a single closing was arranged that allowed an affiliate of Rhodes Homes to take title to all of the property. [Id., paras. 8, 13, 16]

- Rhodes Homes did not sell (or cause to be sold) any of the approximately 5,000 acres to Walnut Creek. [Id., para. 16]

- Walnut Creek deposited \$350,000 into an escrow account for the benefit of Rhodes Homes less than ten business days after the escrow was opened for the sale of the property, and those funds were available to Rhodes Homes at the time of the closing. [Id., paras. 12, 14, 20-21]

B. What Happened.

1. Before the Agreement.

In July, 2004, Walnut Creek began trying to buy property located in Mohave

1 County that was owned by six different persons and entities (the "Yandell Property").
2 [Statement of Facts, para. 1] As time went on, Walnut Creek learned that another party,
3 whose identity was then unknown, was also trying to buy the Yandell Property, and that
4 the two parties were bidding against one another. [See Id., paras. 1-5] On October 26,
5 2004, Walnut Creek increased its bid to \$7.5 million, which as it turned out, was the then-
6 highest bid. [Id., para. 4] That led the other party, which identified itself as Rhodes
7 Homes, to contact Walnut Creek and explore whether the two could join together in
8 buying the property. [Id., para. 5]

9 2. The Agreement.

10 On October 28, 2004, Walnut Creek and Rhodes Homes entered into an Agreement.
11 [Id., paras. 6-8] Under that Agreement, Walnut Creek was to withdraw its \$7.5 million
12 bid, which it did, leaving Rhodes Homes as the high bidder at \$7.1 million. [Id., paras. 6-
13 9] The Agreement contemplated that the Yandell Trust would "re-accept[] Rhodes Homes
14 offer of \$7.1 million," and in that event, Rhodes Homes promised to sell all but three
15 sections of the property to Walnut Creek at a price set forth in the Agreement. [Id. at Ex.
16 3]

17 The Agreement also required Rhodes Homes to "arrange a simultaneous[] closing
18 so that Walnut Creek Estate[s] would hold fee simple title to the balance of the property
19 once Rhodes Homes closes with the [Seller]." [Id.] And, the Agreement obligated Rhodes
20 Homes to pay \$700,000 into an escrow account to secure the property and further required
21 Walnut Creek to pay Rhodes Homes one-half of that amount, or \$350,000, "within ten
22 business days of Rhodes Homes opening escrow." [Id.]

23 3. After the Agreement.

24 Although the Agreement contemplated that Rhodes Homes would ask to have its
25 \$7.1 million offer "re-accept[ed]," that never happened. [Statement of Facts, para. 10]
26

1 Although the Agreement contemplated that Rhodes Homes would "open[] escrow," that
2 never happened. [Id. at Ex. 3 and para. 13] And, although the Agreement contemplated
3 that Rhodes Homes would deposit \$700,000 into an escrow account, that never happened
4 either. [Id.]

5 Unknown to Walnut Creek, on October 28, 2004, one day after Rhodes Homes
6 prepared the Agreement, instead of Rhodes Homes asking to have its offer "re-accept[ed],"
7 an individual by the name of Charles Sakura submitted a bid of \$7.1 million. [Id., para.
8 10] That bid did not identify on whose behalf it was offered (other than Sakura). [Id. at
9 Ex. 6] It was later learned that Sakura was an employee of defendant James M. Rhodes,
10 who either owns or controls Rhodes Homes. [Id. at Ex. 10]

11 In early December, 2004, an escrow was opened at the Stockton Hill Road office of
12 First American Title Insurance in Kingman. The purpose of that escrow was to close the
13 sale of the Yandell Property for \$7.1 million. [Id., para. 13] Despite what the Agreement
14 said, Rhodes Homes did not open that escrow, nor did Rhodes Homes deposit any money
15 into that account. [Id.]

16 Walnut Creek was not notified about the opening of that escrow [id., paras. 17-18],
17 although, as explained below, as a matter of law, even if Walnut Creek had been notified,
18 it would not alter the result that is warranted here.

19 To facilitate the transmittal of the \$350,000 to Rhodes Homes, Walnut Creek set up
20 an escrow. [Id., para. 12] As required by the Agreement, \$350,000 was placed into that
21 escrow, earmarked for Rhodes Homes, on December 15, 2004, just six working days after
22 the escrow for the Yandell Property had been set up. [Id., paras. 13-14]

23 The sale closed on December 30, 2004. [Id., para. 16] By that date, Rhodes Homes
24 knew about the \$350,000 that had been deposited for its benefit and that was available to
25 it. [Id., paras. 20-21] Moreover, on that date, at the time that the sale was closing, Scott
26

1 Dunton, on behalf of Walnut Creek, sat in the lobby of First American's office, ready to
2 proceed with the "simultaneous closing" called for by the Agreement. [Id., para. 19]
3 Despite knowing about the \$350,000 deposit and despite Dunton being physically present,
4 neither Rhodes Homes, nor any of its sister-affiliates, nor defendant James M. Rhodes,
5 who was present, allowed a simultaneous closing to take place. [Id., para. 18 and Ex. 7,
6 pp. 141-44] Instead, Rhodes Homes decided that, contrary to the Agreement, it was going
7 to keep "the balance of the property" for itself and not sell it to Walnut Creek as required
8 by the Agreement. [Id., para. 16] The only reason given for that decision was that Walnut
9 Creek had purportedly failed to honor its commitment to pay Rhodes Homes \$350,000
10 [see id., para. 19], even though it cannot be disputed that an escrow had been opened with
11 \$350,000 earmarked for Rhodes Homes [id., para. 14] and even though Rhodes Homes
12 (and/or its affiliate successors) knew, no later than the time of the closing, that the
13 \$350,000 was available and could be collected immediately [id., paras. 20-21].

14 **Applicable Law.**

15 This is a case in which Rhodes Homes declared a forfeiture of the Agreement or, in
16 other words, Rhodes Homes rescinded that Agreement because – and only because –
17 Walnut Creek purportedly failed to pay Rhodes Homes \$350,000 "within ten business days
18 of Rhodes Homes opening escrow." As explained below, whether one views the
19 Agreement in a strict-literal way or in a practical-common sense way, the result is the
20 same: as a matter of law, Rhodes Homes (as well as its defendant sister-affiliates) were
21 required to perform as contemplated by the Agreement instead of declaring a forfeiture and
22 rescinding it.¹

24 ¹ The Agreement was between Rhodes Homes and Walnut Creek. [Statement of Facts at Ex. 3] When
25 the escrow was opened, apparently after the assignment of Rhodes' rights under the Agreement, American
26 Land Management was the designated buyer. [Id., para. 13] American Land Management later transferred
its rights to Desert Communities. [Id., para.16] Rhodes Homes, American Land Management, and Desert

1 **A. The Strict-Literal View.**

2 It is settled law in this state “that contracts will be strictly construed to avoid
3 forfeitures.” *Schaeffer v. Chapman*, 176 Ariz. 326, 329, 861 P.2d 611, 614 (1993)
4 (emphasis added). Walnut Creek’s obligation to pay Rhodes Homes \$350,000 was subject
5 to a condition precedent, to wit, Rhodes Homes had to open an escrow. [Statement of
6 Facts at Ex. 3] Rhodes Homes never opened an escrow. [Id., para. 13] Moreover, Rhodes
7 Homes was to deposit \$700,000 into that escrow account, which it did not. [Id.] Thus, if
8 one strictly construes the Agreement, Walnut Creek was never in breach because its
9 obligation to pay Rhodes Homes \$350,000 after Rhodes Homes opened escrow never
10 matured.

11 Yet, even if one assumes that the escrow that was opened satisfied those conditions,
12 Walnut Creek still met its obligation by having \$350,000 deposited into an account for the
13 benefit of Rhodes Homes at the same escrow office, and that deposit was made “within ten
14 business days” of the opening of that escrow. [Id., para. 14] (The escrow was opened on
15 December 7, and the deposit was made on December 15. [Id., paras. 13-14]) Moreover,
16 Rhodes Homes has conceded that, before the sale of the property closed, it was aware that
17 \$350,000 was being held for its benefit at the same escrow office. [Id., paras. 20-21]

18 **B. The Practical-Common Sense View.**

19 If one assumes that the opening of the escrow on December 7 was the escrow
20 contemplated by the Agreement, and if one further assumes that Walnut Creek’s tender of
21 the \$350,000 was late, i.e., more than ten business days after December 7, as a matter of
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Communities are owned or controlled by defendant James Rhodes. [Id. at Ex. 8, para. 4] Further, it is settled law that when, as here, a contract is assigned, the assignment cannot alter the rights of a third party, which here is Walnut Creek: an assignee is obligated to honor the terms of the preexisting contract. *E.g.*, *Stephens v. Textron Inc.*, 127 Ariz. 227, 230, 619 P.2d 736, 739 (1980) (affirming summary judgment).

1 law, Rhodes Homes (and its sister-affiliates) are still required to sell the 5,000 acres to
2 Walnut Creek. Had events proceeded as called for by the Agreement, Rhodes Homes
3 would have wound up with approximately 1,900 acres of the Yandell Property while
4 Walnut Creek would have wound up with "the balance of the property," or approximately
5 5,000 acres. [Id. at Ex. 3] Rhodes Homes got its 1,900 acres, or in other words, Rhodes
6 Homes got what it bargained for.

7 A cancellation or forfeiture of a contract will be upheld only "when the breach is
8 significant." *Foundation Dev. Corp. v. Loehmann's, Inc.*, 163 Ariz. 438, 443, 788 P.2d
9 1189, 1193 (1990). A breach is significant, or material, only when it defeats the object of
10 the contract. *See Foundation Dev.*, 163 Ariz. at 445 & n.10, 788 P.2d at 1196 & n.10; *see*
11 *also Affiliated Hosp. Prod., Inc. v. Merdel Game Mfg. Co.*, 513 F.2d 1183, 1186 (2d Cir.
12 1975) (rescission is unwarranted unless a breach affects the "very essence of the contract
13 and serve[s] to defeat the object of the parties"); *Nolan v. Sam Fox Publishing Co.*, 499
14 F.2d 1394, 1397 (2d Cir. 1974) (a breach must be "so substantial and fundamental as to
15 strongly tend to defeat the object of the parties in making the contract" (numerous citations
16 omitted)).

17 At the outset of the Rhodes Homes-Walnut Creek deal, and as confirmed by the
18 Agreement itself, Rhodes Homes' purpose for entering into the Agreement was to obtain
19 title to 1,900 acres of the Yandell Property. [Statement of Facts, at Ex. 3] Even if one
20 assumes, albeit incorrectly, that Walnut Creek failed to deliver the \$350,000 within the
21 time contemplated by the Agreement, that failure did not prevent Rhodes Homes from
22 buying the 1,900 acres and, thus, realizing its purpose for entering into the Agreement.
23 Thus, as a matter of law, Rhodes Homes had no basis for cancelling or rescinding the
24 Agreement. *See Mortenson v. Berzell Investment Co.*, 102 Ariz. 348, 350, 429 P.2d 945,
25 947 (1967) (rescission improper without showing "of any substantial harm to [non-

1 breaching party]”).

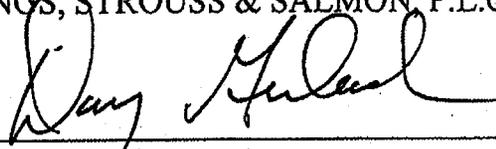
2 Indeed, even giving Rhodes Homes more than the benefit of the doubt does not alter
3 that conclusion. If, as Rhodes Homes has said, the escrow was opened on December 7,
4 that meant that Walnut Creek was required to deliver the \$350,000 not later than
5 December 21 (ten business days later). Rhodes Homes has conceded that, by December
6 30, it was aware that \$350,000 was available to it and sitting at the escrow office waiting
7 to be collected. [Statement of Facts, paras. 20-21] Assuming that Walnut Creek delivered
8 that money on December 30 instead of December 21, that still did not deny Rhodes Homes
9 the opportunity to purchase the 1,900 acres. In these circumstances, even if the payment of
10 the \$350,000 was untimely, it was not a material breach of the Agreement justifying a
11 forfeiture or rescission. See *Foundation Dev.*, 163 Ariz. at 446, 788 P.2d at 1197,
12 *Mortenson*, 102 Ariz. at 350, 429 P.2d at 947 (directing denial of rescission claim because
13 there was no “substantial harm” to the non-breaching party). That is because the most that
14 can be said is that Rhodes Homes was denied the use of \$350,000 for nine days, if that.
15 That may allow Rhodes Homes to claim nine days worth of interest, which at the legal rate
16 in Arizona is \$863, but under no standard recognized by any Arizona court does a loss of
17 the use of money equating to \$863 allow Rhodes Homes to declare a forfeiture of a multi-
18 million dollar land purchase Agreement. *Foundation Dev.*, 163 Ariz. at 446-47, 788 P.2d
19 at 1197-98; RESTATEMENT (SECOND) OF CONTRACTS §241.

20 **Relief Requested**

21 The motion should be granted.

22 October 17, 2006.

JENNINGS, STROUSS & SALMON, P.L.C.

By 

Douglas Gerlach
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Attorneys for Plaintiffs

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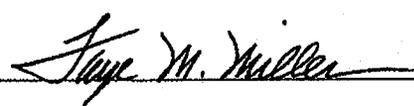
Virlynn Tinnell
Clerk of the Court
Mohave County Superior Court
401 East Spring Street
Kingman, AZ 86402

Copy delivered via Priority Federal Express on October 17, 2006, to:

Hon. Randolph A. Bartlett
Presiding Judge - Division 2
Mohave County Superior Court
2001 College Drive
Lake Havasu City, AZ 86403

Copy mailed on October 17, 2006, to:

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By 

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6 Attorneys for Plaintiffs Walnut Creek Estates
7 Development Co., LLP, McAlister Investments,
8 and Dunton & Dunton, LLP

9 **ARIZONA SUPERIOR COURT**
10 **MOHAVE COUNTY**

11 WALNUT CREEK ESTATES
12 DEVELOPMENT CO., LLP, et al.,

13 Plaintiffs,

14 vs.

15 AMERICAN LAND MANAGEMENT,
16 L.L.C., et al.,

17 Defendants.

No. CV2005-0026

**STATEMENT OF FACTS IN
SUPPORT OF PLAINTIFF
WALNUT CREEK'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

(Hon. Randolph A. Bartlett)

(Oral Argument Requested)

17 1. In July, 2004, Walnut Creek Estates began efforts to purchase approximately
18 7,000 acres of land located in Mohave County that was owned by the Lunsford P. Yandell
19 Charitable Remainder Unitrust, Princeton University, the Choate School, Lunsford P.
20 Yandell VI, Cynthia Yandell, and the Estate of Alexander Barney (the "Yandell
21 Property"). [Ex. 1]

22 2. Those efforts continued into October, 2004. [Ex. 2]

23 3. Around the same time, Rhodes Design & Development Corp. (dba Rhodes
24 Homes) also began attempting to purchase the Yandell Property. [See Ex. 3]

25 4. On October 26, 2004, Walnut Creek increased its offer to purchase the
26 Yandell Property to \$7.5 million. [Ex. 4]

1 5. The next day, Rhodes Homes contacted Walnut Creek, and the two discussed
2 an arrangement by which they both purchase and then divide the Yandell Property. [Ex. 3]

3 6. On October 27, 2004, Rhodes Homes sent a written Agreement to Walnut
4 Creek that set forth the terms of the arrangement that they had discussed. [Ex. 3]

5 7. The Agreement sent to Walnut Creek had been prepared over the signature
6 of Matt Lawson as Vice-President of Land Development and Acquisition for Rhodes
7 Homes, and the Agreement was written on Rhodes Homes letterhead. [Ex. 3]

8 8. By the following day, October 28, 2004, the Agreement was signed: Rhodes
9 Homes was to purchase the Yandell Property and then, sell most, but not all, of the acreage
10 to Walnut Creek. [Ex. 3]

11 9. The Agreement required Walnut Creek to withdraw its offer of \$7.5 million,
12 which Walnut Creek did. [Exs. 3, 5]

13 10. Despite what the Agreement recited, i.e., that Rhodes would renew its offer
14 of \$7.1 million [Ex. 3], instead, an offer in that amount was made personally by Charles
15 Sakura. [Ex. 6] Sakura was employed at the time by defendant James M. Rhodes, who
16 either owned or controlled Rhodes Homes. [Ex. 7 at 52; Ex. 8 at para. 4]¹

17 11. To accomplish the sales to both Rhodes Homes and to Walnut Creek, the
18 Agreement required Rhodes Homes to arrange a "simultaneous closing." [Ex. 3]

19 12. To effect that simultaneous closing, on December 9, 2004, Walnut Creek (by
20 its assignee, McAlister Investments) opened escrow number 291-4403015 at the office of
21 First American Title Insurance Agency of Mohave that is located on Stockton Hill Road in
22 Kingman. [Ex. 9]

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25
26

¹ Exhibit 8 is offered only for the limited purpose of establishing that Defendants American Land Management, Rhodes Design (dba Rhodes Homes), and Desert Communities are owned or controlled by the same person, defendant James Michael Rhodes, and that defendants Bowers, Lawson, and Rhodes are employees of Rhodes Homes. Exhibit 8 is offered for no other purpose.

1 13. Two days earlier, on December 7, 2004, an escrow was opened, albeit not by
2 Rhodes Homes (or Rhodes Design), at the same First American office, the purpose of
3 which was to effect the sale of the Yandell Property. [Ex. 10; Ex. 11 at 7, line 18]²

4 14. The following week, on December 15, 2004, \$350,000 was deposited into
5 escrow 291-4403015. [Ex. 12] That \$350,000 was intended to be paid to Rhodes Homes,
6 pursuant to the terms of the Agreement, to facilitate the purchase of the Yandell Property.
7 [Ex. 13]³

8 15. At some point, before closing the sale of the Yandell Property, Rhodes
9 Homes allowed American Land Management, LLC to become the buyer. [See Ex. 14]
10 Rhodes Homes and American Land Management are both owned or controlled by
11 defendant James M. Rhodes. [Ex. 8 at para. 4]

12 16. The sale of the Yandell Property closed on December 30, 2004, with
13 American Land Management taking title from the sellers and then transferring its interest
14 in the Yandell Property to Desert Communities, Inc. [Ex. 14; Ex. 18; Ex. 7 at 141; Ex. 19,
15 paras. 11-12] Desert Communities and American Land Management are both owned or
16 controlled by defendant James M. Rhodes. [Ex. 8 at para. 4]

17 17. Although Walnut Creek deposited the \$350,000 on December 15, and was
18 prepared to release it to Rhodes Homes, until December 30, the money remained in the
19 escrow account that Walnut Creek had established because Scott Dunton, one of its
20 principals, believed that the escrow Rhodes Homes was to establish could and would not
21 open, thus triggering the payment of the \$350,000, until all sellers had signed the
22

23 ² Exhibit 11 is offered only for the limited purpose of establishing that the Defendants in this action have
24 said that the escrow opened on December 7, 2004. Exhibit 11 is offered for no other purpose.

25 ³ Exhibit 13 is the Verified Amended Complaint, which is admissible as evidence for purposes of summary
26 judgment. See e.g., *Johnson v. Meltzer*, 134 F.3d 1393, 1399-1400 (9th Cir.), cert. denied, 525 U.S. 840
(1998).

1 necessary papers, and he was unaware that that had happened. [Ex.17 at 78-79]

2 18. Walnut Creek did not find out that the sale of the Yandell Property was
3 going to close on December 30, 2004, until that same day. Still, Walnut Creek was ready
4 to conclude the "simultaneous closing" on that date. [Ex. 17 at 117-19, 124-25]

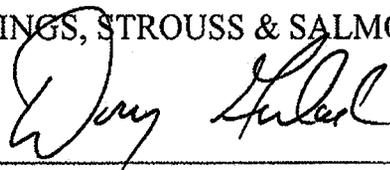
5 19. The day before the closing on December 29, 2004, Rhodes Homes mailed a
6 letter to Walnut Creek. The letter stated that Rhodes Homes deemed the Agreement
7 cancelled because Walnut Creek had not paid the \$350,000, [Ex. 15] Walnut Creek did
8 not learn about that letter or its contents until the day after the closing, December 31, when
9 it was received. [Ex. 16.]

10 20. Not later than December 30, 2004, First American Title was instructed to
11 disburse the \$350,000 that had been deposited for the benefit of Rhodes Homes on
12 December 15. [Ex. 20]

13 21. At the time of the closing on December 30, 2004, defendant James M.
14 Rhodes, who owns or controls Rhodes Homes [Ex. 8 at para. 4], knew that \$350,000 was
15 in an escrow account at First American Title and available to Rhodes Homes [Ex. 7 at 141-
16 44], and, on that same day, a representative of Rhodes Homes in attendance at that closing
17 was given notice of that as well [Ex. 17 at 117-19].

18 October 17, 2006

19
20 JENNINGS, STROUSS & SALMON, P.L.C.

21
22 By 

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Express on October 17, 2006, to:

2 Virlynn Tinnell
3 Clerk of the Court
4 Mohave County Superior Court
401 East Spring Street
Kingman, AZ 86402

5 Copy delivered via Priority Federal
6 Express on October 17, 2006, to:

7 Hon. Randolph A. Bartlett
8 Presiding Judge - Division 2
9 Mohave County Superior Court
2001 College Drive
Lake Havasu City, AZ 86403

10 Copy mailed on October 17, 2006, to:

11 Daryl M. Williams
12 Baird, Williams & Greer, L.L.P.
13 6225 North 24th Street
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14 By *Daryl M. Williams*

1 contending it substantially performed, so Rhodes Homes should have sold it the property.
2 Unfortunately, Walnut Creek mis-characterizes this transaction. The parties' agreement was not
3 a straightforward real-estate purchase; instead, it was an option agreement: Walnut Creek held an
4 option to purchase the property. To exercise an option, however, the option holder must strictly
5 (not substantially) comply with the contract's terms. Here, Walnut Creek admits it did not strictly
6 comply with the option contract. Thus, it is not entitled to judgment on its contract claim. Indeed,
7 because Walnut Creek did not comply with the option, its claims for breach and specific
8 performance of the option contract fail as a matter of law. Accordingly, as part of this response,
9 Rhodes Homes moves for summary judgment to dismiss Walnut Creek's claims for breach of
10 contract and specific performance.

11 I. BACKGROUND

12 Walnut Creek is a residential developer. (SOF ¶ 1)² In the summer of 2004, it began
13 bidding on 6,897 acres of land in Kingman, Arizona, owned primarily by the Landsford Yandell
14 Charitable Remainder Unitrust. *Id.* Around this same time, Rhodes Homes also began bidding
15 on the Yandell property. (SOF ¶ 2) Throughout the fall of 2004, Walnut Creek and Rhodes
16 Homes made competing bids. (SOF ¶ 3) By the end of October, Rhodes Homes had offered \$7.1
17 million for the property; Walnut Creek's offer stood at \$7.5 million. *Id.* Rather than outbid
18 Walnut Creek, Matt Lawson, Rhodes Homes's vice president for acquisitions, approached Scott
19 Dunton, Walnut Creek's principal, to work out a deal. (SOF ¶ 4) Lawson and Dunton reached
20 an agreement containing a series of conditions. Ultimately, if the parties satisfied the conditions,
21 Rhodes Homes and Walnut Creek would split the Yandell property. *Id.*

22 Lawson and Dunton signed a letter memorializing their agreement on October 28,
23 2006. (SOF ¶ 5) In the letter, Walnut Creek agreed to rescind its \$7.5 million offer. *Id.* In
24

25 ²Citations to the defendants separate statement of facts are abbreviated as "SOF."

1 exchange, Rhodes Homes agreed to open an escrow account with the Yandell Trust, deposit
2 \$700,000 in that escrow and purchase the entire Yandell property for \$7.1 million. *Id.* The letter
3 provided that Walnut Creek could “reimburse Rhodes Homes one half this amount (\$350,000)
4 within ten business days of Rhodes Homes opening escrow.” (SOF ¶ 6) If Walnut Creek paid
5 the \$350,000, then the parties would arrange a “simultaneous closing” by which Rhodes Homes
6 would sell the Yandell property, except sections 2, 11 and 14, to Walnut Creek. *Id.* The parties
7 agreed that if Walnut Creek exercised the purchase option, its cost to buy the property from
8 Rhodes Homes would be “calculated on a per-acre basis (\$1,029/acre) . . . based upon a total
9 acreage of approximately 6,897 acres and a sales price of \$7.1 million.” (SOF ¶ 7) Sections 2,
10 11, and 14—the sections Rhodes Homes would keep—totaled 1,897 acres. *Id.* So by exercising
11 its option, Walnut Creek would purchase 5,000 acres [6,897 - 1897] from Rhodes Homes. *Id.*
12 Under the cost per acre basis, it would pay Rhodes Homes approximately \$5.1 million [5,000
13 acres x \$1,029/acre]. *Id.*

14 After Dunton and Lawson signed the letter, Walnut Creek revoked its \$7.5 million
15 offer. (SOF ¶ 8) Thereafter, Charles Sakura, the operating manager for several Rhodes Homes’
16 subsidiaries, sent a letter of intent to the Yandell Trust’s attorney, dated October 29, 2004, to
17 initiate the purchase of the property. *Id.* Lawson faxed a copy of the letter of intent to Dunton
18 on November 9, 2004. *Id.* So by that day, Dunton knew that Charles Sakura was purchasing the
19 property for Rhodes Homes’s subsidiary. (*Id.*)

20 American Land Management (“ALM”), a Rhodes Homes subsidiary, and the Yandell
21 Trust formally executed an agreement to purchase the Yandell property on November 17, 2004.
22 (SOF ¶ 9) The agreement contained escrow instructions, requiring ALM to open an escrow
23 account with First American Title Company (“FATCO”). (*Id.*) Once again, Lawson faxed
24 Dunton a copy of the purchase agreement, so that Dunton knew that AML was purchasing the
25 property for Rhodes Homes and that it would be opening escrow soon. (*Id.*)

1 In accordance with its agreement with Walnut Creek, Rhodes Homes, through ALM,
2 deposited \$700,000 in an escrow account with FATCO on December 1, 2004. (SOF ¶ 11)
3 FATCO officially opened escrow no. 291-4401443 ("escrow 1443") for the ALM/Yandell
4 transaction on December 7, 2006. (*Id.*) This triggered Walnut Creek's option; it needed to pay
5 Rhodes Homes \$350,000 within ten days. (SOF ¶ 12) Instead of paying Rhodes Homes,
6 however, Walnut Creek in the name of its nominee, McAllister Investments,³ opened a second
7 escrow account at FATCO—escrow no. 291-4403015 ("escrow 3015"). (*Id.*) Rather than paying
8 \$350,000 directly to Rhodes Homes, Walnut Creek deposited \$350,000 into escrow 3015 as
9 earnest money, a down payment. (SOF ¶ 13) Indeed, in its proposed escrow instructions, Walnut
10 Creek deducted the \$350,000 from the \$5.1 million purchase price. (*Id.*)

11 On December 21, ALM and the Yandell Trust executed final escrow instructions for
12 Escrow 1443. (SOF ¶ 14) By this time, ten business days had passed, and Walnut Creek had still
13 not paid Rhodes Homes the \$350,000. (*Id.*) Instead, contrary to the parties' agreement, \$350,000
14 was sitting in a second escrow account. (*Id.*) Lawson called Dunton on December 23, 2004, to
15 ask about the delay. (SOF ¶ 16) Even though it was 12 days after ALM opened escrow, Lawson
16 was still willing to sell the 5,000 acres to Walnut Creek if it paid the \$350,000. (*Id.*) But during
17 their phone conversation, Dunton equivocated, telling Lawson that he wanted to further condition
18 the \$350,000 payment. (*Id.*) Specifically, Dunton wanted to use the \$350,000 as an earnest
19 money down payment. (*Id.*) In addition, he wanted to condition payment of the \$350,000 on the
20 closing of the ALM/Yandell sale, so if the sale fell through, Walnut Creek would receive its
21 money back—half of Rhodes Homes's \$700,000 deposit. (*Id.*) In fact, Walnut Creek, through
22 McAllister, had already instructed FATCO that "if Escrow number 291-4401443 [the first escrow]
23 cancels, American Land Management, LLC will equally split the disbursement [the \$700,000] to
24

25 ³McAllister Investments was Walnut Creek's partner.

1 them with McAllister Investments.” (*Id.*) But Rhodes Homes had never agreed that Walnut
2 Creek (nor McAllister) could deposit \$350,000 in escrow in lieu of paying Rhodes Homes, much
3 less that it could split Rhodes Homes’s \$700,000 deposit. (SOF ¶ 17) As a result of this phone
4 conversation, Lawson determined that Walnut Creek was not going to perform as it had agreed.
5 (*Id.*)

6 By December 29, Walnut Creek had still not paid Rhodes Homes \$350,000. (SOF
7 ¶ 18) So Rhodes Homes’ treasurer, Paul Huygens, sent a letter to Dunton, informing him that
8 Walnut Creek no longer had an interest in the Yandell property. (*Id.*) ALM closed on the Yandell
9 property on December 30, 2005. (SOF ¶ 19) Walnut Creek sued ALM and Rhodes Homes on
10 January 19, 2006, alleging breach of contract, fraud and seeking specific performance of the sale
11 of the 5,000 acres.⁴ (*Id.*)

12 II. LEGAL ANALYSIS

13 A. The Parties’ Agreement Was an Option Contract.

14 Walnut Creek contends that by placing \$350,000 in escrow, it substantially complied
15 with the parties’ agreement, so Rhodes Homes had no right to repudiate it. But Walnut Creek
16 misconstrues the nature of the agreement; it views the agreement as a normal purchase contract.
17 In fact, however, the agreement was an option contract, and substantial compliance with the
18 option terms is insufficient to accept it.

19 An option is a privilege to accept or reject a continuing offer within a specific time.
20 *Dumes v. Harold Laz Adver. Co.*, 2 Ariz. App. 387, 389, 409 P.2d 307, 309 (1965). It is a
21 unilateral obligation binding on the party making the offer, the optionor. *Coulter & Smith, Ltd.*
22 *v. Russells*, 966 P.2d 852, 859 (Utah 1998). The holder of the option, the optionee, has the
23

24 ⁴Walnut Creek has since moved to amend its complaint to drop the fraud claims and add
25 claims for intentional interference with contractual relations and breach of the covenant of good
faith and fair dealing. The court has not yet ruled on the motion to amend.

1 privilege to exercise the option by accepting the offer, thereby creating a contract, or to not
2 exercise the option. *Id.* A real estate purchase option involves two enforceable obligations, both
3 supported by consideration. "The first is the contract to keep the offer to sell open through a
4 specified time. The second is a contract to sell the land upon timely acceptance by the optionee
5 of the offer to sell." *Estate of Jorstad v. Yates*, 447 N.W. 2d 283, 285 (N.D. 1989). Put
6 differently, an option is a unilateral contract binding the optionor to hold an offer open, which the
7 optionee can transform into a second contract of purchase by an unqualified acceptance of the
8 offer's terms. J.R. Kemper, *Necessity for Payment or Tender of Purchase Money Within Option*
9 *Period in Order to Exercise Option in Absence of Specific Time Requirement for Payment*, 71
10 A.L.R. 3d 1201 (1976).

11 In this case, the parties negotiated an option agreement. They agreed that Rhodes
12 Homes would buy the Yandell property, and that Walnut Creek would then purchase 5,000 acres
13 of the property if it paid Rhodes Homes \$350,000 within ten days of Rhodes Homes opening
14 escrow. Two obligations were implicit in this agreement. First, Rhodes Homes was obligated to
15 hold the offer open for a specified period of time, namely, for ten days after opening escrow. This
16 obligation was supported by consideration, that is, Walnut Creek's promise to rescind its \$7.5
17 million offer. In addition, the parties' agreement contemplated a second obligation: the contract
18 to sell the 5,000 acres upon Walnut Creek's timely acceptance of Rhodes Homes' offer. As with
19 every option agreement, Walnut Creek had a choice; either exercise the option thereby creating
20 a contract, or not.⁵

21 Option contracts often require that the optionee's exercise of the option be
22 accompanied by a payment. Kemper, 71 A.L.R. 3d 1021. "The making or tender of such payment

23
24 ⁵It is this choice that is the essence of an option contract. As Arthur Corbin writes, "there
25 are various kinds of options; in all of them the option holder has a choice, a power of electing
between alternatives. Usually this choice or power of electing is possessed by only one party."
Arthur L. Corbin, *Corbin on Contracts* § 259 at 358 (1 Vol. Ed. 1952).

1 is essential or a condition precedent to the formation of a contract of purchase and sale. Payment
2 in such circumstances being the performance called for or required in order to accept the offer
3 embodied in the option contract.” *Id.* Here, Walnut Creek was required to pay \$350,000 to
4 exercise its option. If it did not make the payment, it rejected the offer, and Rhodes Homes could
5 revoke it.

6 But because this was an option agreement, Walnut Creek was not free to pay any way
7 it chose. As the Arizona Court of Appeals has noted, “the law is crystal clear that an option
8 agreement must be strictly construed in that it must be exercised in exact accord with its terms and
9 conditions.” *Rogers v. Jones*, 126 Ariz. 180, 182 613 P.2d 844, 846 (App. 1980). “Nothing less
10 than unconditional and precise acceptance will suffice. . . .” 1 Williston on Contracts § 5:18 (4th
11 Ed. Supp. 2006). Courts strictly construe options to compensate for the relative latitude given to
12 optionees: “since the optionor is bound while the optionee is free to accept or not as he chooses,
13 courts are strict in holding optionees to exact compliance to the terms of the option.” *Id.* So when
14 the option expresses a manner in which payment is to be made, the optionee must comply exactly
15 with the terms to effectuate a contract. *Id.*; see also Williston § 5:18 (“if payment by the optionee
16 is required before the termination date of the option, exercise of the option can only be
17 accomplished by timely payment”).

18 *Richardson v. Casey*, 6 Ariz. App. 141, 430 P.2d 720 (1967), illustrates this rule.
19 There, the parties entered an option contract for the purchase of real estate. The plaintiff had the
20 option of purchasing the property for \$3,000. He could exercise the option by depositing \$1,700
21 in an escrow account within a certain period of time. The property, however, had been sold for
22 taxes. So before the parties could execute the transactions, they had to redeem the property. As
23 part of the option agreement, the parties agreed that the plaintiff would redeem the property and
24 the redemption costs would be credited to the purchase price. The plaintiff redeemed the property
25 for \$287.60. He then opened an escrow account to exercise the option. But rather than deposit

1 \$1,700 in the account, the plaintiff deposited \$1,412.40, that is, \$1,700 less the \$287.60
2 redemption costs. The defendant cancelled the deal, and the plaintiff sued to enforce it. The
3 plaintiff argued he had substantially complied with the agreement because the redemption price
4 was to be credited to the purchase price. But the court, relying on the strict compliance rule,
5 concluded that the defendant rightly cancelled the agreement. It reasoned that the option required
6 a \$1,700 deposit, not \$1,412.40. That the \$1,412.40 plus the redemption price totaled \$1,700 was
7 irrelevant. The terms of the option required that the redemption price be credited to the remaining
8 balance, not the escrow.

9 Here, the option agreement required that Walnut Creek pay Rhodes Homes \$350,000
10 within ten days of opening escrow. But Walnut Creek deposited \$350,000 in a second escrow
11 account as earnest money, and it further conditioned its payment of the \$350,000. The option
12 agreement did not allow Walnut Creek to deposit the money in escrow, to use it as earnest money,
13 or condition its payment. Rather, the agreement simply required Walnut Creek to pay the money
14 directly to Rhodes Homes. Indeed, by depositing the money in escrow as earnest money, Walnut
15 Creek—as opposed to the plaintiff in *Richardson*—did not even comply with the substance of the
16 agreement. After all, the earnest money would have been credited against the purchase price,
17 reducing the \$5.1 million by \$350,000. But nothing in the agreement provided that the \$350,000
18 would be credited to the \$5.1 million. Instead, Walnut Creek had to pay \$350,000 to exercise the
19 option. Once exercised, Walnut Creek then had the right to buy the property by paying \$5.1
20 million.

21 In sum, Walnut Creek did not strictly comply with the option agreement; it did not
22 pay Rhodes Homes \$350,000 within ten days of opening of escrow. Once the ten days passed,
23 Rhodes Homes was entitled to revoke its offer.

24

25

1 B. There is no Forfeiture.

2 Walnut Creek argues that failure enforce this contract will result in a forfeiture. And,
3 the argument continues, a forfeiture will only be upheld if one party's breach is so significant that
4 it defeats the purpose of the contract. Walnut Creek contends that because Rhodes Homes
5 received what it bargained for—namely, 1,900 acres of the Yandell property—the court should
6 not countenance this alleged forfeiture. But this argument is misdirection. Because the parties
7 agreed to an option, the issue of a forfeiture or whether Rhodes Homes realized its purpose is
8 irrelevant.

9 Walnut Creek correctly notes that equity abhors a forfeiture. But as noted in the
10 Restatement of Contracts, the rule disapproving of forfeitures does not apply to options: “Despite
11 equity’s dislike of forfeiture, requirements governing the time and manner of exercise of a power
12 of acceptance under an option contract are applied strictly.” Restatement Second of Contracts §
13 25 rptr’s note (1981); *see also Casa El Sol Acapulco v. Fontenot*, 919 S.W. 2d 709, 714 (Tex. Ct.
14 App. 1996). (“Doctrine of inequitable forfeiture is not applicable to cases involving option
15 contracts.”) The reason for this rule is that “the failure to comply strictly with the conditions of
16 an option contract deprives no party of any right or abrogates no contract.” *Id.* (quoting 17A Am.
17 Jur. 2d *Contracts* § 73 (1991)). As the 9th Circuit explained, the optionee can simply walk away
18 from the deal:

19 An option given for consideration binds the optionor, but it does not
20 bind the optionee. He may, if he chooses, walk away from the deal.
21 That is why the language of the option agreement is construed in favor
22 of the optionor and why courts require the optionee to strictly comply
with whatever conditions the agreement imposes upon his right to
exercise the option if he chooses to do so.

23 *Cummings v. Bullock*, 367 F.2d 182, 186, (9th Cir. 1966); *see also Williston* § 5:18 (noting that
24 because an option affords the offeree protection against the offerer’s inconsistent action, courts
25 construe attempts to accept options strictly; forfeiture does not enter into the matter).

1 On the other hand, relaxing an option hurts the optionor. As the Restatement
2 provides, "any relaxation of terms would substantively extend the option contract to subject one
3 party [the optionor] to stricter obligations than he bargained for." Restatement § 25 rptrs note.
4 In other words, loosening the option forces the optionor to hold the offer open longer than he
5 agreed or to accept less money or a different performance than he bargained for, while
6 substantially rewarding the optionee for its own failure to timely perform. This is hardly
7 equitable.

8 In this case, because the parties entered an option contract. There cannot be a
9 forfeiture. As required, Rhodes Homes held its offer open for ten days. Walnut Creek did not pay
10 \$350,000 to exercise its option to purchase the property. Nevertheless, Walnut Creek walked
11 away from this deal without losing anything; it did not have to pay \$350,000 or \$5.1 million.
12 Because there is no forfeiture, the issue of whether Rhodes Homes received the substance of its
13 bargain is beside the point. In fact, Walnut Creek's argument that Rhodes Homes received the
14 substance of its bargain begs the question; it assumes that the parties actually formed the second
15 purchase contract. But the option to purchase was merely an offer. Because Walnut Creek did
16 not pay Rhodes Homes \$350,000, it never accepted the offer. If Walnut Creek did not accept the
17 offer, then the parties never formed a purchase contract. And if the parties did not form a
18 contract, it makes no sense to argue that one party received what it contracted for.⁶ Simply put,
19 how can one party have received what it contracted for if there was no contract?

20 To sum up, because this was an option contract, the issue of a forfeiture, or whether
21 Rhodes Homes received the substance of its bargain are irrelevant. The only issue is whether
22 Walnut Creek strictly complied with the option. It did not; Rhodes Homes was entitled to revoke
23 its offer.

24
25 ⁶Indeed, contrary to Walnut Creek's argument, Rhodes Homes did not receive what it
bargained for, i.e., a \$350,000 payment and \$5.1 million.

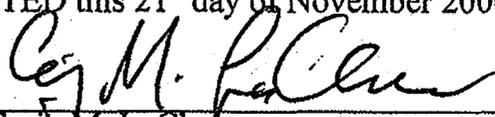
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III. CONCLUSION

To accept an option, the optionee must strictly comply with the option's terms. Here, the parties created an option agreement, which required Walnut Creek to pay \$350,000 directly to Walnut Homes. Walnut Creek did not pay Rhodes Homes the money; instead, it paid \$350,000 in escrow and attempted to condition its payment. This did not comply with the option. Rhodes Homes was entitled to revoke the option; it did not breach the option contract. Walnut Creek is not entitled to summary judgment on its contract claim. Rather, Rhodes Homes is entitled to summary judgment dismissing Walnut Creek's contract claim. After all, there is no issue of material fact; Walnut Creek admits it did not strictly comply with the option. Because Walnut Creek did not strictly comply, it has no claim for breach—and consequently for strict performance—as a matter of law.

For the preceding reasons, Rhodes Homes asks the court to (1) deny Walnut Creek's motion for summary judgment, and (2) grant Rhodes Homes' summary judgment, dismissing Walnut Creek's contract and specific performance claims.

RESPECTFULLY SUBMITTED this 21st day of November 2006.


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ORIGINAL filed with the Clerk of Court of Mohave County this 21st day of November 2006 (Sent via overnight FedEx delivery)

and a COPY mailed this same day to:

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Diana L. Clark

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

Walnut Creek Estates Development Company,
L.L.P., an Arizona limited liability
partnership; McAlister Investments, a
California corporation; and Dunton &
Dunton, L.L.P., an Arizona limited liability
partnership,

Plaintiff,

vs.

American Land Management, L.L.C., a South
Dakota limited liability company; Rhodes
Design and Development Corporation, a
Nevada corporation; Desert Communities,
Inc., a Nevada corporation; William F.
Bowers and Jane Doe Bowers, husband and
wife; James M. Rhodes and Jane Doe Rhodes,
husband and wife; and Matt Lawson and Jane
Doe Lawson, husband and wife,

Defendant.

No. CV 2005-26

**Defendants' Response to Plaintiff's
Statement of Facts and Statement of
Facts in Support of its Cross-Motion for
Summary Judgment**

I. DEFENDANTS' RESPONSE TO PLAINTIFF'S STATEMENT OF FACTS

Defendants respond to plaintiff's statement of facts *in serriatum* as follows:

1. Not disputed.
2. Not disputed.
3. Not disputed.

- 1 4. Not disputed.
- 2 5. Not disputed.
- 3 6. Not disputed.
- 4 7. Not disputed.
- 5 8. Disputed in part. Rhodes Homes admits that the parties signed the agreement
6 on October 28, 2004. But Rhodes Homes denies that the agreement unconditionally obligated it
7 to sell the Yandell property to Walnut Creek. Instead, Rhodes Homes maintains that the
8 agreement only obligated it to sell the Yandell property on the condition that Walnut Creek
9 directly paid it \$350,000. (See Letter of Agreement, exhibit A.)
- 10 9. Not disputed. The agreement speaks for itself.
- 11 10. Not disputed. Nevertheless, Rhodes Homes objects to Walnut Creek's
12 implication that Sakura's involvement was somehow nefarious. In fact, Walnut Creek knew that
13 Sakura was handling this transaction for Rhodes Homes in early November, 2004. (See Fax from
14 Lawson to Dunton dated November 9, 2004, exhibit C; see also Fax from Lawson to Dunton
15 dated November 23, 2004, exhibit H.)
- 16 11. Not disputed. The agreement speaks for itself.
- 17 12. Not disputed. Rhodes Homes does not dispute that Walnut Creek opened an
18 escrow account.
- 19 13. Not disputed, but Rhodes Homes takes issue with Walnut Creek's implication
20 that it did not know who was opening the escrow account when, in fact, Walnut Creek knew that
21 a Rhodes Homes subsidiary, American Land Management was buying the property, and that it had
22 opened the escrow for this very purpose. (See Decl. of Matt Lawson, exhibit B; see also Fax from
23 Lawson to Dunton dated November 23, 2004, exhibit H.)
- 24 14. Disputed in part. Rhodes Homes admits that Walnut Creek deposited
25 \$350,000 into escrow. But it denies that Walnut Creek deposited this money in escrow pursuant

1 to the terms of the agreement. As a matter of fact, by depositing the money into escrow—rather
2 than paying it directly to Rhodes Homes—Walnut Creek controverted the agreement. (*See* Letter
3 of Agreement, exhibit A.)

4 15. Not disputed.

5 16. Not disputed.

6 17. Disputed in part. Rhodes Homes admits that Walnut Creek deposited
7 \$350,000 in escrow and that the money was still there by December 30. But Rhodes Homes
8 denies that Walnut Creek was prepared to release the funds. In fact, Walnut Creek wanted Rhodes
9 Homes to satisfy conditions to which the parties never agreed before it released the funds. (*See*
10 McAllister Investments Escrow Instructions, exhibit D.)

11 18. Not disputed but irrelevant. By December 30, Walnut Creek had failed to
12 timely exercise its option. Even if it was still willing to complete the sale, it had lost the right to
13 purchase the property.

14 19. Not disputed but irrelevant.

15 20. Not disputed but irrelevant. By December 30, Walnut Creek's option to
16 purchase the Yandell property had expired. That the money was sitting in escrow on December
17 30 was beside the point. Walnut Creek should have paid the money to Rhodes Homes within ten
18 days after at least December 7.

19 21. Not disputed but irrelevant. By December 30, Walnut Creek's option to
20 pursue the property had expired.

21
22 **II. DEFENDANTS' STATEMENT OF FACTS IN SUPPORT OF ITS CROSS-MOTION
FOR SUMMARY JUDGMENT**

23 1. Walnut Creek is a residential developer. In the summer of 2004, it began
24 bidding on 6,897 acres of land in Kingman, Arizona, owned primarily by the Landsford Yandell
25 Charitable Remainder Unitrust. (*See* Depo. of Scott Dunton at 10-12, exhibit E.)

1 2. Around the same time, Rhodes Homes also began bidding on the Yandell
2 property. (See Decl. of Matt Lawson, exhibit B.)

3 3. Throughout the fall of 2004, Walnut Creek and Rhodes Homes made
4 competing bids. By the end of October, Rhodes Homes had offered \$7.1 million for the property;
5 Walnut Creek's offer stood at \$7.5 million. (See Letter of Agreement, exhibit A.)

6 4. Rather than outbid Walnut Creek, Matt Lawson, Rhodes Homes's vice
7 president for acquisitions, approached Scott Dunton, Walnut Creek's principal investor, to work
8 out a deal. Lawson and Dunton reached an agreement containing a series of conditions.
9 Ultimately, if the parties satisfied the conditions, Rhodes Homes and Walnut Creek would split
10 the Yandell Property. (See Letter of Agreement, exhibit A; see also Decl. of Matt Lawson, exhibit
11 B.)

12 5. Lawson and Dunton signed a letter memorializing their agreement on October
13 28, 2006. In the letter, Walnut Creek agreed to rescind its \$7.5 million offer. In exchange,
14 Rhodes Homes agreed to open an escrow account with the Yandell Trust, deposit \$700,000 in that
15 escrow and purchase the entire Yandell property for \$7.1 million. (See Letter of Agreement,
16 exhibit A.)

17 6. The letter further provided that Walnut Creek could "reimburse Rhodes
18 Homes one half this amount (\$350,000) within ten business days of Rhodes Homes' opening
19 escrow." If Walnut Creek paid the \$350,000, then the parties would arrange a "simultaneous
20 closing" by which Rhodes Homes would sell the Yandell property, except sections 2, 11 and 14,
21 to Walnut Creek. (See Letter of Agreement, exhibit A.)

22 7. The parties agreed that if Walnut Creek exercised the purchase option, its cost
23 to buy the property from Rhodes Homes would be calculated on a per-acre basis (\$1,029/acre)
24 . . . based upon a total acreage of approximately 6,897 acres and a sales price of \$7.1 million."
25 Sections 2, 11, and 14—the sections Rhodes Homes would keep—totaled 1,897 acres. So by

1 exercising its option, Walnut Creek would purchase 5,000 acres from Rhodes Homes. Under the
2 cost per acre basis, it would pay Rhodes Homes approximately \$5.1 million. (See Letter of
3 Agreement, exhibit A.)

4 8. After Dunton and Lawson signed the letter, Walnut Creek revoked its \$7.5
5 million offer. Thereafter, Charles Sakura, the operating manager for several Rhodes Homes's
6 subsidiaries, sent a letter of intent to the Yandell Trust's attorney, dated October 9, 2005, to initiate
7 the purchase of the property. Matt Lawson sent a copy of the letter of intent to Scott Dunton on
8 November 9, 2004. So by that day, Dunton knew that Charles Sakura was purchasing the property
9 for Rhodes Homes. (See November 9, 2004, Fax from Lawson to Dunton, exhibit C.)

10 9. American Land Management ("ALM"), a Rhodes Homes subsidiary, and the
11 Yandell Trust signed an agreement to purchase the Yandell property on November 17, 2004. The
12 agreement contained escrow instructions, requiring ALM to open an escrow account with First
13 American Title Company ("FATCO"). (See Purchase and Sale Agreement, exhibit F; see also
14 Letter from Ed Lowry to Charles Sakura dated November 17, 2004, exhibit G.)

15 10. On November 25, 2004, Lawson faxed Dunton a copy of the purchase
16 agreement, so that Dunton knew that AML was purchasing the property for Rhodes Homes and
17 that it would be opening escrow soon. (See Fax from Lawson to Dunton, dated November 23,
18 2004, exhibit H.)

19 11. In accordance with its agreement with Walnut Creek, Rhodes Homes, through
20 ALM, deposited \$700,000 in an escrow account with FATCO on December 1, 2004. FATCO
21 officially opened escrow no. 291-4401443 ("escrow 1443") for the ALM/Yandell transaction on
22 December 7, 2006. (See December 1, 2004 Cashier's check, exhibit I, see also Title Order
23 Information Sheet, exhibit J.)

24 12. This triggered Walnut Creek's option; instead of paying Rhodes Homes,
25 however, Walnut Creek in the name of its nominee, McAllister Investments, opened a second

1 escrow account at FATCO—escrow no. 291-4403015 (“escrow 3015”). (See Escrow Instruction
2 Write-Up Sheet for escrow 4403015, exhibit K.)

3 13. Rather than paying \$350,000 directly to Rhodes Homes, Walnut Creek
4 deposited \$350,000 into escrow 3015 as earnest money, a down payment. Indeed, in its escrow
5 instructions, Walnut Creek deducted the \$350,000 from the \$5.1 million purchase price. (See
6 Escrow Instruction Write-Up Sheet for escrow 4403015, exhibit K.)

7 14. On December 21 ALM and the Yandell Trust executed final escrow
8 instructions for Escrow 1443. By this time, ten business days had passed, and Walnut Creek had
9 still not paid Rhodes Homes the \$350,000. Instead, contrary to the parties’ agreement, \$350,000
10 was sitting in a second escrow account. (See Executed Escrow Instructions for 291-4401443,
11 exhibit L.)

12 15. Lawson called Dunton on December 23, 2004, to ask about the delay. Even
13 though it was 12 days after ALM opened escrow, Lawson was still willing to sell the 5,000 acres
14 to Walnut Creek if it paid the \$350,000. (See Decl. of Matt Lawson, exhibit B.)

15 16. During their phone conversation, Dunton equivocated, telling Lawson that he
16 wanted further conditions the \$350,000 payment. Specifically, Dunton wanted to use the
17 \$350,000 as an earnest money down payment. In addition, he wanted to condition payment of the
18 \$350,000 on the closing of the ALM/Yandell sale, so if the sale fell through, Walnut Creek would
19 receive half of Rhodes Homes’s \$700,000 deposits. In fact, that very day, Walnut Creek, through
20 McAllister, instructed FATCO that “if Escrow number 291-4401443 [the first escrow] cancels,
21 American Land Management, LLC will equally split the disbursement to them with McAllister
22 Investments.” (See Decl. of Matt Lawson, exhibit B; see also McAllister Investments Escrow
23 Instructions for escrow 4403015, exhibit D.)

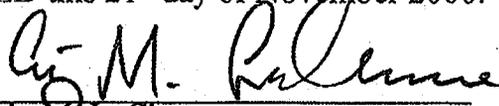
24 17. Rhodes Homes had never agreed that Walnut Creek (nor McAllister) could
25 deposit their \$350,000 in escrow in lieu of paying Rhodes Homes, much less that they could split

1 Rhodes Homes's \$700,000 deposit. After that phone conversation, Lawson determined that
2 Walnut Creek was not going to perform as it had agreed. (See Letter of Agreement, exhibit A;
3 see also Decl. of Matt Lawson, exhibit B.)

4 18. By December 29, Walnut Creek had still not paid Rhodes Homes \$350,000.
5 So Rhodes Homes' treasurer, Paul Huygens, sent a letter to Dunton informing him that Walnut
6 Creek no longer had an interest in the Yandell property. (See Letter from Huygens to Dunton
7 dated December 2, 2004, exhibit M.)

8 19. ALM closed on the Yandell property on December 30, 2005. Walnut Creek
9 sued ALM and Rhodes Homes on January 19, 2006, alleging breach of contract, fraud and seeking
10 specific performance of the sale of the 5,000 acres. (See Warranty Deed to American Land
11 Management, exhibit N; see also Walnut Creek Complaint.)

12 RESPECTFULLY SUBMITTED this 21st day of November 2006.

13
14 
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17 ORIGINAL filed with the Clerk of Court
18 of Mohave County this 21st day of
19 November 2006 (Sent via FedEx
overnight mail)

20 and a COPY mailed this same day to:

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8 and Dunton & Dunton, LLP

9 **ARIZONA SUPERIOR COURT**
10 **MOHAVE COUNTY**

11 WALNUT CREEK ESTATES
12 DEVELOPMENT CO., LLP, et al.,

13 Plaintiffs,

14 vs.

15 AMERICAN LAND MANAGEMENT,
16 L.L.C., et al.,

17 Defendants.

No. CV2005-0026

**PLAINTIFFS' RESPONSE TO
THE STATEMENT OF FACTS
SUBMITTED IN SUPPORT OF
DEFENDANTS' CROSS-MOTION**

(Hon. Randolph A. Bartlett)

(Oral Argument Requested)

- 18 1. Not disputed except to state that the precise number of acres was 6,897.83.
19 [Ex. 21, para. 3]¹
- 20 2. Not disputed except to state that bidding ended in late-October, 2004, and
21 did not continue "throughout the fall." [See Exs. 3 and A]
- 22 3. Not disputed.
- 23 4. Disputed to the extent that "split the Yandell Property" means something
- 24

25 _____
26 ¹ Exhibit 21 is the first exhibit attached to this submission. Exhibits 1-20 are attached to the Statement of Facts in Support of Plaintiff Walnut Creek's Motion for Partial Summary Judgment (dated 10/17/06).

1 other than what is reflected in paragraph 2 of Defendants' Exhibit A (and Plaintiffs'
2 Exhibit 3), to wit, Rhodes Homes was to receive 1,713 acres and Walnut Creek Estates
3 was to receive 5,184.83 acres. [Ex. 21, para. 3] Further disputed (although not relevant
4 for purposes of the motion and cross-motion) to the extent that the statement suggests as a
5 fact that Rhodes Homes would have outbid Walnut Creek. (Should the Court deem the
6 assertion relevant, we move to strike it as unfounded speculation – no evidence presented
7 by Rhodes Homes shows how much Walnut Creek was willing to bid. *E.g., Cullison v.*
8 *City of Peoria*, 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978) (“speculation is not
9 competent evidence”); see also Ex. 21, paras. 4-5].

10 5. Disputed. The statement is incomplete and, thus, inconsistent with the terms
11 of Exhibit A. Rhodes Homes was to open two, not one, escrow accounts, i.e., to arrange a
12 “simultaneous[] closing” so that at the same time that the 6,897.83 acres was being
13 transferred to Rhodes Homes, 5,184.83 acres was simultaneously transferred to Walnut
14 Creek. It was the opening of that second escrow that triggered the \$350,000 payment to
15 Rhodes Homes. [Ex. 21, para. 8] To the extent that Exhibit A is ambiguous in this regard,
16 the ambiguity must be construed against Rhodes Homes. *E.g., Leschorn v. Xericos*, 121
17 Ariz. 77, 81, 588 P.2d 320, 374 (App. 1978) (“a contract will be construed most strictly
18 against its author”). Further, the statement ignores that Rhodes Homes later informed
19 Walnut Creek that escrow would open at such time as a fully-executed purchase and sale
20 agreement was received from all, and not just some or even most, of the sellers [Ex. 21,
21 para. 8], and that escrow never opened in 2004 [See Defs.' Ex. C at p. 2, para. 5, and paras.
22 8-9 below].

23 6. Disputed. Exhibit A does not state, as Defendants' paragraph 6 asserts, that
24 Walnut Creek “could” reimburse Rhodes Homes. Exhibit A (which Rhodes Homes
25 drafted) says that Walnut Creek “will” do so. (Emphasis added) Correctly understood,
26 Exhibit A states that the \$350,000 “will” be paid upon Rhodes Homes opening an escrow

1 intended to complete the sale of the 5,184.83 acres to Walnut Creek. [Ex. 21, paras. 6-8]
2 To the extent that Exhibit A is ambiguous in this regard, the ambiguity must be construed
3 against Rhodes Homes. *E.g., Leschorn v. Xericos*, 121 Ariz. 77, 81, 588 P.2d 320, 374
4 (App. 1978) (“a contract will be construed most strictly against its author”). Further, the
5 statement ignores that Rhodes Homes later informed Walnut Creek that escrow would
6 open at such time as a fully-executed purchase and sale agreement was received from all,
7 and not just some or even most, of the sellers, and that escrow never opened in 2004. [See
8 Defs.’ Ex. C at p. 2, para. 5, and paras. 8-9 below]

9 7. Disputed. Exhibit A does not speak in terms of an option and does not create
10 an option. To the contrary, Exhibit A states that the \$350,000 was intended only to
11 “reimburse” a security deposit that was to be applied against the \$7.1 million purchase
12 price. And, instead of making the \$350,000 payment discretionary, as if it were an option,
13 Exhibit A makes the payment mandatory, i.e., it “will” be paid. Further, Exhibit A makes
14 clear that the recited figure of “1,897 acres” was used for illustrative purposes only and
15 was not the precise number of acres that Rhodes Homes would obtain. Rhodes Homes was
16 to receive only sections 2, 11, and 14, and those three sections equate to 1,713 acres. [Ex.
17 21, para. 3] Finally, the assertion that Exhibit A is an option agreement is inconsistent
18 with Rhodes Homes’ prior pleading that the failure to pay \$350,000 was a breach of
19 contract and not the lapsing of an option, and it is also inconsistent with at least one other
20 judicial admission that Rhodes Homes has made. [Exs. 22-23] Accordingly, evidence of a
21 purported option agreement may not be considered: we object to all such evidence and
22 move to strike it. *Keller v. United States*, 58 F.3d 1194, 1199 n. 8 (7th Cir. 1995)
23 (statements in pleadings are judicial admissions that are conclusive and may not be
24 controverted at trial: unlike evidentiary admissions, which may be controverted or
25 explained, judicial admissions ““have the effect of withdrawing a fact from contention””)
26 (citation omitted); *Fleitz v. Van Westrienen*, 114 Ariz. 246, 248, 560 P.2d 430, 432 (App.

1 1977) (judicial admissions “preclude attempts to dispute the admitted fact or to submit
2 evidence to dispute the admitted fact or to submit evidence to disprove them”; *see also*
3 *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir. 1988)
4 (“statements of fact contained in a brief may be considered admissions of the party in the
5 discretion of the [trial] court”) (emphasis in text).

6 8. Not disputed except to state that the Sakura letter [Ex. C] was dated October
7 29, 2005, and not October 9, 2005 as recited in defendants’ paragraph 8. Paragraph 5 of
8 Exhibit C defines “the opening of escrow” as the date on which “a fully-executed
9 [purchase and sale] Agreement is delivered to First American Title.” That is consistent
10 with what Matt Lawson of Rhodes Homes was telling Scott Dunton in December, 2004.
11 [Ex. 21, paras. 8, 13] Before a “fully-executed Agreement” could be delivered, an
12 undivided 8.33 percent interest in the Yandell Property had to be probated and a personal
13 representative had to be appointed who had the legal capacity to sell that interest. In other
14 words, no living person or group of living persons could complete the sale until a personal
15 representative was appointed for an undivided 8.33 percent interest in the Yandell
16 Property. [See Exs. 24-27] The appointment of that personal representative did not occur
17 until February, 2005 [Exs. 24-26], which means that, under the terms of Exhibit C – which
18 Rhodes Homes drafted – no escrow could be deemed to have opened until then. But, by
19 February, 2005, Rhodes Homes had repudiated the Contract with Walnut Creek. [Ex. 15]

20 9. Disputed to the extent that the escrow to which the statement refers was
21 anything other than meaningless. By its terms, the agreement to which the statement
22 refers, i.e., Exhibit F, failed to result in the opening of an escrow. Paragraph 2.1 (at p. 2)
23 of Exhibit F states that escrow would not open until all sellers had signed that agreement.
24 At the time, throughout December 2004, and continuing into February 2005, no living
25 person had the legal capacity to sign Exhibit F (or any similar document) on behalf of an
26 undivided 8.33 percent interest in the Yandell Property that was owned by the Winchester

1 Yandell Trust. [Exs. 24-27] Yet, well before February, 2005, Rhodes Homes repudiated
2 Exhibit A [see Ex. 15], and thus, breached it. Further, Exhibit A obligated Rhodes Homes
3 to open an escrow before the \$350,000 payment from Walnut Creek came due, and neither
4 Rhodes Homes nor any successor to or representative of Rhodes Homes did so. [Ex. 21,
5 paras. 8-9]

6 10. Disputed to the extent that the statement is intended to refer to a fully
7 executed purchase agreement or an escrow that triggered Walnut Creek's \$350,000
8 payment. [See paras. 5, 8-9 above]

9 11. Disputed and irrelevant. Defendants' paragraph 11 contradicts itself by
10 stating that, on December 1, Rhodes Homes, through American Land Management,
11 "deposited \$700,000 in an escrow account" that was not opened until December 7.
12 Further, contrary to Defendants' paragraph 11, the cashier's check to which the statement
13 refers bears no reference to the funds coming from either Rhodes Homes or American
14 Land Management. Finally, the escrow to which the statement refers is not the escrow that
15 triggered Walnut Creek's \$350,000 payment. [See paras. 5, 8-9 above]

16 12. Disputed. As explained, Exhibit A is not an option agreement, nor may it be
17 considered as such in this proceeding. [See para. 7] Further, for the reasons previously
18 explained, at no time before Rhodes Homes repudiated Exhibit A did the event take place
19 on which Walnut Creek's \$350,000 payment was contingent. [See paras. 5, 8-9 above]
20 Finally, Exhibit A does not specify the manner in which the \$350,000 payment was to be
21 made, and thus, the manner chosen by Walnut Creek, being reasonable, is consistent with
22 Exhibit A. [Ex. 21, paras. 9-10]

23 13. Disputed to the extent that Defendants are now denying that the \$350,000
24 was intended for someone other than Rhodes Homes (or a successor) or that it was meant
25 to be something other than a reimbursement of one-half of the security deposit. [See Ex.
26 21, paras. 9-10]

1 14. Disputed. Because an undivided 8.33 percent interest could not be conveyed
2 to American Land Management on December 21, "final" escrow instructions could hardly
3 have been executed on that date. [See paras. 8-9 above] Further, the opening of a second
4 or simultaneous escrow to effect the sale of the 5,184.83 acres to Walnut Creek was
5 contemplated by Exhibit A and was not, as the statement asserts, inconsistent with Exhibit
6 A. To the extent that Exhibit A is ambiguous in this regard, the ambiguity must be
7 construed against Rhodes Homes. *E.g., Leschorn v. Xericos*, 121 Ariz. 77, 81, 588 P.2d
8 320, 374 (App. 1978) ("a contract will be construed most strictly against its author").

9 15. Disputed and irrelevant. Lawson has previously admitted that, in the
10 December 23 phone call, he did not ask about the delay. [Ex. 21, para. 11] But whether or
11 not he did is irrelevant because, as of December 23, Rhodes Homes had not opened the
12 escrow that triggered Walnut Creek's \$350,000 payment, and Rhodes Homes had not been
13 provided with a fully-executed purchase and sale agreement that would allow the sale to
14 proceed. Thus, the \$350,000 payment from Walnut Creek, however one chooses to
15 characterize it, was not due. [See paras. 5, 8-9 above]

16 16. Defendants' paragraph 16 is substantially correct, and it reflects what was
17 contemplated by Exhibit A. The total sales price for all 6,897.83 acres was \$7.1 million,
18 \$700,000 of which was to be paid as a security deposit that would be applied to the
19 purchase price. Walnut Creek agreed to pay \$350,000 as "reimburse[ment]" of one-half of
20 that security deposit. To the extent that Defendants are taking the position that the
21 \$350,000 was meant to be applied to something other than the security deposit, their
22 contention is refuted by Exhibit A. [See also Ex. 21, para. 10] And, to the extent that
23 Defendants are taking the position that the security deposit was not applied to the purchase
24 price, that, too, is inconsistent with Exhibit A. [See also Ex. 21, para. 10] Rhodes Homes
25 drafted Exhibit A, and to the extent that Exhibit A is ambiguous in this regard, the
26 ambiguity must be construed against Rhodes Homes. *E.g., Leschorn v. Xericos*, 121 Ariz.

1 77, 81, 588 P.2d 320, 374 (App. 1978) (“a contract will be construed most strictly against
2 its author”).

3 17. Disputed. The first sentence in Defendants’ paragraph 17 is refuted by
4 Exhibit A, which says that (i) Rhodes Homes was to open an escrow for the sale of
5 5,184.83 acres to Walnut Creek (which Rhodes Homes never did [Ex. 21, para. 8; see also
6 Pltfs’. State. Facts, paras. 11-14]), and (ii) the \$350,000 from Walnut Creek was intended
7 specifically to “reimburse Rhodes Homes one-half” of a \$700,000 payment made “to
8 secure the property.” Lawson’s impression that Walnut Creek was not going to perform is
9 (i) contradicted by his own previous statements [Ex. 21, paras. 11, 13], (ii) contradicted by
10 Walnut Creek’s conduct at the time [Pltfs.’ State. Fact. paras. 20-21; Ex. 21, paras. 9, 12]
11 and (iii) irrelevant because on December 23, no person or persons could convey the entire
12 interest in the Yandell Property to Rhodes Homes [see paras. 8-9 above]. In addition,
13 Lawson’s statement is insufficient for purposes of a summary judgment (and accordingly,
14 we move to strike paragraph 11 of Defendants’ Exhibit B). *Carmen v. San Francisco*
15 *Unified Sch. Dist.*, 237 F.3d 1026, 1028 (9th Cir. 2001) (plaintiff’s statement about
16 defendant’s intent was “speculation or unfounded accusation” and not competent
17 evidence); *Carey v. Beans*, 500 F. Supp. 580, 583 (E.D. Pa. 1980) (granting motion to
18 strike statements about what defendant was thinking), *aff’d*, 659 F.2d 1065 (3rd Cir. 1981).

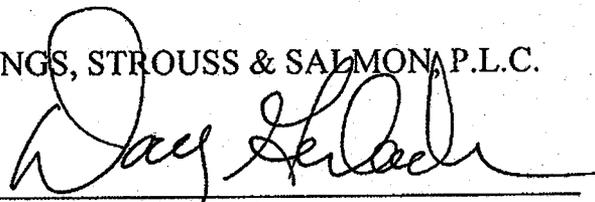
19 18. Disputed. By December 29, Walnut Creek had paid \$350,000 into an escrow
20 account for the benefit of Rhodes Homes [Pltf’s. Fact. State., paras. 20-21; Ex. 21, paras.
21 9, 12], and there can be no dispute that Exhibit A, which Rhodes Homes drafted, does not
22 specify the manner in which Rhodes Homes was to be paid. The Huygens letter, however
23 [Ex. M], does amount to a repudiation, and thus a breach, of Exhibit A.

24 19. Disputed in part. The closing that took place on December 30, 2004 (not
25 2005 as stated in Defendants’ paragraph 19) was not the closing contemplated by Exhibit
26 A. That is because Exhibit A contemplated the purchase and sale of a 100 percent interest

1 in all 6,897.83 acres of the Yandell Property, and for the reasons explained above, on
2 December 30, 2004, a 100 percent interest could not be conveyed to Rhodes Homes. [See
3 paras. 8-9 above]

4 December 11, 2006.

JENNINGS, STROUSS & SALMON P.L.C.

6
7
8 By 

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12 **ARIZONA SUPERIOR COURT**

13 **MOHAVE COUNTY**

14 WALNUT CREEK ESTATES
15 DEVELOPMENT CO., LLP, et al.,

16 Plaintiffs,

17 vs.

18 AMERICAN LAND MANAGEMENT,
19 L.L.C., et al.,

20 Defendants.

No. CV2005-0026

**PLAINTIFFS' COMBINED REPLY
IN SUPPORT OF PLAINTIFF
WALNUT CREEK'S MOTION FOR
PARTIAL SUMMARY JUDGMENT
AND RESPONSE IN OPPOSITION
TO DEFENDANTS' CROSS-
MOTION**

(Hon. Randolph A. Bartlett)

(Oral Argument Requested)

21 **Summary of Argument**

22 There is no dispute here that, if the Contract [Ex. 3] to which the parties agreed in
23 October, 2004, had been performed, a piece of property, consisting of 6,897.83 acres and
24 identified as the Yandell Property, would have been divided as follows: 5,184.83 acres to
25 plaintiff Walnut Creek Estates (or a successor) and 1,713 acres to defendant Rhodes
26 Homes (or a successor). [Pltfs.' Response to Defs.' Fact State. at Ex. 21, para. 3] That is
the result that will occur if the Court grants Walnut Creek's motion and denies Rhodes

1 Homes' cross-motion. [See Ex. 21, paras. 9, 12]¹

2 To avoid that outcome, Rhodes Homes' Response/Cross-Motion (the "RCM")
3 would, in effect, have this Court interpret the Contract (which Rhodes Homes wrote) in a
4 way that would require the Court to:

5 1) ignore that an agreement is to be interpreted giving the words their normal,
6 ordinary meaning [e.g., *Korman v. Kieckhefer*, 114 Ariz. 127, 129, 559 P.2d 683, 683
7 (App. 1976)], and, if there is any ambiguity in such an agreement, it is construed against
8 the author [e.g., *Leschorn v. Xerikos*, 121 Ariz. 77, 81, 588 P.2d 370, 374 (App. 1978)];

9 2) ignore that a party is not permitted to avoid summary judgment by contradicting
10 its pleadings [*Keller v. United States*, 58 F.3d 1194, 1199 n.8 (7th Cir. 1995); see also
11 *Fleitz v. Van Westrienen*, 114 Ariz. 246, 248, 560 P.2d 430, 432 (App. 1977)]; and

12 3) ignore dispositive facts, of which Rhodes Homes must have been aware all
13 along, the effect of which are that, as both a legal and a factual matter, Rhodes Homes
14 repudiated the Contract before any breach by Walnut Creek or any failure to exercise a
15 purported option [see Section B below].

16 After all is said and done, the RCM is predicated on a single asserted fact, which,
17 unless the Court buys into it, compels the granting of Walnut Creek's motion and the
18 denial of Rhodes Homes' cross-motion. That single assertion is that the Contract between
19 Walnut Creek and Rhodes Homes [Ex. 3] purportedly was an option agreement. As
20 explained in more detail below, as a matter of law, the Contract was not an option
21 agreement but, instead, a garden variety bilateral agreement to buy and sell property. But,
22 even if one were to assume, albeit erroneously, that the Contract was an option agreement,
23 as a matter of law, Rhodes Homes repudiated, and thus breached, the Contract before the
24

25 ¹ This brief continues the convention used in the defendants' Response/Cross-Motion, to wit, "Walnut
26 Creek" refers to the plaintiffs and "Rhodes Homes" refers to the business-entity defendants.

1 purported option expired.

2 **Reasons to Reject the RCM's Contentions and Grant Walnut Creek's Motion**

3 **A. Why, as a Matter of Law, the Contract Is Not an Option Agreement.**

4 **1. The Plain Meaning of the Contract.**

5 The interpretation of a contract is a question of law. *Hadley v. Southwest*
6 *Properties, Inc.*, 116 Ariz. 503, 506, 570 P.2d 190, 193 (1977). Such interpretation
7 requires that contract terms are given their plain, ordinary meaning. *E.g., Korman*, 114
8 Ariz. at 129, 559 P.2d at 685 (stating that words used in a contract "will be given their
9 normal ordinary meaning").

10 There is no dispute that Rhodes Homes wrote the Contract. There also is no dispute
11 that the Contract provides for the division of the Yandell Property: as it works out, Rhodes
12 Homes was to receive "sections 2, 11, and 14" (i.e., 1,713 acres), and Walnut Creek was to
13 receive the rest. [Ex. 3; see also Ex. 21, para. 3] The Contract goes on to say that a
14 "simultaneous[] closing" would take place or, in other words, there would be a closing for
15 the sale of all 6,897.83 acres to Rhodes Homes, and a "simultaneous[]" – not a subsequent
16 – closing to transfer all but "sections 2, 11, and 14" to Walnut Creek. [Ex. 3] Further, the
17 Contract acknowledges that Rhodes Homes would be paying a \$700,000 security deposit,
18 and obligates Walnut Creek to "reimburse Rhodes Homes one-half of this amount . . .
19 within ten business days of Rhodes Homes opening escrow." [Ex. 3 (emphasis added)]

20 Here is why, when giving the terms of the Contract their plain, ordinary meaning,
21 the notion of an option agreement fails.

22 First, the Contract says that Walnut Creek "will" pay the \$350,000 – not "could"
23 pay or "may" pay or "has the discretion to pay," but "will" pay. [Ex. 3 (emphasis added)]
24 In urging the existence of an option agreement, the RCM necessarily would have this
25 Court believe that, notwithstanding contract language stating that the payment "will" be
26

1 made, that payment was really discretionary. The RCM ignores, however, as courts have
2 repeatedly recognized, that the plain, ordinary meaning of the word “will” means that
3 something is “required, not discretionary.” *Summit Packaging Sys., Inc. v. Kenyon &*
4 *Kenyon*, 273 F.3d 9, 12 (1st Cir. 2001) (interpreting contract and concluding that “the plain
5 meaning of the phrase ‘will be submitted’ is that the course of action is required, not
6 discretionary”); *see also United States v. Benjamin*, 138 F.3d 1069, 1074 (6th Cir. 1998)
7 (concluding that use of the word “will” in a plea agreement created an obligation and did
8 not preserve any discretion). It is no exaggeration to say that, should the Court read the
9 word “will” in the Contract as creating an obligation on Walnut Creek’s part, that ends the
10 inquiry because the premise of every argument presented in the RCM is that the \$350,000
11 was discretionary and not obligatory.

12 Second, the Contract fails to say that the \$350,000 was intended to be the price of
13 an option. To the contrary, the plain language of the Contract identifies the payment only
14 as a “reimburse[ment]” for one-half of the security deposit that was to be paid. If, in
15 October, 2004, Rhodes Homes truly wanted an agreement by which the \$350,000 was the
16 price of an option, it could have written the Contract to say so. And it certainly could have
17 said so using terms other than “reimburse[ment].”

18 Third, correctly understood, the payment of the \$350,000 was to be made within ten
19 days of “Rhodes Homes opening escrow.” (Emphasis added). Yet, neither Rhodes Homes,
20 nor any representative or successor of Rhodes Homes opened an escrow that would have
21 allowed for the “simultaneous[] closing” called for by the Contract. [Ex. 21, para. 8] As a
22 precautionary measure, and in the hope of avoiding what has since transpired – an
23 assertion by Rhodes Homes that Walnut Creek never paid the \$350,000 and, thus,
24 abandoned the Contract – Walnut Creek opened the second escrow, and then deposited the
25 \$350,000 into the account that, under the terms of the Contract, Rhodes Homes should
26

1 have opened in the first place. [Pltfs.' State. Facts, paras 11-12, 14; Ex. 21, para. 9]²

2 Fourth, the RCM's assertion that Walnut Creek indicated an unwillingness to
3 proceed with the sale by imposing conditions on the \$350,000 payment to which Rhodes
4 Homes never agreed is, correctly understood, an attempt to re-write the Contract. There is
5 no dispute about the price to be paid for all 6,897.83 acres of the Yandell Property: the
6 Contract says \$7.1 million and no one contends that number ever changed. The Contract
7 also identifies a \$700,000 security deposit. Because the purchase price was always \$7.1
8 million and not \$7.8 million, the only reasonable interpretation of the Contract is that the
9 \$700,000 security deposit was to be applied to the \$7.1 million price. The Contract then
10 says that Walnut Creek would reimburse one-half of that security deposit, which is the
11 same security deposit that was to be applied to the purchase price. [See also Ex. 21, para.
12 10] What the RCM now says is that, although the \$700,000 security deposit applied to the
13 purchase price, what amounted to Walnut Creek's \$350,000 share of that security deposit
14 did not. If that is what Rhodes Homes intended, it could have said so in the Contract. But
15 as written, the plain language of the Contract says otherwise.³ Yet, even if the RCM's
16 interpretation is correct, and the \$350,000 payment was not to be applied to the purchase
17 price, as a matter of law, that is not enough to forfeit Walnut Creek's interest in the
18 Yandell Property. [See Pltfs.' Motion at pp. 6-8]

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21 ² The Contract nowhere prescribes the manner in which the payment is to be delivered to Rhodes Homes.
22 If, as the RCM contends, Walnut Creek should have transmitted a check directly to Rhodes Homes instead
23 of depositing it in an escrow account for Rhodes Homes' benefit, then Rhodes Homes could have specified
24 the manner of payment in the Contract. Moreover, it is not as if Rhodes Homes was prejudiced by the
25 manner of payment: it is undisputed that the \$350,000 was available to Rhodes Homes, and indeed,
26 Rhodes' principal has conceded knowing that. [Pltfs. State. Facts, paras. 20-21] Moreover, the \$350,000
payment was earmarked specifically as reimbursement of one-half of the security deposit: Rhodes Homes
paid its security deposit into an escrow, and so, Walnut Creek did the same. [Ex. 21, para. 10]

³ For the same reasoning, the Court should reject the RCM's argument that, if the sale fell through and the
seller refunded all or part of the security deposit, the Contract would have allowed Rhodes Homes to keep
all of that refund rather than allowing Walnut Creek to receive a pro rata share.

1 In sum, when, as here, the language of a contract is clear and unambiguous, it must
2 be given effect as it is written. *Hadley*, 116 Ariz. at 506, 570 P.2d at 193; *see also Estates*
3 *Co. v. Aztec Const., Inc.*, 139 Ariz. 166, 168, 677 P.2d 939, 941 (App. 1983). Merely
4 because the parties disagree about the meaning of a contract does not establish an
5 ambiguity. *E.g., Chandler Med. Bldg. Partners v. Chandler Dental Group*, 175 Ariz. 273,
6 277, 855 P.2d 787, 791 (App. 1993). If there is any ambiguity, it is resolved against the
7 drafter, which here is Rhodes Homes. *Leschorn*, 121 Ariz. at 81, 588 P.2d at 374. The
8 RCM would, among other things, have this Court conclude that “will” means “could,”
9 “reimburse[ment]” means “option price,” and “simultaneous” means “one at a time.” In
10 other words, the RCM is nothing less than an attempt to avoid the plain, ordinary meaning
11 of a Contract that Rhodes Homes wrote by asking this Court, in effect to rewrite it in a way
12 that is consistent with Rhodes Homes’ purposes, and in a way to which Walnut Creek
13 never agreed. The RCM’s attempt should be rejected. *E.g., Isaak v. Massachusetts Indem.*
14 *Life Ins. Co.*, 127 Ariz. 581, 584, 623 P.2d 11, 14 (1981) (“It is not within the power of
15 this court to ‘revise, modify, alter, extend, or remake’ a contract”). Alternatively, the
16 RCM is an attempt to avoid summary judgment by creating the illusion of ambiguity out of
17 the words that Rhodes Homes chose to use. That should not be allowed, either.

18 **2. The Plain Meaning of Rhodes Homes’ Pleadings.**

19 A party may not avoid summary judgment by contradicting statements made in its
20 pleadings. *Keller v. United States*, 58 F.3d at 1199 n. 8 (7th Cir. 1995) (concluding that
21 statements in pleadings are judicial admissions that are conclusive and may not be
22 controverted at trial: unlike evidentiary admissions, which may be controverted or
23 explained, judicial admissions ““have the effect of withdrawing a fact from contention””)
24 (citation omitted); *Davis v. A.G. Edwards & Sons*, 823 F.2d 105, 107-08 (5th Cir. 1987)
25 ““Factual assertions in pleadings are . . . judicial admissions conclusively binding on the
26

1 party that made them.’ Facts that are admitted in the pleadings ‘are no longer at issue.’”
2 (ellipsis and emphasis in text) (citations omitted); *see also Fleitz*, 114 Ariz. at 248, 560
3 P.2d at 432 (concluding that judicial admissions “preclude attempts to dispute the admitted
4 fact or to submit evidence to disprove them”).

5 Rhodes Homes’ answer to the amended complaint (which Rhodes filed in Federal
6 District Court while the case was pending there before being remanded) states: “Walnut
7 Creek failed to perform, thereby causing a material breach of the agreement and relieving
8 Rhodes Homes of any obligation to convey any property to Walnut Creek.” [Ex. 22 at pp.
9 5-6, paras. B-C (emphasis added); *see also id.* at p. 3, para. 16 (stating that Rhodes would
10 purchase the Yandell Property and “then sell” to Walnut Creek, without reference to any
11 option)] That answer nowhere says anything about Rhodes Homes being relieved of any
12 obligation to convey property because Walnut Creek failed to exercise an option. It speaks
13 only in terms of either an alleged breach of agreement or the purported failure to reach an
14 agreement in the first place. [Ex. 22] The RCM, on the other hand, asserts that an
15 agreement was, in fact, reached but there was no breach because the Contract was merely
16 an option agreement, making the \$350,000 payment discretionary, not obligatory. It is
17 difficult to imagine two more inconsistent factual assertions: once upon a time, there was
18 a breach, but today, there was no breach. As a matter of law, the latter, and what it
19 necessarily implies (i.e., an option agreement) should be disregarded.⁴

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24 ⁴ Rhodes Homes’ notice of removal also asserts that Walnut Creek (i.e., Scott Dunton) breached the
25 Contract, but says nothing about the failure to exercise any purported option. [Ex. 23 at p. 3, line 20]
26 “[S]tatements of fact contained in a brief may be considered admissions of the party in the discretion of the
[trial] court.” *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226-27 (9th Cir. 1988) (emphasis in
text).

1 **B. Why It Makes No Difference Whether the Contract Is Deemed an**
2 **Option Agreement.**

3 The RCM's assertion about the failure to exercise a purported option is predicated
4 on the assumption that, on December 7, 2004, the escrow opened that started the running
5 of a 10-day period to exercise that option. The RCM's contention is refuted by its own
6 exhibits. Consistent with the Contract, Walnut Creek withdrew its \$7.5 million offer for
7 the Yandell Property to allow Rhodes Homes to proceed with its \$7.1 million offer.
8 Rhodes Homes then entered into an initial agreement for the sale of the Yandell Property,
9 which was provided to Walnut Creek. [Ex. C] That agreement stated that escrow would
10 not be deemed to open until a "fully executed" purchase and sale agreement for all
11 6,897.83 acres was obtained. [Ex. C, at p. 2, para. 5 ("The opening of escrow shall be the
12 date upon which a fully-executed [purchase and sale] Agreement is delivered to First
13 American Title" (emphasis added))] Rhodes Homes admitted as much in telephone calls
14 with Walnut Creek in December, 2004. [Ex. 21, paras. 8, 11] As explained below, as a
15 matter of law, and as a matter of fact, no living person and no group of living persons was
16 capable of executing the required purchase and sale agreement at any time in December,
17 2004. [See Pltfs.' Response to Defs.' State. Facts, paras. 8-9] Accordingly, the escrow
18 that started the time to exercise the purported option never opened in December, 2004, nor
19 did it ever open before Rhodes Homes' repudiated [Ex. 15], and thus, breached the
20 Contract, even if one wishes to construe the Contract as an option agreement.⁵

21 The reason that the "fully executed" agreement could not be obtained, and thus, the
22 triggering escrow could not open, is as follows:

23
24 ⁵ We did not become aware of the following facts until after receipt of the RCM. [See Ex. 21, para. 13]
25 Thus, statements in our previously filed motion and statement of facts to the effect that the sale of the
26 Yandell Property closed on December 30, 2004, are incorrect. We are no longer certain what transpired on
26 December 30, 2004, but it is beyond all reasonable dispute that whatever happened was without the
26 agreement of one of ownership interests in the Yandell Property.

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- The Winchester Yandell Trust owned an undivided 8.33 percent interest in the Yandell Property. [Exs. 24, 27]
 - No trustee of the Winchester Yandell Trust was alive in 2004. [Ex. 24]
 - Thus, in December, 2004, no living person or group of living persons had legal capacity to execute an agreement for the purchase and sale of the Yandell Property. [See generally Exs. 24-27]
 - It was not until February, 2005, when a living person could execute a purchase and sale agreement on behalf of the undivided 8.33 percent interest owned by the Winchester Yandell Trust. [Exs. 25-27]

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But, by February, 2005, Rhodes Homes had already repudiated the Contract. [Ex. 15; see also Ex. 21, paras. 9, 12] It is settled law that such a repudiation is a breach of the Contract. *Kammert Bros., Enters. v. Tanque Verde Plaza Co.*, 102 Ariz. 301, 306, 428 P.2d 678, 683 (1967); *Rancho Pescado, Inc. v. Northwestern Mut. Life Ins. Co.*, 140 Ariz. 174, 186, 680 P.2d 1235, 1247 (App. 1984). Indeed, even if Rhodes Homes was under the mistaken apprehension that it had the right to cancel the Contract, its repudiation is still a breach. *Arizona Prop. & Cas. Ins. Guaranty Fund v. Helme*, 153 Ariz. 129, 137, 735 P.2d 451, 459 (1987).

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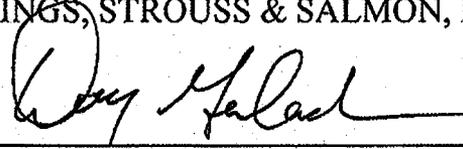
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Relief Requested

Walnut Creek's motion for partial summary judgment should be granted and Rhodes Homes' cross-motion should be denied.

1 December 11, 2006.

JENNINGS, STROUSS & SALMON, P.L.C.

2
3
4 By 

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13 Mohave County Superior Court
14 401 East Spring Street
15 Kingman, AZ 86402

16 and copies mailed to:

17 Hon. Randolph A. Bartlett
18 Presiding Judge - Division 2
19 Mohave County Superior Court
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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF MOHAVE

8 Walnut Creek Estates Development Company,)
9 L.L.P., an Arizona limited liability)
10 partnership; McAlister Investments, a)
11 California corporation; and Dunton &)
12 Dunton, L.L.P., an Arizona limited liability)
13 partnership,)

14 Plaintiff,

15 vs.

16 American Land Management, L.L.C., a South)
17 Dakota limited liability company; Rhodes)
18 Design and Development Corporation, a)
19 Nevada corporation; Desert Communities,)
20 Inc., a Nevada corporation; William F.)
21 Bowers and Jane Doe Bowers, husband and)
22 wife; James M. Rhodes and Jane Doe Rhodes,)
23 husband and wife; and Matt Lawson and Jane)
24 Doe Lawson, husband and wife,)

25 Defendant.

No. CV2005-26

**Reply in Support of Cross-Motion for
Summary Judgment**

(Assigned to the Honorable Judge Randolph
A. Bartlett)

20 Walnut Creek tries mightily to argue that the parties' contract was a contract for sale
21 and not an option contract. But ultimately, the characterization of this contract is immaterial,
22 because there is only one determinative fact: Walnut Creek was obligated to pay Rhodes Homes
23 \$350,000 within ten days, and it did not. If this was a contract for sale, then Walnut Creek
24 repudiated it. If it was an option, then Walnut Creek failed to exercise it. Regardless, Rhodes
25

01/29/07

1 Homes is not obligated to sell Walnut Creek 5,000 acres of the Yandell property. The court
2 should deny Walnut Creek's motion for summary judgment and grant Rhodes Homes's.

3 I. WALNUT CREEK REPUDIATED THE PARTIES' AGREEMENT

4 Walnut Creek wants the court to believe that it did not enter an option contract. So
5 as an initial matter, let us assume it is right, and that the contract is one for sale. Even so, Walnut
6 Creek is still up the creek. The fact remains that Walnut Creek did not perform as promised.
7 Instead, it conditioned its performance, divining additional contractual terms from the ether.
8 These conditions were a repudiation, discharging Rhodes Homes's obligations.

9 A repudiation is a species of breach. *Snow v. Western Savings & Loan*, 152 Ariz. 27,
10 32, 730 P.2d 204, 210 (1987). It occurs when a party manifests an intent not to render his
11 promised performance. *Id.* A party repudiates a contract even when his non-performance is based
12 on a mistaken interpretation of the agreement:

13 If one party to a contract either wilfully, or by mistake,
14 demands the of the other a performance to which he has
15 no right under the contract, and states definitely that
16 unless his demand is complied with he will not render his
17 promised performance, an anticipatory breach has been
18 committed.

19 *Id.* (quoting 4A Arthur C. Corbin, *Corbin on Contracts*, § 973 (1951)); see also, *United*
20 *California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 278, 681 P.2d 390, 430 (App.
21 1983) ("one party's insistence upon terms which are not contained in the contract constitutes an
22 anticipatory repudiation"); Restatement (Second) of Contracts, § 250, cmt. b (1981) (language that
23 amounts to a statement of an intention not to perform except on conditions which go beyond the
24 contract constitutes a repudiation).

25 Here the agreement provided that "Walnut Creek will reimburse Rhodes Homes
[\$350,000] within ten days of opening escrow." Rhodes Homes opened escrow for its purchase
of the Yandell Property on December 7, 2004. Allowing ten business days from that date, Walnut

1 Creek was supposed to pay Rhodes Homes \$350,000 by December 21. Rather than pay Rhodes
2 Homes, however, Walnut Creek opened its own escrow on December 8 and deposited \$350,000
3 in it. The parties never agreed that Walnut Creek could open a second escrow or that it could
4 deposit money in escrow rather than pay Rhodes Homes. To make matters worse, Walnut Creek
5 instructed the title company to use the \$350,000 as a down payment on its purchase of the 5,000
6 acres from Rhodes Homes. Once again, however, the parties never agreed that the \$350,000
7 could be used as a down payment. Indeed, by the plain language of the agreement, the \$350,000
8 was nothing but a payment to Rhodes Homes. Finally, as part of its second escrow, Walnut Creek
9 instructed the title company to refund the \$350,000 in the event that Rhodes Homes's deal with
10 the Yandell Trust cancelled. But nothing in the contract states that the \$350,000 was refundable.
11 In fact, by December 23, two days after the ten-day window had passed, Walnut Creek was still
12 demanding a refund. That very day, Scott Dunton called the title company demanding that Walnut
13 Creek "should get \$350,000 back" (exhibit A).

14 And so by the end of December, Walnut Creek had imposed three conditions on its
15 performance that were not in the contract. It had not only indicated that it would not perform
16 unless these conditions were met, but it had, in fact, not performed; it did not pay Rhodes Homes
17 \$350,000 within ten days. Walnut Creek's multiple attempts to condition its performance coupled
18 with its actual non-performance amounted to a repudiation. Rhodes Homes was not obligated to
19 sell Walnut Creek the 5,000 acres. *See* Restatement (Second) of Contracts, section § 253(2)
20 (1981) ("one party's repudiation of a duty to render performance discharges the other parties'
21 remaining duties to render performance.")

22 Walnut Creek's sole justification for these conditions is that it needed the second
23 escrow to effectuate the agreement's "simultaneous closing." But the agreement provides that
24 Rhodes Homes will arrange a "simultaneous [] closing," not Walnut Creek. Thus, by trying to
25 effectuate the simultaneous closing itself, Walnut Creek usurped Rhodes Homes contractual

1 obligations. Nevertheless, Walnut Creek maintains it had to open the second escrow because
2 Rhodes Homes's escrow did not allow a simultaneous closing. But Walnut Creek opened its
3 second escrow on December 8, one day after Rhodes Homes opened escrow. How did Walnut
4 Creek presume to know, one day after Rhodes homes opened escrow, that Rhodes Homes was not
5 going to arrange a simultaneous closing? Why within 24 hours did Walnut Creek suppose Rhodes
6 Homes would not perform? Walnut Creek's assumption that Rhodes Homes would not perform
7 is a slender reed upon which to rest its entire case, so slender in fact, it disintegrates under even
8 superficial scrutiny.

9 In short, even if the court accepts Walnut Creek's interpretation of the contract, the
10 fact remains that Walnut Creek was still required to unconditionally pay Rhodes Homes \$350,000
11 within ten days, and that it did not. Rhodes Homes was discharged from any further duties. It is
12 not liable for breach.

13 II THE OPTION CONTRACT

14 A. The Parties Executed an Option Contract

15 Alternatively, the court may interpret the parties' agreement as an option contract.
16 Walnut Creek offers several ponderous and confusing arguments about how this agreement is not
17 an option, but to no avail. Simply put, this agreement is best characterized as an option. Rhodes
18 Homes was obligated to hold an offer to sell 5,000 acres open for ten days, and Walnut Creek was
19 free to accept it or reject it. Despite its arguments to the contrary, Walnut Creek did not exercise
20 the option.

21 First, armed with a new declaration from its principal owner, Scott Dunton, Walnut
22 Creek argues that it should not be bound by an option because it never believed it was entering
23 an option agreement. But the interpretation of a contract is a question of law. *Grubb & Ellis Mgt.*
24 *Serv. v. 407417BC L.L.C.*, 213 Ariz. 83, 86, 138 P.3d 1210, 1213 (App. 2006). By extension,
25 whether a contract is an option or a contract for sale is a question of law for the court. *Dixon v.*

1 *Kinser*, 282 S.E. 2d 529, 531, (N.C. Ct. App. 1981). The formation of an option contract is
2 governed by objective manifestation, not the parties subjective intent. *Allen v. Smith*, 114 Cal.
3 Rptr. 2d 898, 903 (Cal. Ct. App. 2002). The court looks at “the nature and terms of the document
4 and the obligations of the parties regardless of how the parties may label or identify the
5 document.” *Id.* at 904. Walnut Creek’s subjective opinions about whether this is an option
6 contract are irrelevant.

7 The test for whether an agreement is an option contract is whether there is a mutuality
8 of obligation. If both parties are obligated to perform, the contract is an agreement for sale, but
9 if one party—the optionor—is obligated, it is an option. *Id.* Put differently, the outstanding
10 feature of an option contract is that the optionee is not bound until he acts on the option, *i.e.*, he
11 has discretion. 1 Williston on Contracts Section 5:16 (4th Ed., 2006). To determine if the optionee
12 has discretion, the court looks to whether the contract specifies a time period and a method of
13 exercising the options. *See Allen*, 114 Cal. Rptr. 2d at 905 (holding that time period and method
14 of performance are *idicia* of an option). After all, an option is a right to accept an offer within a
15 *limited time in the future*. *Id.* (*italics in original*). The existence of a time period indicates that
16 an offer is being held open and that the optionee has time in which to accept it. Moreover,
17 language setting forth a mode of acceptance indicates the optionee has discretion, and that he may
18 decline to exercise it.

19 In this case, the agreement is an option. It sets forth a time period and a method for
20 exercising the option. It states that Walnut Creek had to do something (pay \$350,000) within a
21 certain period of time (ten days). By paying the \$350,000 within ten days, Walnut Creek became
22 obligated to purchase the 5,000 acres. That the contract included these terms indicates that
23 Walnut Creek’s performance was discretionary. The time period indicates that Walnut Creek had
24 a choice. After all, why include the time period? If Walnut Creek did not have a choice, there
25 was no reason to give it time to exercise its choice.

1 But Walnut Creek contends it did not have discretion because the agreement provides
2 that Walnut Creek "will" pay Rhodes Homes \$350,000, which indicates that the payment was
3 required, not discretionary. Walnut Creek reads this provision too narrowly. Courts, on the other
4 hand, must read a contract as a whole and in light of other parts of the agreement. *Bryceland v.*
5 *Northey*, 160 Ariz. 213, 215, 772 P.2d 36, 38 (App. 1989). Granted, read by itself the word "will"
6 could imply a requirement. But when read in light of the other parts of the contract, the parties
7 could not have required payment of the \$350,000. Again, if the payment was required, why
8 include the ten-day time period? Why not simply require Walnut Creek to pay the money the day
9 Rhodes Homes opened escrow? For that matter, why include a payment at all? The parties could
10 have just agreed that Rhodes Homes would sell the 5,000 acres to Walnut Creek. Quite simply,
11 this time period can only be explained as prescribing an option. The use of the word "will" does
12 not alter this option. Indeed, the "will" is better understood as mandating how the option is
13 accepted, and not that the option must be accepted. In essence, it means that if Walnut Creek
14 elects to exercise the option, it will pay Rhodes Homes \$350,000. As a matter of fact, given that
15 the acceptance of an option must be unqualified, *Rogers v. Jones*, 126 Ariz. 180, 182, 613 P.2d
16 844, 846 (App. 1980), the use of the word "will" makes sense as describing how Walnut Creek
17 must unqualifiedly exercise the option. In short, the word "will" does not affect Walnut Creek's
18 discretion.

19 In a similar vein, Walnut Creek contends that if the parties had intended the \$350,000
20 to be the cost of exercising the option, they would not have called it a "reimbursement." But as
21 noted, the test for determining the existence of an option is the effect of the contract, not the
22 parties' labels. So the court looks to whether use of the word "reimbursement" creates a mutuality
23 of obligation. In this case, it does not. Rather, the "reimbursement" merely describes the type of
24 payment that Walnut Creek must make to exercise the option. In essence, the agreement provides
25 that if Walnut Creek wants to exercise its option to purchase the 5,000 acres, then it will

1 reimburse Rhodes Homes one half of Rhodes Homes' \$700,000 deposit. Nevertheless, that
2 Rhodes Homes will treat the payment as a "reimbursement" does not obligate Walnut Creek to
3 pay it; it has a choice to reimburse Rhodes Homes or not. Indeed, if the contract really required
4 Walnut Creek to reimburse—that is, to repay or indemnify—Rhodes Homes, why did the parties
5 include a ten-day time period? If Walnut Creek was required to reimburse Rhodes Homes, it
6 should have done so immediately.

7 Next, Walnut Creek makes a confusing contention that it was somehow excused from
8 paying Rhodes Homes \$350,000 to exercise the option. The point appears to be that because
9 Rhodes Homes's escrow did not allow for a simultaneous closing, the ten-day option period never
10 began running. This is ludicrous. While the contract provides that Rhodes Homes arrange a
11 simultaneous closing, it does not require Rhodes Homes to arrange the closing before Walnut
12 Creek exercised its option. In fact, a common sense reading indicates the opposite: Rhodes
13 Homes would arrange for a simultaneous closing after Walnut Creek exercised the option. After
14 all, why would Rhodes Homes set up another escrow to arrange for a transaction that would not
15 even exist until Walnut Creek exercised its option? That Rhodes Homes failed to perform an
16 obligation that could only arise after Walnut Creek exercised its option does not somehow excuse
17 Walnut Creek's failure to exercise the option. This argument does not even make sense.

18 Finally, Walnut Creek argues that its attempts to condition the payment of the
19 \$350,000 did not negate its attempt to execute the option. Wrong. As noted, an option must be
20 executed in exact accord with its terms and conditions. *Rogers*, 126 Ariz. at 182, 613 P.2d at 846;
21 *see also Hart v. Hart*, 544 S.E. 2d 366, 375 (2001) ("the acceptance of an option to purchase
22 realty must be absolute and unconditional, in accordance with the offer made, and without
23 modification or the imposition of new terms in order to constitute a valid exercise of the option").
24 Here, nothing in the agreement indicated that Walnut Creek could deposit the \$350,000 in escrow
25 or that it could be credited as a down-payment on the purchase price of the 5,000 acres. Rather,

1 the contract only stated that Walnut Creek was to pay the money to Rhodes Homes. Walnut
2 Creek's attempts to condition this payment amounted to a rejection of the option. But ultimately,
3 Walnut Creek's conditions are beside the point. The fact remains, Walnut Creek never paid
4 Rhodes Homes the \$350,000 within the ten-day time period. This failure to pay was an
5 unequivocal rejection of the offer, regardless of any conditions.

6 In sum, the court may view this arrangement as an option contract. The parties
7 agreed that Rhodes Homes would hold an offer to sell 5,000 acres open for ten days. If Walnut
8 Creek wanted to exercise its option, it had to pay Rhodes Homes \$350,000 within those ten days.
9 Walnut Creek never paid the money, so it never exercised the option. Rhodes Homes was not
10 obligated to sell the property to Walnut Creek; it did not breach the agreement.

11 B. Rhodes Homes's Option Argument is not Precluded

12 Walnut Creek also contends that Rhodes Homes is precluded from arguing that the
13 agreement was an option. Specifically, it contends that in a previous answer, Rhodes Homes
14 asserted that Walnut Creek breached the agreement. But, the argument continues, now Rhodes
15 Homes is making a new argument, namely, that Walnut Creek did not breach the agreement, but
16 that it failed to exercise an option. Walnut Creek maintains that because these defenses are
17 inconsistent, the court should disregard Rhodes Homes's option argument.

18 This argument is preposterous. As an initial matter, a defendant is entitled to plead
19 inconsistent defense. *Inglais v. Neidlinger*, 70 Ariz. 40, 47, 216 P.2d 387, 391 (1950). Moreover,
20 Walnut Creek misunderstands that Arizona is a notice pleading jurisdiction. Basically, Walnut
21 Creek argues that because Rhodes Homes did not assert an option defense in its answer, it is
22 precluded from asserting one now. But a defendant is not forever wedded to allegations in its
23 answer. A defendant has the right to amend his answer to assert a new defense at any time before
24 trial. *State ex rel. LaPrade v. Smith*, 43 Ariz. 343, 344, 31 p.2d 102, 103 (1934). And in fact,
25 Rhodes Homes properly amended its answer to assert this defense. The court allowed Walnut

1 Creek to amend its complaint in December 2006. Rhodes Homes answered it a few days later.
2 In its amended answer, Rhodes Homes asserted that the parties had entered an option contract.¹
3 Thus, that argument is now before the court; Rhodes Homes's cross-motion for summary
4 judgment does not contradict its answer.

5 III. THE ESCROW OPENED ON DECEMBER 7, 2004

6 As a final, flailing attempt at salvaging its case, Walnut Creek argues that regardless
7 of how the court characterizes the agreement, the time in which Walnut Creek was supposed to
8 pay the \$350,000 did not begin to run on December 7, 2004. It bases this argument on language
9 from a preliminary purchase agreement between Rhodes Homes and the Yandell Trust. That
10 agreement provides that "the opening of escrow shall be the date upon which a fully executed
11 agreement is delivered to First American Title." But, Walnut Creek contends, one of the
12 component trusts of the Yandell group lacked a legal representative until February 2005. So, the
13 argument continues, because there was no one with legal capacity to fully execute the sale until
14 February 2005, the opening of escrow which triggered Walnut Creek's obligation, did not begin
15 until February 2005. And, Walnut Creek contends, because Rhodes Homes repudiated the
16 agreement before February 2005, it never had a chance to exercise its option.

17 This is nonsense. Walnut Creek wants the court to use another party's agreement to
18 interpret its own agreement with Rhodes Homes. It wants American Land Management's and the
19 Yandell Trust's understanding concerning the opening of escrow to apply to its agreement too.
20 But a court should not interpret one contract in light of some other party's contract. This would
21 be the equivalent of, for example, interpreting a lease between a landlord and tenant in light of
22 the landlord's separate contract with a painter to paint the premises. The two agreements may
23 concern the same property, but they have nothing to do with each other. Individual contracts give
24

25 ¹An option defense is not even an affirmative defense that must be asserted under Rule 8(c).

1 COPY mailed and faxed this same day to:

2 Judge Randolph A. Bartlett
3 Mohave County Superior Court

4 COPY mailed this same day to:

5 Douglas Gerlach
6 Jennings, Strouss & Salmon, P.L.C.
7 The Collier Center, 11th Floor
8 201 East Washington Street
9 Phoenix, Arizona 85004-2385
10 Attorney for plaintiffs

11 *Diana L. Clark*

12

13

14

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16

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24

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Exhibit A

IMPORTANT MESSAGE

DM

FOR _____

DATE 12-23 TIME 11:23 AM, P.M.

M Westt, Van Lan

OF _____

PHONE AREA CODE 3 1314 NUMBER EXTENSION

FAX AREA CODE NUMBER TIME TO CALL

MOBILE

TELEPHONED	PLEASE CALL	X
CAME TO SEE YOU	WILL CALL AGAIN	
WANTS TO SEE YOU	WILL CALL AGAIN	
RETURNED YOUR CALL	SPECIAL CONDITION	

MESSAGE 350,000 of 81000

McAllister Investment

440 3015

SIGNED Treasure from Wm Come

Received 12-14-84

IMPORTANT MESSAGE

DM

FOR _____

DATE 12-23 TIME 11:23 AM, P.M.

M Westt, Van Lan

OF _____

PHONE AREA CODE 3 1314 NUMBER EXTENSION

FAX AREA CODE NUMBER TIME TO CALL

MOBILE

TELEPHONED	PLEASE CALL	X
CAME TO SEE YOU	WILL CALL AGAIN	
WANTS TO SEE YOU	WILL CALL AGAIN	
RETURNED YOUR CALL	SPECIAL CONDITION	

MESSAGE 350,000 of 81000

McAllister Investment

440 3015

SIGNED Treasure from Wm Come

Received 12-14-84

1 BAIRD, WILLIAMS & GREER, L.L.P.
2 6225 NORTH 24TH STREET, SUITE 125
3 PHOENIX, ARIZONA 85016
 TELEPHONE (602) 256-9400

4 Daryl M. Williams (004631)
5 Attorneys for Rhodes Homes Arizona, LLC

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF MARICOPA

8 RHODES HOMES ARIZONA, LLC, an
9 Arizona limited liability company,

10 Plaintiff,

11 vs.

12 STANLEY CONSULTANTS INC., an Iowa
13 corporation,

14 Defendant.

15 Stanley Consultants, Inc., an Iowa
16 Corporation,

17 Counterclaimants,

18 vs.

19 Rhodes Homes Arizona, LLC, an Arizona
20 limited liability company,

21 Counterdefendants.

) No. CV2006-011358

) **Reply to Counterclaim**

22 Rhodes Homes, Arizona, LLC, an Arizona limited liability company (Rhodes), for
23 its reply to the counterclaim, admits, denies and alleges as follows:

24 1. Admits the allegations of paragraph 1.
25

1 2. Admits that Rhodes authorized to transact business in Arizona, but denies the other
2 allegations of paragraph 2.

3 3. It is admitted that Rhodes entered into various agreements with Stanley
4 Consultants, Inc., an Iowa corporation ("Stanley"), whereby Rhodes agreed to pay Stanley for civil
5 engineering services on various projects. All the other allegations of paragraph 3 are denied.

6 4. Admit.

7 5. Rhodes homes incorporates its reply to the various allegations incorporated into
8 this paragraph by the counterclaimant.

9 6. It is admitted that Rhodes Homes and Stanley entered into various contracts, but
10 it is denied that Stanley performed the required services.

11 7. It is admitted that Stanley provided civil engineering services beginning in July
12 2004, and issued invoices to Rhodes for these services, but the remaining allegations of paragraph 7 are
13 denied.

14 8. It is admitted that Rhodes has not paid Stanley for all of the invoiced work, but all
15 of the allegations of paragraph 8 are denied.

16 9. Rhodes incorporates its reply with respect to the allegations incorporated into this
17 paragraph by the counterclaimant.

18 10. Admit.

19 11. Deny.

20 12. Deny.

21 13. Deny.

22 14. Rhodes incorporates by reference its reply to the various allegations incorporated
23 into this paragraph by the counterclaimant.

24 15. Admit.

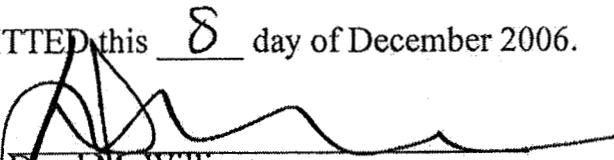
25

1 16. It is admitted that some parts of the civil engineering services provided to Rhodes
2 have benefitted Rhodes to a certain extent, but all other allegations of paragraph 16 are denied.

3 17. Deny.

4 18. All allegations of the counterclaim not expressly admitted are denied.

5 RESPECTFULLY SUBMITTED this 8 day of December 2006.

6
7 
8 Daryl M. Williams
9 Baird, Williams, Greer, L.L.P.
10 6225 North 24th Street, Suite 125
11 Phoenix, Arizona 85016
12 Attorneys for plaintiff

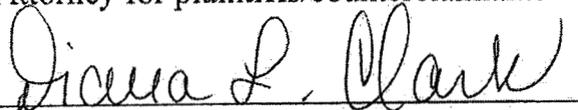
13 ORIGINAL e-filed with the Clerk of Court
14 of Maricopa County this 8th day of
15 December, 2006

16 Copy mailed this same day to:

17 The Honorable Colin F. Campbell

18 and a COPY mailed this same day to:

19 P. Douglas Folk
20 Folk & Associates
21 One Columbus Plaza, Suite 600
22 3636 N. Central Avenue
23 Phoenix, AZ 85012-8503
24 Attorney for plaintiffs/counterclaimants

25 

1 BAIRD, WILLIAMS & GREER, L.L.P.
2 6225 NORTH 24TH STREET, SUITE 125
3 PHOENIX, ARIZONA 85016
 TELEPHONE (602) 256-9400

4 Daryl M. Williams (004631)
5 Robert L. Greer (005372)
6 Attorneys for Rhodes Homes Arizona, LLC

7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
8 IN AND FOR THE COUNTY OF MARICOPA

9 RHODES HOMES ARIZONA, LLC, an) No.
10 Arizona limited liability company,)
11 Plaintiff,)
12 vs.)
13 STANLEY CONSULTANTS INC., an Iowa)
14 corporation,)
) Defendant.)

15 The plaintiff, Rhodes Homes Arizona, LLC, alleges for its complaint as follows:

- 16 1. Plaintiff is an Arizona limited liability company which is in the process of
17 developing master planned communities in Mohave County, Arizona.
18 2. Stanley Consultants in an Iowa corporation with offices in Maricopa County,
19 Arizona, which was engaged by Rhodes Homes to do civil engineering and construction-related
20 and development services for Rhodes Homes. The transactions, events and occurrences giving
21 rise to this claim occurred in Arizona.
22 3. Rhodes Homes is the actual contracting party with Stanley Consultants
23 notwithstanding the fact that certain "consultant agreements" and other documents forming the
24 basis of this action refer to Rhodes Design and Development Corporation and Rhodes Ranch
25 General Partnership, neither of which is a proper party to this case.

1 4. Although Stanley Consultants' Phoenix office was involved in the work done
2 for Rhodes Homes, the bulk of the work was out of Stanley Consultants' Las Vegas office.

3 5. Stanley Consultants began working for Rhodes Homes in approximately July,
4 2004.

5 6. Stanley Consultants has billed Rhodes Homes \$6,895,189.84 for work it
6 claims has been performed, and Rhodes Homes has paid \$5,459,403.04, leaving an unpaid
7 balance, according to Stanley Consultants, of \$1,489,567.06.

8 7. Stanley Consultants was employed by Rhodes Homes because it represented
9 it had the expertise and the experience to do the engineering and consulting work necessary to
10 help Rhodes Homes with the government approval process and development of master planned
11 communities in Mohave County efficiently and expeditiously . Stanley Consultants knew that
12 Rhodes Homes was relying upon its representations as to its expertise, acumen and capabilities
13 for the development and necessary engineering and permitting of the projects being developed by
14 Rhodes Homes.

15 8. As a part of Stanley Consultants' activities, it was specifically directed to
16 stop work on certain projects, but it disregarded instructions, and continued the projects and
17 billings which resulted in payments to Stanley Consultants that did not have value to Rhodes
18 Homes.

19 9. Stanley Consultant's activities on behalf of Rhodes Homes were dilatory and,
20 contrary to the representations which had been made to Rhodes Homes, involved activities in
21 which Stanley Consultants Las Vegas did not have experience so that Stanley Consultants'
22 dilatoriness was exacerbated by its lack of familiarity with processes and requirements by
23 governmental agencies.

24 10. Significant parts of work done by Stanley Consultants was ineffective.
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WHEREFORE judgment is demanded as follows:

A. Awarding Rhodes Homes damages as will be established at trial.

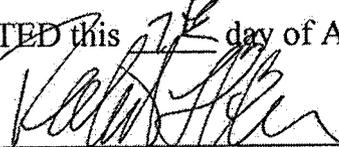
B. Rhodes Homes is entitled to a declaration that it is entitled to use the work product of Stanley Consultants.

C. Awarding Rhodes Homes punitive damages.

D. Awarding Rhodes Homes attorneys fees and costs pursuant to contract or A.R.S. § 12-341.01.

E. For such other relief as the court deems appropriate.

RESPECTFULLY SUBMITTED this 7th day of August, 2006.



Daryl M. Williams
Robert L. Greer
Baird, Williams, Greer, L.L.P.
6225 North 24th Street, Suite 125
Phoenix, Arizona 85016
Attorneys for

RECEIVED

NOV 28 2006

BWG



1 P. Douglas Folk (006340)
 2 **FOLK & ASSOCIATES, P.C.**
 3 One Columbus Plaza, Suite 600
 3636 N. Central Avenue
 4 Phoenix, Arizona 85012-8503
 (602) 222-4400
orders@folklaw.com
 5 Attorneys for Stanley Consultants, Inc.

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

**RHODES HOMES ARIZONA, LLC an
Arizona limited liability company,**

Plaintiff,

vs.

**STANLEY CONSULTANTS, INC., an
Iowa Corporation,**

Defendant.

NO. CV2006-011358

**ANSWER OF STANLEY CONSULTANTS,
INC.**

And

COUNTER CLAIM

**(Assigned to the Honorable Colin F.
Campbell)**

**STANLEY CONSULTANTS, INC., an
Iowa Corporation,**

Counter-Plaintiff

vs.

**RHODES HOMES ARIZONA, LLC an
Arizona limited liability company,**

Counter-Defendant.

For its Answer to Plaintiff's Complaint (the "Complaint"), Stanley Consultants, Inc. ("Stanley"), admits denies, and alleges as follows:

GENERAL ALLEGATIONS

1. Stanley denies any allegations contained in the Complaint which are not expressly admitted in this Answer.

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**COUNT TWO
(Bad Faith)**

9. Stanley denies the allegations in Paragraph 16 of Plaintiff's Complaint.

**COUNT THREE
(Declaratory Relief and Replevin)**

10. In response to the allegations in Paragraph 17 of Plaintiff's Complaint, Stanley affirmatively states that under the terms of its agreements/instruments with Rhodes, the work Stanley has done for Rhodes remains the property of Stanley.

11. Stanley denies the allegations in Paragraphs 18 through 20 of Plaintiff's Complaint.

**COUNT FOUR
(Fraud)**

12. Stanley denies the allegations in Paragraphs 21 and 22 of Plaintiff's Complaint.

**COUNT FIVE
(Punitive Damages)**

13. Stanley denies the allegations in Paragraph 23 of Plaintiff's Complaint and affirmatively states that Plaintiffs are not entitled to punitive damages in this action.

AFFIRMATIVE DEFENSES

14. Except as otherwise admitted in this Answer, Stanley generally denies the allegations of the Complaint.

15. The Complaint fails to state a claim for which relief may be granted and is barred by Rule 12(b)(6) ARCP.

16. The Complaint is barred by Plaintiff's own comparative fault.

17. Stanley's alleged negligence is not the proximate cause of the damages

1 alleged.

2 18. Plaintiff's recovery is barred or reduced by their failure to mitigate
3 damages.

4 19. The injuries and damages alleged were proximately caused by other
5 persons or entities for which Stanley is neither responsible nor liable, and such other
6 persons or entities bear the sole comparative fault for such injuries and damages.

7 20. Stanley affirmatively alleges that Plaintiff has not suffered damage in the
8 manner or amounts alleged.

9 21. Stanley asserts the following affirmative defenses: betterment, estoppel,
10 laches, waiver, statute of limitations, statute of frauds, lack of privity, failure of
11 conditions precedent, the economic loss doctrine, the economic waste doctrine, or any
12 other affirmative defense set forth in the Arizona Rules of Civil Procedure that may
13 appear in discovery or disclosure.

14 22. In defending this Complaint, Stanley has incurred, and will continue to
15 incur, reasonable attorney's fees, and in order that such claim is not waived, Stanley
16 affirmatively alleges that it is entitled to recover its reasonable attorney's fees pursuant
17 to A.R.S. §§ 12-341.01 and/or 12-349, Rule 11, A.R.C.P., by contract, or otherwise by
18 operation of law.

19 23. Stanley reserves the right to amend its Answer, to assert any other
20 defenses allowed by Rule 8, A.R.C.P., as further investigation of this claim reveals and
21 permits;

22 WHEREFORE, Defendant Stanley, requests the entry of judgment as follows:

23 A. That Plaintiff's Complaint be dismissed with prejudice and that Plaintiff
24 recovers nothing on its Complaint against Stanley;

25 B. That Plaintiff's claim for punitive damages be denied;

26

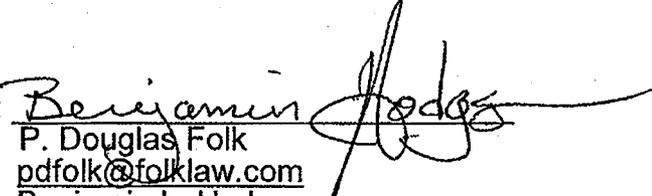
1 C. That this Court deny Plaintiff's request for an order declaring that Plaintiff
2 is entitled to use the work product of Stanley Consultants, Inc.

3 D. For an award of Stanley's attorneys' fees and costs incurred herein, as a
4 result of the Plaintiff's Complaint, pursuant to ARS § 12-341 and § 12-341.01 and the
5 subject contract, with interest thereon at the maximum rate permitted by law; and

6 E. For such other and further relief as the Court deems just and proper
7 under the circumstances.

8 DATED this 18th day of October 2006.

9 FOLK & ASSOCIATES, P.C.

10
11 By: 
12 P. Douglas Folk
13 pdfolk@folklaw.com
14 Benjamin L. Hodgson
15 bihodgson@folklaw.com
16 Attorney for Stanley Consultants, Inc.

17 **COUNTER-CLAIM**

18 Defendant/Counter-Plaintiff Stanley Consultants, Inc. ("Stanley"), for its
19 Counter-Claim against Rhodes Homes Arizona, LLC ("Rhodes") as follows:

20 **GENERAL ALLEGATIONS**

21 1. Stanley is a corporation organized under the laws of the State of Iowa
22 and is authorized to conduct business in the State of Arizona. Stanley provides civil
23 engineering services and is doing business in Maricopa County, Arizona.

24 2. Plaintiff/Counter-Defendant Rhodes, upon information and belief, is
25 authorized to transact business in Arizona and caused the acts alleged herein to occur
26 in Maricopa County, Arizona.

- 1 B. For its reasonable attorneys' fees incurred and to be incurred herein
- 2 pursuant to the Contract and Ariz.Rev.Stat. §12-341.01 which, in event of
- 3 default, will not be less than \$5,000.00;
- 4 C. For its costs incurred in this action pursuant to the terms of the Contract and
- 5 Ariz.Rev.Stat. §12-341; and
- 6 D. For such other and further relief as the court deems just and proper.

COUNT TWO
(Quantum Meruit)

7
8
9 9. Stanley incorporates the allegations in paragraphs 1 through 8 of this
10 Counter-Claim as though fully set forth in this Count Two.

11 10. Starting in July 2004 Stanley provided civil engineering design services to
12 Rhodes under the Contract in connection with various projects.

13 11. Stanley provided the civil engineering services requested by Rhodes in
14 reliance on the promises of Rhodes to pay the reasonable value of such civil
15 engineering services.

16 12. Rhodes has failed and refused to pay Stanley for the reasonable value of
17 the civil engineering services provided by Stanley, and as a consequence, Rhodes
18 has been unjustly enriched through its use of Stanley's civil engineering services in
19 the improvement of the various projects.

20 13. There remains due and owing to Stanley an amount in excess of
21 \$2,566,582.00 for the reasonable and agreed value of the civil engineering services
22 provided by Stanley to Rhodes.

23 WHEREFORE, Stanley requests judgment against Plaintiff/Counter- Defendant
24 Rhodes on Count Two of Stanley's Counter-Complaint as follows:

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26

- 1 A. For a determination that the fair and reasonable value of the civil engineering
2 services provided by Stanley to Plaintiff/Counter-Defendant Rhodes, is in
3 excess of \$2,566,582.00;
- 4 B. For damages in excess of \$2,566,582.00, the exact amount will be proven at
5 trial, with pre-judgment interest, calculated at the statutory rate of ten percent
6 (A.R.S. §44-1201) (10%) per annum on each invoice until paid, plus post-
7 judgment interest on the cumulative amount calculated at the statutory rate
8 of ten percent (A.R.S. §44-1201) (10%) until paid;
- 9 C. For its reasonable attorneys' fees and costs, which in the event of default will
10 not be less than \$5,000.00;
- 11 D. For its costs incurred herein;
- 12 E. For post-judgment interest on each of the above sums at the rate of ten
13 percent (10%) per annum, pursuant to A.R.S. § 44-1201, from the date of
14 judgment until payment thereon; and
- 15 F. For such other and further relief as the Court deems just and proper.

16 **COUNT THREE**
17 **(Unjust Enrichment)**

18 14. Stanley incorporates the allegations in paragraphs 1 through 13 of this
19 Counter-Complaint as though fully set forth in this Count Three.

20 15. Starting on July 2004, and subsequent thereto, Stanley provided civil
21 engineering services in connection with various projects as requested by Rhodes.

22 16. On information and belief, Stanley alleges that the civil engineering
23 services it furnished to Rhodes for the various projects have benefited Rhodes and
24 benefited and enhanced the various projects.

25
26

1 Unless otherwise indicated below, the original of the foregoing was hand delivered for
filing this 18th day of October 2006 to:

2 Clerk of Superior Court (602) 506-2168 Mailed
3 Maricopa County Superior Court Faxed/Emailed
4 201 West Jefferson Avenue
5 Phoenix, AZ 85003

6 Unless otherwise indicated below, a copy of the foregoing was mailed this 18th day of
7 October 2006 to:

8 The Honorable Colin F. Campbell Hand Delivered
9 Maricopa County Superior Court Faxed/Emailed
10 101 W. Jefferson,
11 Phoenix AZ 85003-2243

12 Robert L. Greer. (602) 256-9400 Hand Delivered
13 Baird, Williams & Greer, LLP Faxed/Emailed
14 6225 North 24th Street, Suite 125
15 Phoenix, Arizona 85016
16 Attorneys for Plaintiffs

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Roy Carrasco

VERIFICATION

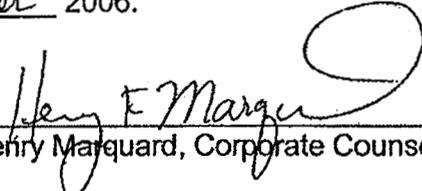
1 STATE OF IOWA)
2) ss.
3 County of Muscatine)

4
5 Henry Marquard deposes and says:

- 6 1. I am Corporate Counsel for Stanley Consultants, Inc. an Iowa corporation;
7 2. I am authorized to provide this Verification on behalf of Stanley Consultants,
8 Inc.;
- 9 3. I have read Stanley Consultants, Inc's Answer and Counter-Claim; and
10 4. The statements made therein are true to the best of my knowledge,
11 information and belief.

12 I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE
13 AND CORRECT.

14 Executed on this 18th day of October 2006.

15
16 
17 _____
18 Henry Marquard, Corporate Counsel
19
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**RESPONSES OF PERKINS MOUNTAIN WATER COMPANY AND
PERKINS MOUNTAIN UTILITY COMPANY TO
ARIZONA CORPORATION COMMISSION STAFF'S
FIRST SET OF DATA REQUESTS IN
DOCKET NOS. W-20380A-05-0490 AND SW-20379A-05-0489
MARCH 31, 2006**

BNC 1.16 Have any of the (present and past) officers, directors and/or employees of Rhodes Homes Arizona, LLC, Perkins Mountain Water Company, and/or Perkins Mountain Utility Company and their respective affiliates been accused of allegations of political corruption (including but not limited to campaign violations and election law violations); allegations of construction violations; allegations of misconduct; and filings at administrative hearings, at the local, state or federal agencies, including at the Federal Elections Commission, Registrar of Contractors, or any violations of law? If so, please provide a comprehensive list of all affiliated individuals and entities that have been accused of the above mentioned allegations; the litigation history; and the individual case disposition.

Response:

Objection. The Applicants object to this question on the grounds that it is overly broad and unduly burdensome. Because of various ownership interests, common control or contractual relationships among numerous companies, partnerships and trusts, the current number of employees is in excess of 800 people. The Applicants do not have information of the nature described above for the vast majority of those 800 employees. Moreover, the terminology used in this data request is so broad, vague and ambiguous that it is impossible to answer the data request as written. There are no definitions provided for the terms "political corruption," "construction violations," "misconduct," or "violations of law." Additionally, the data request is open ended, not limited to a time frame, and it does not specify the maker(s) of the allegations. By way of illustration, this potentially places the Applicants in the impossible position of responding to unilateral allegations reported by persons quoted in newspaper articles at any point in time, or uncorroborated statements made by members of the public at public comment sessions. Finally, Applicants incorporate herein by reference the objection set forth in the response to data request BNC 1.11.

Without waiving the foregoing objection and upon information and belief, a list of matters involving officers or directors of the entities listed in the response to data request BNC 1.10 is provided. Consistent with the other responses included herein, the list is limited to matters that were filed from January 1, 1996 through and including the date of this response.¹

¹ In some instances an officer or director is named in a case along with one or more of the entities. Because the entity is often the primary party, any case that identifies an officer or director and one of the entities is listed in the response to BNC 1.17.

**RESPONSES OF PERKINS MOUNTAIN WATER COMPANY AND
PERKINS MOUNTAIN UTILITY COMPANY TO
ARIZONA CORPORATION COMMISSION STAFF'S
FIRST SET OF DATA REQUESTS IN
DOCKET NOS. W-20380A-05-0490 AND SW-20379A-05-0489
MARCH 31, 2006**

Applicants will supplement this response with additional information, changes or documents that may come to their attention.

**BNC 1.16
Continued**

Prepared by: Mark E. Hall
Corporate Counsel
Rhodes Homes Arizona, LLC
2215 Hualapai Mountain Road, Suite H
Kingman, AZ 86401

Officer & Director Case List

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Herrera for Congress: In re James A. Bevan	MUR 5305	9/26/02	Civil Penalty of \$5,500	Closed	James A. Bevan was the Chief Financial Officer at Rhodes Design and Development Corp.
Herrera for Congress: In re Ronald E. Gillette	MUR 5305	9/26/02	Federal Elections Commission ("FEC") No Further Action Decision 9/20/05; No Civil Liability	Closed	Ronald E. Gillette was President of Sagebrush Enterprises, Inc.; The FEC Decided to Take No Further Action With Regard to Mr. Gillette's Involvement in This Matter
Palm Gardens Ltd. Partnership, James M. Rhodes v. Gardens East, Inc., Prestige Development Corp., Louis E. Goldman, Jr., and Marshall Goldman	A347438	6/21/95	\$2,166,498.85 Judgment Entered Against James M. Rhodes On 10/14/00	Reopened	Partnership Dispute; James M. Rhodes is President of Sagebrush Enterprises, Inc., Sedora Holdings, LLC, Desert Communities, Inc., and The Rhodes Companies, LLC
Louise Ruiz v. R and R Concrete, Inc., James M. Rhodes	A341530	1/10/95	\$276,554.28 Amended Judgment Entered 10/11/00 in Favor of Plaintiff	Closed	Asset Allocation Dispute; James M. Rhodes is President of Sagebrush Enterprises, Inc., Sedora Holdings, LLC, Desert Communities, Inc., and The Rhodes Companies, LLC

**RESPONSES OF PERKINS MOUNTAIN WATER COMPANY AND
PERKINS MOUNTAIN UTILITY COMPANY TO
ARIZONA CORPORATION COMMISSION STAFF'S
FIRST SET OF DATA REQUESTS IN
DOCKET NOS. W-20380A-05-0490 AND SW-20379A-05-0489
MARCH 31, 2006**

BNC 1.17 Have Rhodes Homes Arizona, LLC, Perkins Mountain Water Company, and/or Perkins Mountain Utility Company and/or any of their respective affiliates been accused of allegations of political corruption (including but not limited to campaign violations and election law violations); allegations of construction violations; allegations of misconduct; and filings at administrative hearings, at the local, state, or federal agencies, including at the Federal Elections Commission, Registrar of Contractors, or any violations of law? If so, please provide a comprehensive list of all affiliated individuals and entities that have been accused of the above mentioned allegations; the litigation history; and the individual case disposition.

Response:

Objection. The Applicants object to this question on the grounds that it is overly broad and unduly burdensome. The terminology used in this data request is so broad, vague and ambiguous that it is impossible to answer the data request as written. There are no definitions provided for the terms "political corruption," "construction violations," "misconduct," or "violations of law." Additionally, the data request is open ended, not limited to a time frame, and it does not specify the maker(s) of the allegations. By way of illustration, this potentially places the Applicants in the impossible position of responding to unilateral allegations reported by persons quoted in newspaper articles at any point in time, or uncorroborated statements made by members of the public at public comment sessions. Finally, the Applicants incorporate herein by reference the objection set forth in the response to data request BNC 1.11.

Without waiving the foregoing objection and upon information and belief, a list of matters involving the entities listed in the response to data request BNC 1.10 is provided. Consistent with the other responses included herein, the list is limited to matters that were filed from January 1, 1996 through and including the date of this response.

Perkins Mountain Water Company and Perkins Mountain Utility Company were specifically formed in 2005 to eventually provide water and sewer service in accordance with a Certificate of Convenience and Necessity to the areas specified in these dockets. The Applicants are unaware of any allegations or accusations against Perkins Mountain Water Company or Perkins Mountain Utility Company that would fall within any of the categories listed above.

Various Rhodes entities, including Rhodes Homes Arizona, LLC plan, develop, and construct on a large scale. Unfortunately, it is not uncommon for disputes

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MARCH 31, 2006**

and allegations of

BNC 1.17
Continued

construction defects to arise. Since a wide array of individuals and companies work together creating these developments, it may be difficult to determine the party responsible for a particular defect. As a result, the contractors, subcontractors, Mr. Jim Rhodes and some of the Rhodes entities listed in the response to data request BNC 1.10 have found themselves involved in litigation. A list attempting to summarize those cases is attached.

Applicants will supplement this response with additional information, changes or documents that may come to their attention.

Prepared by: Mark E. Hall
Corporate Counsel
Rhodes Homes Arizona, LLC
2215 Hualapai Mountain Road, Suite H
Kingman, AZ 86401

RELATED ENTITIES CASE LIST

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Dennis Ewing, et al. v. Rhodes Design and Development Corp., Rainbow Canyon, LLC, Desert Communities, Inc., Artistic Tile, Inc.	A408473	9/22/99	Settled	Closed	Alleged Construction Defect
Peter Licata, Lauri Licata v. Spanish Hills Community Association, Tropicana Durango Ltd., Tropicana Durango Investments Corp., James M. Rhodes	A402754	5/4/99	\$9,529.88 Judgment of Dismissal Entered in Favor of Defendants 7/21/04	Closed	Alleged Misrepresentation of Lot Size Purchased at Spanish Hills
Rhodes Ranch Land Holding Limited Partnership, Rhodes Ranch Land Holdings, Inc., Durango Springs Properties Limited Partners, Mustang Properties, Inc., Southwestern Opportunities Limited Partners, Coronado Properties, Inc., Rhodes Ranch Limited Partnership, Rhodes Ranch General Partnership, Rhodes Design and Development Corp., Bravo, Inc., James Rhodes v. Wes Adams, Asset Management Services, LLC, Western States Contracting, Inc.	A408972	10/4/99	Settled; Rhodes' Motion to Enforce Settlement Agreement Granted 8/17/04	Closed	

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Desert Communities, Inc., Jim Rhodes v. Brad Boe	A514942	12/23/05		Inactive	Case stayed in order to arbitrate claims.
Mark Cluff and Mary A. Cluff v. James Rhodes dba Rhodes Homes, Desert Communities, Inc.	A443560	12/7/01	Settled; Order of Dismissal with Prejudice entered 9/24/02	Closed	
Jerilyn J. Clayton v. James M. Rhodes	A452737	6/28/02		Closed	Dismissed pursuant to NRCPC 41(a)(1); Voluntary Dismissal by Plaintiff
Olen Residential Realty Corp. v. James M. Rhodes, Bravo, Inc., dba Rhodes Framing, Dirk Griffith, Rhodes Design & Development Corp.	A394611	10/12/98	Order of Dismissal With Prejudice Entered 9/17/03	Closed	
United Title Company of Nevada, Chicago Title Insurance Co. v. Palm City Developers, LLC, Rhodes Design & Development Corp., Commerce Association, LLC, Rainbow Canyon, LLC, James M. Rhodes	A418517	5/4/00	Order of Dismissal With Prejudice Entered 3/14/03	Closed	
Rhodes Design and Development Corp., James M. Rhodes v. Park West Golf, Inc.	A388049 A401184 (consolidated)	5/7/98 3/26/99	Arbitration Award Confirmed 4/22/02	Closed	

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Phoenixcor, Inc. v. James M. Rhodes, Rhodes Realty, Inc., Rhodes Design & Development Corp.	A407056	8/16/99	Order of Dismissal Without Prejudice Entered 9/4/01	Closed	
Clark County of Nevada v. the Estate of James M. Booth, Catherine Booth, Diane M. Robins, James G. Keller, Marilyn M. Keller, Dale W. Crisp, Donna L. Crisp, E. J. Callery, Ed Callery, Title Insurance and Trust Company, Cara Walstrum, US Office of IRS Special Liens Division, James M. Rhodes, Anthony D. Hunter, Deborah M. Hunter, Familian Corp., dba Familian Pipe & Supply, USAA Property and Casualty Insurance	A397017	12/14/98	Judgment of Condemnation Entered 9/21/01	Closed	
First Security Bank of Nevada v. Rhodes Design & Development Corp., James M. Rhodes	A402327	4/23/99	Notice of Dismissal Without Prejudice Granted 10/18/99	Closed	
Zion Credit Corp. v. Rhodes Design & Development Corp., James M. Rhodes	A400660	3/16/99	Settled	Closed	
MDC Holdings, Inc. v. Ronald Gorski dba Richmond American Homes of Nevada, Inc., James M. Rhodes	A489374	7/26/04		Active; Trial Date 10/17/06	Alleged Breach of Contract, Intentional Interference with Contractual Relationship

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Hart/Volland Enterprises, LLC v. Durango/Springs Properties, Ltd., Partner, Mustang Properties, Inc., Bravo, Inc., James M. Rhodes, United Title of Nevada, Inc.	A386967	4/10/98	Order of Dismissal With Prejudice Entered 6/27/01	Closed	
Indemnity Co. of California v. Bravo, Inc. dba Rhodes Framing, Tropicana Durango Investments Corp., Tropicana Durango Ltd., James M. Rhodes	A383344	1/15/98	Order Entered 3/31/98	Closed	
Wendell Brown v. Rhodes Homes, Madrid Properties, Ltd. Partnership, Madrid Estates Homeowner's Association, Inc., Rhodes Realty, James M. Rhodes, Robert M. Beville, Robert W. Sweeney, Ray Calles	A384183	2/5/98	Order of Dismissal With Prejudice Entered 11/17/98	Closed	
Tileworks, Inc. v. Rhodes Design & Development Corp., Indemnity Co. of California, James M. Rhodes, Deborah L. Rhodes	A372026	4/8/97	Stipulation and Order to Close Case Entered 3/5/98	Closed	
Michael A. Silvaggio, Terra West Realty and Development v. Rhodes Design & Development Corp., Teal Investments General Partnership, James M. Rhodes, Robert M. Beville	A362781	8/12/96	Order of Dismissal With Prejudice Entered 9/5/97	Closed	

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Eamon Springall v. Rhodes Ranch Ltd. Partnership, Sagebrush Enterprises, Inc., Rhodes Ranch, LLC, James Rhodes, Gorman Cook	A477413	12/5/03	Default Judgment Entered Against Gorman Cook on 11/19/04 in the Amount of \$820,500	Closed	
Lisa Povill, et al. v. Rhodes Ranch, Ltd. Partnership, Rhodes Design & Development Corp., Sagebrush Enterprises, Inc., Vistana Condominium Owner's Association	A471433 A471463 (consolidated)	7/30/03 7/31/03	A471463 Order of Dismissal Without Prejudice Entered 4/27/04	Closed	Appealed to Supreme Court 6/16/05
Rhodes Ranch Ltd. Partnership, Sagebrush Enterprises, Inc. v. KB Home Nevada, Inc.	A466561	4/21/03	Order of Dismissal With Prejudice Entered 7/1/03	Closed	
Washington Homes-Nevada dba Washington Homes of Nevada v. Southwestern Opportunities, Ltd. Partners, Stewart Title of Nevada, Sagebrush Enterprises, Inc., Rhodes Ranch, LLC, Rhodes Ranch General Partnership	A442581	11/15/01	Order of Dismissal With Prejudice Entered 4/15/03	Closed	

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Delta Plastering Stucco, Inc. v. James Rhodes, Rhodes Design & Development Corp., Elkhorn Partners Limited Partnership, Rhodes Homes	A401733	4/9/99	Order of Dismissal Without Prejudice Entered 2/5/02	Closed	
Ready Mix, Inc., v. Rhodes Ranch, Ltd. Partnership, Durango/Springs, Ltd. Partnership, Sagebrush Enterprises, Inc., Elkhorn Partners, Abraham Benefrain, et al.	A478000	12/17/03	Judgment of Dismissal Entered 5/17/04	Closed	
Walnut Creek Estates, McAlister Investments, Dunton & Dunton, LLP v. American Land Management, LLC, Rhodes Design and Development Corp., Matt Lawson	S-8015-CV-20050026	1/7/05			Mohave County Superior Court
Sedora Holdings, LLC v. Arizona State Department of Revenue, Mohave County	TX2006-050005 TX2006-050006 TX2006-050007	1/6/06	Order of Dismissal Entered 5/18/06		
Vistana Condominium Owners Association, Inc. v. Rhodes Ranch Limited Partnership, Rhodes Design and Development Corp., Sagebrush Enterprises, Inc., Rhodes Ranch, LLC, Rhodes Ranch General Partnership, Rhodes Home, James A. Bevan	CV2006-006306	5/2/2006			

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Claudia Mirkin v. Jim Rhodes, Rhodes Design and Development Corp.	CA795602	6/16/98			
Deutsche Bank Securities, Inc. v. Rhodes Companies, Jim Rhodes	SDNY 1:06cv413	1/19/06		Active	Alleged Breach of Contract
Richard McCleve, Pat McCleve v. James Rhodes, Rhodes Homes, Inc.	A451229	5/28/02	Order of Dismissal With Prejudice Entered 1/15/04	Closed	
Lyon Financial Services, Inc. dba BCL Capital v. Rhodes Design and Development Corp., James M. Rhodes	A420601	6/20/00	\$1,251,006.54 Judgment Entered 6/22/00 in Favor of Plaintiff	Closed	Partial Summary Judgment Granted in Favor of Lyon Financial Services; Judgment Lien
Sharon Allen, et al. v. Elkhorn Partners, Elkhorn Investments, Inc., D and B Holdings General Partnership, Rhodes Design and Development Corp. dba Rhodes Homes, Rhodes Realty, Inc., James M. Rhodes, Willis Roof Consulting, Inc.	A478315	12/24/03	Defendants' Motion to Dismiss Granted 5/17/04	Closed	Alleged Construction Defect

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Jerry Argovitz, et al. v. United Title of Nevada, Southwestern Opportunities Ltd. Partnership, Coronado Properties, Inc., Rhodes Design & Development Corp., Durango Springs Properties Ltd. Partners, James Rhodes, Susan Coleman	A417983	4/21/00	Order of Dismissal With Prejudice Entered 1/27/04	Closed	
James Rhodes, Rhodes Design & Development Corp., Gypsum Resources, LLC v. Mark A. James	A466041	4/10/03	Dismissal Pursuant to NRCP 41(a)(1) Entered 6/2/03	Closed	NRCP 41(a)(1); Voluntary Dismissal by Plaintiff
Warthen Services Co. Inc., Nicholas Naff, et al. v. Palm City Developers, LLC, James Rhodes	A421447	7/11/00	Order of Dismissal With Prejudice Entered 6/6/02	Closed	
Rhodes Design & Development Corp., James Rhodes v. Lyon Financial Services, Inc. dba BCL Capital	A424830	9/28/00	Order of Dismissal With Prejudice Entered 3/8/01	Closed	
Vistana Condominium Owners Association, Inc. v. Rhodes Ranch Ltd. Partnership, Rhodes Design and Development Corp., Sagebrush Enterprises, Inc., Rhodes Ranch, LLC, Rhodes Ranch General Partnership, Rhodes Homes, James A. Bevan	A498921	1/31/05	Order of Dismissal Without Prejudice Entered 5/19/06	Active	

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David R. Smith v. James Rhodes, Rhodes Design & Development Corp.	A400855	3/19/99	Defendant's Renewed Motion for Summary Judgment Granted 6/5/00; Order of Dismissal With Prejudice Entered 9/11/00	Closed	
Carmine Iovino v. Darrell Ruiz, James Rhodes, R & R Concrete, Inc., Nevada Department of Motor Vehicles	A382959	1/6/98	Order of Dismissal Entered 12/22/98	Closed	
Rhodes Design & Development Corp., James Rhodes v. Integrity Homes, Inc.	A358227	4/15/96	Order of Dismissal With Prejudice Entered 8/6/97	Closed	
Coldwell Banker, Inc. v. James Rhodes, Jim Rhodes Construction, Inc., Robert Rishling, Phylcon, Inc.	A271417	1/26/98	Order of Dismissal With Prejudice Entered 12/4/91	Closed	Notice of Withdrawal of Appeal 6/29/92
Herrera For Congress: In re James M. Rhodes, Rhodes Design and Development Corp., Bravo, Inc. dba Rhodes Framing, Rhodes Ranch General Partnership	MUR 5305	9/26/02	\$148,000 Civil Penalty	Closed	The Parties Entered a Conciliation Agreement With the FEC and Paid a Civil Penalty; The Case Was Not Criminal in Nature

RHODES and RELATED ENTITIES CASE LIST

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Dennis Ewing, et al. v. Rhodes Design and Development Corp., Rainbow Canyon, LLC, Desert Communities, Inc., Artistic Tile, Inc.	A408473	9/22/99	Settled	Closed	Alleged Construction Defect
Peter Licata, Lauri Licata v. Spanish Hills Community Association, Tropicana Durango Ltd., Tropicana Durango Investments Corp., James M. Rhodes	A402754	5/4/99	\$9,529.88 Judgment of Dismissal Entered in Favor of Defendants 7/21/04	Closed	Alleged Misrepresentation of Lot Size Purchased at Spanish Hills
Rhodes Ranch Land Holding Limited Partnership, Rhodes Ranch Land Holdings, Inc., Durango Springs Properties Limited Partners, Mustang Properties, Inc., Southwestern Opportunities Limited Partners, Coronado Properties, Inc., Rhodes Ranch Limited Partnership, Rhodes Ranch General Partnership, Rhodes Design and Development Corp., Bravo, Inc., James Rhodes v. Wes Adams, Asset Management Services, LLC, Western States Contracting, Inc.	A408972	10/4/99	Settled; Rhodes' Motion to Enforce Settlement Agreement Granted 8/17/04	Closed	

BNC 1.17 (Updated as of 2/28/07)

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Desert Communities, Inc., Jim Rhodes v. Brad Boe	A514942	12/23/05		Inactive	Case stayed in order to arbitrate claims.
Mark Cluff and Mary A. Cluff v. James Rhodes dba Rhodes Homes, Desert Communities, Inc.	A443560	12/7/01	Settled; Order of Dismissal with Prejudice entered 9/24/02	Closed	Easement dispute.
Jerilyn J. Clayton v. James M. Rhodes	A452737	6/28/02		Closed	Dismissed pursuant to NRCPC 41(a)(1); Voluntary Dismissal by Plaintiff
Olen Residential Realty Corp. v. James M. Rhodes, Bravo, Inc., dba Rhodes Framing, Dirk Griffith, Rhodes Design & Development Corp.	A394611	10/12/98	Order of Dismissal With Prejudice Entered 9/17/03	Closed	
United Title Company of Nevada, Chicago Title Insurance Co. v. Palm City Developers, LLC, Rhodes Design & Development Corp., Commerce Association, LLC, Rainbow Canyon, LLC, James M. Rhodes	A418517	5/4/00	Settled. Order of Dismissal With Prejudice Entered 3/14/03	Closed	
Rhodes Design and Development Corp., James M. Rhodes v. Park West Golf, Inc.	A388049 A401184 (consolidated)	5/7/98 3/26/99	Arbitration Award Confirmed 4/22/02	Closed	

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Phoenixcor, Inc. v. James M. Rhodes, Rhodes Realty, Inc., Rhodes Design & Development Corp.	A407056	8/16/99	Order of Dismissal Without Prejudice Entered 9/4/01	Closed	
Clark County of Nevada v. the Estate of James M. Booth, Catherine Booth, Diane M. Robins, James G. Keller, Marilyn M. Keller, Dale W. Crisp, Donna L. Crisp, E. J. Callery, Ed Callery, Title Insurance and Trust Company, Cara Walstrum, US Office of IRS Special Liens Division, James M. Rhodes, Anthony D. Hunter, Deborah M. Hunter, Familian Corp., dba Familian Pipe & Supply, USAA Property and Casualty Insurance	A397017	12/14/98	Judgment of Condemnation Entered 9/21/01	Closed	
First Security Bank of Nevada v. Rhodes Design & Development Corp., James M. Rhodes	A402327	4/23/99	Notice of Dismissal Without Prejudice Granted 10/18/99	Closed	
Zion Credit Corp. v. Rhodes Design & Development Corp., James M. Rhodes	A400660	3/16/99	Settled	Closed	
MDC Holdings, Inc. v. Ronald Gorski dba Richmond American Homes of Nevada, Inc., James M. Rhodes	A489374	7/26/04		Active; Trial Date 10/17/06	Alleged Breach of Contract, Intentional Interference with Contractual Relationship

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Hart/Volland Enterprises, LLC v. Durango/Springs Properties, Ltd., Partner, Mustang Properties, Inc., Bravo, Inc., James M. Rhodes, United Title of Nevada, Inc.	A386967	4/10/98	Order of Dismissal With Prejudice Entered 6/27/01	Closed	
Indemnity Co. of California v. Bravo, Inc. dba Rhodes Framing, Tropicana Durango Investments Corp., Tropicana Durango Ltd., James M. Rhodes	A383344	1/15/98	Order Entered 3/31/98	Closed	
Wendell Brown v. Rhodes Homes, Madrid Properties, Ltd. Partnership, Madrid Estates Homeowner's Association, Inc., Rhodes Realty, James M. Rhodes, Robert M. Beville, Robert W. Sweeney, Ray Calles	A384183	2/5/98	Order of Dismissal With Prejudice Entered 11/17/98	Closed	Personal injury. Driver ran off the road and sued, despite defendant's adherence to the County barricade plan.
Tileworks, Inc. v. Rhodes Design & Development Corp., Indemnity Co. of California, James M. Rhodes, Deborah L. Rhodes	A372026	4/8/97	Stipulation and Order to Close Case Entered 3/5/98	Closed	
Michael A. Silvaggio, Terra West Realty and Development v. Rhodes Design & Development Corp., Teal Investments General Partnership, James M. Rhodes, Robert M. Beville	A362781	8/12/96	Order of Dismissal With Prejudice Entered 9/5/97	Closed	

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Eamon Springall v. Rhodes Ranch Ltd. Partnership, Sagebrush Enterprises, Inc., Rhodes Ranch, LLC, James Rhodes, Gorman Cook	A477413	12/5/03	Default Judgment Entered Against Gorman Cook on 11/19/04 in the Amount of \$820,500	Closed	
Lisa Povill, et al. v. Rhodes Ranch, Ltd. Partnership, Rhodes Design & Development Corp., Sagebrush Enterprises, Inc., Vistana Condominium Owner's Association	A471433 A471463 (consolidated)	7/30/03 7/31/03	A471463 Order of Dismissal Without Prejudice Entered 4/27/04	Closed	Appealed to Supreme Court 6/16/05
Rhodes Ranch Ltd. Partnership, Sagebrush Enterprises, Inc. v. KB Home Nevada, Inc.	A466561	4/21/03	Order of Dismissal With Prejudice Entered 7/1/03	Closed	
Washington Homes-Nevada dba Washington Homes of Nevada v. Southwestern Opportunities, Ltd. Partners, Stewart Title of Nevada, Sagebrush Enterprises, Inc., Rhodes Ranch, LLC, Rhodes Ranch General Partnership	A442581	11/15/01	Order of Dismissal With Prejudice Entered 4/15/03	Closed	

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Delta Plastering Stucco, Inc. v. James Rhodes, Rhodes Design & Development Corp., Elkhorn Partners Limited Partnership, Rhodes Homes	A401733	4/9/99	Order of Dismissal Without Prejudice Entered 2/5/02	Closed	
Ready Mix, Inc., v. Rhodes Ranch, Ltd. Partnership, Durango/Springs, Ltd. Partnership, Sagebrush Enterprises, Inc., Elkhorn Partners, Abraham Benefraim, et al.	A478000	12/17/03	Judgment of Dismissal Entered 5/17/04	Closed	
Walnut Creek Estates, McAlister Investments, Dunton & Dunton, LLP v. American Land Management, LLC, Rhodes Design and Development Corp., Matt Lawson	S-8015-CV-20050026	1/7/05		Active	Mohave County Superior Court
Sedora Holdings, LLC v. Arizona State Department of Revenue, Mohave County	TX2006-050005 TX2006-050006 TX2006-050007	1/6/06	Order of dismissals entered 5/16/06; 12/19/06; 10/31/06;		Tax appeal.

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Claudia Mirkin v. Jim Rhodes, Rhodes Design and Development Corp.	CA795602	6/16/98			
Deutsche Bank Securities, Inc. v. Rhodes Companies, Jim Rhodes	SDNY 1:06cv413	1/19/06		Active	Alleged Breach of Contract
Richard McCleve, Pat McCleve v. James Rhodes, Rhodes Homes, Inc.	A451229	5/28/02	Order of Dismissal With Prejudice Entered 1/15/04	Closed	
Lyon Financial Services, Inc. dba BCL Capital v. Rhodes Design and Development Corp., James M. Rhodes	A420601	6/20/00	\$1,251,006.54 Judgment Entered 6/22/00 in Favor of Plaintiff	Closed	Partial Summary Judgment Granted in Favor of Lyon Financial Services; Judgment Lien Regarding Office Equipment.
Sharon Allen, et al. v. Elkhorn Partners, Elkhorn Investments, Inc., D and B Holdings General Partnership, Rhodes Design and Development Corp. dba Rhodes Homes, Rhodes Realty, Inc., James M. Rhodes, Willis Roof Consulting, Inc.	A478315	12/24/03	Defendants' Motion to Dismiss Granted 5/17/04	Closed	Alleged Construction Defect

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Jerry Argovitz, et al. v. United Title of Nevada, Southwestern Opportunities Ltd. Partnership, Coronado Properties, Inc., Rhodes Design & Development Corp., Durango Springs Properties Ltd. Partners, James Rhodes, Susan Coleman	A417983	4/21/00	Order of Dismissal With Prejudice Entered 1/27/04	Closed	
James Rhodes, Rhodes Design & Development Corp., Gypsum Resources, LLC v. Mark A. James	A466041	4/10/03	Dismissal Pursuant to NRCP 41(a)(1) Entered 6/2/03	Closed	NRCP 41(a)(1); Voluntary Dismissal by Plaintiff
Warthen Services Co. Inc., Nicholas Naff, et al. v. Palm City Developers, LLC, James Rhodes	A421447	7/11/00	Order of Dismissal With Prejudice Entered 6/6/02	Closed	Deficiency matter settled for attorney's fees.
Rhodes Design & Development Corp., James Rhodes v. Lyon Financial Services, Inc. dba BCL Capital	A424830	9/28/00	Order of Dismissal With Prejudice Entered 3/8/01	Closed	Improperly attached judgment lien from judgment for office equipment.
Vistana Condominium Owners Association, Inc. v. Rhodes Ranch Ltd. Partnership, Rhodes Design and Development Corp., Sagebrush Enterprises, Inc., Rhodes Ranch, LLC, Rhodes Ranch General Partnership, Rhodes Homes, James A. Bevan	A498921 CV2006-00636	1/31/05	Order of Dismissal Without Prejudice Entered 5/19/06	Active	Ongoing alleged construction defect litigation.

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David R. Smith v. James Rhodes, Rhodes Design & Development Corp.	A400855	3/19/99	Defendant's Renewed Motion for Summary Judgment Granted 6/5/00; Order of Dismissal With Prejudice Entered 9/11/00	Closed	
Carmine Iovino v. Darrell Ruiz, James Rhodes, R & R Concrete, Inc., Nevada Department of Motor Vehicles	A382959	1/6/98	Order of Dismissal Entered 12/22/98	Closed	
Rhodes Design & Development Corp., James Rhodes v. Integrity Homes, Inc.	A358227	4/15/96	Order of Dismissal With Prejudice Entered 8/6/97	Closed	Easement Dispute.
Coldwell Banker, Inc. v. James Rhodes, Jim Rhodes Construction, Inc., Robert Rishling, Phylcon, Inc.	A271417	1/26/98	Order of Dismissal With Prejudice Entered 12/4/91	Closed	Notice of Withdrawal of Appeal 6/29/92
Herrera For Congress: In re James M. Rhodes, Rhodes Design and Development Corp., Bravo, Inc. dba Rhodes Framing, Rhodes Ranch General Partnership	MUR 5305	9/26/02	\$148,000 Civil Penalty	Closed	The Parties Entered a Conciliation Agreement With the FEC and Paid a Civil Penalty; The Case Was Not Criminal in Nature

BNC 1.17 (Updated as of 2/28/07)

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Halstead Construction Supplies, Inc. v. James Rhodes	A260197	10/8/87	Judgment entered for \$7,190.00	Closed	Dispute over the price of construction materials.
James Rhodes v. Ed J. Callery	A294542	4/10/91	Judgment in favor of James M. Rhodes in the amount of \$3,486.50.	Closed	Tax lien issue.
Flamingo Ridge Homeowners Association v. Westar Development Corp.	A314172	12/3/92	Order of dismissal with prejudice. Stipulation in the amount of \$75,000.	Closed	Construction Defect.
James Rhodes v. H.R. Campbell	A314668	12/18/92	Judgment of dismissal with prejudice.	Closed	
Ron Byrd v. Tropicana-Durango Ltd.	A331900	4/7/94	Order of dismissal with prejudice.	Closed	Correct piping work done.
ARC Materials Corp. v. D and R Construction Inc.	A332357	4/21/94	Order of dismissal without prejudice.	Closed	Construction materials dispute with supplier.
Southern Nevada Adult Mental Health Services v. James Rhodes	A333060	5/11/94	Order of dismissal with prejudice.	Closed	
Louise Ruiz v. R and R Concrete Inc.	A341530	1/10/95	Satisfaction of Judgment	Closed	Partnership dispute over allocation of assets.

Case Name	Case Number	Date Filed	Judgment	Status	Comments
Palm Gardens Ltd. Partnership v. Gardens Past Inc.	A347438	6/21/95	Order of dismissal with prejudice.	Closed	Partnership dispute.
Don Alves v. Rhodes Design and Development Corp.	A378750	9/23/97	Settled	Closed	Construction Defect.
Rainbow Development Corp. v. Rhodes Design and Development Corp.	A392416	8/25/98		Active	
Rhodes Homes Arizona v. Stanley Consultants, Inc.	CV2006-011358	8/7/06		Active	Breach of Contract.
Zenaïda B. Prado v. Rhodes Design and Development Corporation d/b/a Rhodes Homes	A484108 CV2006-091746	4/16/04	Settled		Wrongful death suit stemming from a drunk driving auto accident. Plaintiff sued Rhodes and the County engineers alleging defects in the design of the intersection.
Rhodes Design and Development Corporation v. RLI Insurance Company	A467077 CV2006-014742	12/1/99	Settled		Case settled subject to a confidentiality agreement.
Sedora Holdings v. Mohave County	TX2006-000246	11/22/06		Active	Tax appeal.
Americian Land Management, LLC, Sedora Holdings, LLC v. Arizona State Department of Water Resources	LC2006-000476-001 CV2006-011146	7/27/06	Not Served	Active	Administrative appeal of ADWR's priority date determination.