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DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE CANYON, LLC, a Nevada limited liability company, Plaintiff, v. STATE OF NEVADA ex. rel. VIRGIN VALLEY WATER DISTRICT, a political subdivision of the State of Nevada; and DOE Individuals I through X; and ROE Corporations and Organizations I through V, inclusive, Defendants.	Case No. A-18-774539-B Dept. No. XIII **OPPOSITION AND COUNTERMOTION TO VIRGIN VALLEY WATER DISTRICT'S MOTION TO DISMISS** Date: Aug. 15, 2018 Time: 9:00 AM

Plaintiff PARADISE CANYON, LLC ("Plaintiff" or "Paradise Canyon"), by and through its attorneys at the law firm of Sylvester & Polednak, Ltd., hereby files this Opposition and Countermotion to VIRGIN VALLEY WATER DISTRICT's ("VVWD") Motion to Dismiss. This Opposition and Countermotion is made and based on the following Memorandum of Points and Authorities, all of the pleadings and papers on file herein, and any oral argument the Court may entertain on this matter.

In the interest of judicial economy, Paradise Canyon primarily addresses VVWD's arguments as to the Fourth and Fifth Causes of Action below, and contemporaneously requests: (1) summary judgment as to the First and Second Causes of Action; and (2) leave to exceed the 30-page limit set by EDCR 2.20(a) to further address VVWD's request to dismiss the First, Second, and Third Causes of Action.

VVWD submits to declaratory relief on the First and Second claims, and good cause exists to allow this brief to exceed the 30-page limit inasmuch as: (1) over $1 million is at stake in this action, (2) the brief contains both an opposition and a countermotion, and (3) VVWD filed a lengthy brief filled with *ad hominem* attacks that require a detailed response. This action is being reported on by the Mesquite Local News, and the aspersions cast by VVWD have already been published to the local citizenry in order to arouse local animus against Paradise Canyon. To correct VVWD's intentional misrepresentations and efforts to paint Paradise Canyon in a false light, and to ensure that this Motion is decided on the merits with a complete record, additional pages are necessary.

DATED this 9th day of August, 2018.

SYLVESTER & POLEDNAK, LTD.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

This case should be decided on its merits, not on a frivolous motion to dismiss. Indeed, with its bombastic rhetoric, VVWD's Motion was apparently written for "Mesquite Local News," a daily online news site, to arouse local animus and to paint Paradise Canyon in a false light. VVWD's flippant assertions, e.g., that Wolf Creek is "subsidized by the residents of the Virgin Valley" (Mot. at 17:1-2) and proceeding in "bad-faith" (Mot. at 22:1), are *verifiably false*. The Motion is a libelous work of fiction and should be denied outright.

The truth is, Paradise Canyon owns the Wolf Creek Golf Course, which opened in 2000 and quickly became a "bucket list" golf course; a fan-favorite worldwide (Comp., at ¶ 24). Paradise Canyon employs 85 residents of the Virgin Valley, and Wolf Creek is responsible for bringing approximately 30,000 golfers to the City of Mesquite annually (id. at ¶ 25); Wolf Creek's annual economic impact to the City of Mesquite, along with the other golf courses, is approximately $60 million (id. at ¶ 26). But to continue employing residents and providing the City with tens of millions of dollars annually, the golf course needs irrigation water (id. at ¶ 35).

Currently, Paradise Canyon pays VVWD approximately $43,000 per year for irrigation water and $130,000 per year for drinking water, placing it on VVWD's Top Ten List of all local businesses for potable water charges. Instead of celebrating Wolf Creek's success as a local business and protecting it as a treasured community partner to the City of Mesquite, VVWD monopolistically demands a 500% rate hike on Paradise Canyon's irrigation water (from $250 per share to $1,246), and incorrectly asserts that: (1) it can legally raise Paradise Canyon's rate to whatever rate it pleases, without regard to the duties of good faith and fair dealing (Mot. at 8-15), and (2) this Honorable Court owes "unquestioned adherence" to VVWD's rate hike (Mot. at 16:10). VVWD is woefully wrong on its legal arguments, and intentionally misrepresents the facts of this case to paint Paradise Canyon in a false light. If Paradise Canyon must pay the exorbitant rate for irrigation water that VVWD demands, it will become the number one

ratepayer (potable and non-potable) in the whole area, surpassing the casinos, the School District and even the City of Mesquite itself, in terms of payments to VVWD, a result *never* contemplated during lease negotiations.

VVWD fallaciously asserts that "[t]his is a case of a golf course that doesn't want to pay *the going-rate* for irrigation shares" (Mot. at 2:12) and in the same breath avers it is not bound to charge a "going-rate" at all (id. at 8). To be sure, VVWD *must* comply with the duty of good faith and fair dealing attendant to "every" contract in the state of Nevada, and whether VVWD is doing so is a question-of-fact to be decided at trial, not on a motion to dismiss. Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 107 Nev. 226, 233, 808 P.2d 919, 923 (1991) ("Lewis's good faith relative to the Hilton–Dynamic Duo contract is a question of fact to be determined by the jury after presentation of all relevant evidence.").

II.

FACTUAL BACKGROUND

Paradise Canyon leases 155 irrigation shares from VVWD, to irrigate the Wolf Creek Golf Course in Mesquite, Nevada (Comp. at ¶ 33). VVWD does not generate or distribute the irrigation water, nor does it provide any infrastructure to irrigate the golf course; it is a 'middleman,' *leasing water rights for a profit* without adding any value to the transaction.

Paradise Canyon pays VVWD $250 per irrigation share, per year, but VVWD has unequivocally stated that it will increase the rate to $1,246 per share in 2020 when the current rate expires, a 500% increase (Comp. at ¶ 72). Well-settled contract law and reason protect Paradise Canyon from such rate hikes, and protection is needed from this Honorable Court to, *inter alia*, enforce the implied covenant of good faith and fair dealing. Paradise Canyon is one of the Top Ten ratepayers for water in the Virgin Valley. Why VVWD is targeting Paradise Canyon, essentially daring the golf course to "go brown" if it will not yield, is baffling.

As noted, the Wolf Creek golf course needs irrigation water (Comp. at ¶ 35). To ensure an uninterrupted and continuous water source, Paradise Canyon negotiated for and executed "the Lease" with VVWD in 2011, resulting in a rate of $250 per irrigation share, per year, and

an annual payment of $43,000 (id.). "[T]he goal in setting the rate was to provide stability to the golf courses for both lending and financing purposes while setting a rate that was comparable to rates paid by other users within the District." ***Exhibit 1*** (Decl. Gustavsen; Decl. Ramaker) at ¶ 15. To be clear, Paradise Canyon's rate is NOT a subsidy, it is "the market value for Irrigation Shares paid by other lessees whose place of use [is] the greater Mesquite area." Id. at ¶ 18.

Indeed, at the time that VVWD set Paradise Canyon's rental rate at $250 per share in 2011, VVWD also approved a lease with Southern Nevada Water Authority (SNWA), which was later amended in 2014 to set SNWA's rate at $1,246 per share, per year (Comp. at ¶¶ 51-52). VVWD now demands that Paradise Canyon also pay $1,246 per share (Mot. at 2:12), but does not mention that the deal with SNWA (for "inflated prices") was part of a legal settlement (hence the $4 million cap) dating back to 2011. See ***Exhibit 2***.[1] Moreover, SNWA actually leases VVWD's non-potable water and then promptly dumps it into Lake Mead in order to increase its legal share of potable water from the Colorado River (see Mot. at 4:18-19 ("surface water for culinary use in the Las Vegas Valley"), Ex. D (referencing the Seven States Agreement at ¶ C)).

Moreover, at the time VVWD approved the SNWA amendment in 2014 (setting the rate at $1,246 per share) the VVWD board members publicly affirmed that the SNWA lease rate would ***not*** be used to establish the new lease rate for Paradise Canyon (or any other golf courses) in 2020 (Comp. at ¶ 53). To that point, the former Board expressly represented that the SNWA lease rate related solely to the 2014 SNWA lease agreement, and that the SNWA lease rate would not affect or impact third parties like Paradise Canyon holding valid rights to renew their lease in 2020 (Comp. at ¶ 53).

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[1] Barbara Ellestad, http://mesquitelocalnews.com/2015/03/vv-water-district-vindicated-in-civil-lawsuits/, Mesquite Local News (accessed on July 24, 2018). Plaintiff hereby requests judicial notice of this news article, per NRS 47.130. Accord Plymouth County Retirement Ass'n v. Primo Water Corp., 966 F. Supp. 2d 525 (M.D. N.C. 2013) (Court may take judicial notice of newspaper articles on motion to dismiss, when they specifically discuss the subject of the case).

Now, VVWD demands that Paradise Canyon pay the SNWA lease rate of $1,246 per share, or forfeit its irrigation water. However, VVWD is 'the only game in town,' so to speak, such that Paradise Canyon cannot just go and obtain new water rights from someone else (Mot. at 4:21-22; 5:2-5). VVWD is obviously aware of Paradise Canyon's urgent need for this water, and not only threatens to declare a breach of the Lease if Paradise Canyon does not cave to VVWD's extortionate demands, but also files a motion to dismiss falsely casting Paradise Canyon as "catering to the wealthy" and operating against the interests of the local community. The truth is directly to the contrary: **Paradise Canyon is asking to pay a reasonable lease rate for irrigation water, to sustain its ongoing vitality for the benefit of the community as a whole, and if allowed to sub-lease its unused shares has offered to pass on any profits it would receive directly to VVWD**.

III.

LEGAL ARGUMENT

As noted above, and given the paucity of supporting authority coupled with inappropriate *ad homenin* remarks, VVWD's Motion was apparently written to arouse local animus - during an election year - and to paint Paradise Canyon in a false light, not to be taken seriously by this Honorable Court. Pursuant to controlling legal standards and contract principles, the Motion fails on *every* point.

A. The Motion fails on the standard for dismissal alone.

A motion to dismiss for failure to state a claim should not be granted unless it appears beyond a doubt that plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim. Buzz Stew, LLC v. City of N. Las Vegas, 124 Nev. 224, 181 P.3d 670 (2008). The test for determining whether allegations in a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of legally sufficient claims and the relief requested. NRCP 12(b)(5); Breliant v. Preferred Equities, Corp., 112 Nev. 663, 918 P.2d 314 (1996). For the purposes of a Rule 12(b)(5) motion, a court must accept all of the allegations in the complaint as true and draw all inferences in favor of the non-

moving party. Buzz Stew at 228, 181 P.3d at 672. Finally, Nevada is a notice pleading jurisdiction, such that a party need only plead (1) a short and plain statement of the claim showing the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. NRCP (8)(a).

Reference and incorporation are hereby made to all 101 allegations in the Complaint, as well as the prayer for relief and Exhibits 1 & 2. Even a cursory inspection of the Complaint reveals the frivolousness of VVWD's Motion; Paradise Canyon pled 73 detailed factual allegations, and adequately stated 5 causes of action for declaratory relief, with 1 succinct prayer for relief. VVWD has so much fair notice of the nature and basis of Paradise Canyon's legally sufficient claims for relief that it filed a 27-page motion (albeit one full of half-truths and express misrepresentations) seeking to dismiss each of the five claims. The legal sufficiency of each claim is addressed below, but Paradise Canyon clearly met and indeed well exceeded the notice-pleading standard.

B. VVWD's rate hike must be in good faith.

In the Fourth Cause of Action, Paradise Canyon seeks a declaration from this Court that: (1) VVWD must comply with the implied covenant of good faith and fair dealing; and (2) that VVWD's 500% rate increase is a breach of that implied covenant (Comp. at ¶ 94). VVWD states "all that matters is what the Lease itself says" (Mot. at 10:1-2). Well, the Lease itself says "[t]he laws of Nevada shall govern this Lease" (Comp. at Ex. 2, ¶ 12), and the laws of Nevada state: (1) VVWD must comply with the implied covenant of good faith and fair dealing; and (2) whether VVWD's 500% rate increase is a breach of that implied covenant is a question of fact to be decided by a judge/jury at trial, not on a motion to dismiss. A.C. Shaw Const., Inc. v. Washoe Cty., 105 Nev. 913, 914, 784 P.2d 9, 10 (1989) (emphasis in original) ("[T]he implied covenant of good faith and fair dealing exists in *all* contracts," including public works contracts); Hilton Hotels, 107 Nev. at 233, 808 P.2d at 923 ("Lewis's good faith relative to the Hilton–Dynamic Duo contract is a question of fact to be determined by the jury after presentation of all relevant evidence.").

Under Nevada law, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and execution." A.C. Shaw Constr., 105 Nev. at 914, 784 P.2d at 10 (quoting Restatement (Second) of Contracts § 205 (1981)); see also Nelson v. Heer, 123 Nev. 217, 163 P.3d 420, 427 (2007) ("It is well established that all contracts impose upon the parties an implied covenant of good faith and fair dealing, **which prohibits arbitrary or unfair actions by one party that work to the disadvantage of the other.**") (emphasis added). And a party *can* comply with the technical terms of their contract and still incur liability for breach of the implied covenant of good faith and fair dealing. Hilton Hotels Corp., 107 Nev. at 232, 808 P.2d at 922–23. Accordingly, VVWD is plainly wrong when it surmises that its discretion to increase the irrigation lease rate is "not conditioned, limited or otherwise restricted in anyway (sic)" (Mot. at 9:11-12). Indeed, "the implied covenants of good faith and fair dealing impose a burden that requires each party to a contract to 'refrain from doing anything to injure the right of the other to receive the benefits of the agreement.'" Integrated Storage Consulting Servs., 2013 WL 3974537, at *7, (D.Nev. 2013) (quoting San Jose Prod. Credit Ass'n v. Old Republic Life Ins. Co., 723 F.2d 700, 703 (9th Cir.1984)). The implied covenant thus complements the express grant of discretion, it does not replace it.

VVWD is further mistaken when it argues that the "sole and absolute discretion" language in the Lease undermines Plaintiff's claim (Mot. at 9:14-15). A considerable number of cases hold that the implied covenant of good faith *does* apply to a party's exercise of its "sole discretion" under a contract. See, e.g., Travellers Int'l, A.G. v. Trans World Airlines, Inc., 41 F.3d 1570, 1575 (2d Cir.1994) ("Even when a contract confers decision-making power on a single party, the resulting discretion is nevertheless subject to an obligation that it be exercised in good faith"); Tymshare, Inc. v. Covell, 727 F.2d 1145, 1154 (D.C.Cir.1984) (explaining that clause giving party the power to act "within [its] sole discretion ... is not necessarily the equivalent of 'for any reason whatsoever, no matter how arbitrary or unreasonable."); In re Gulf Oil/Cities Serv. Tender Offer Litig., 725 F.Supp. 712, 738 (S.D.N.Y.1989) (holding that provision allowing one party to make a determination in its "sole judgment ... does not

obliterate implied good faith"); In re Schick, 235 B.R. 318, 327–28 (Bankr.S.D.N.Y.1999) ("'Absolute discretion,' however, does not necessarily mean what it suggests, or negate the implied covenant of good faith and fair dealing."). Indeed, "ordinary contract principles require that, where one party is granted discretion under the terms of the contract, that discretion must be exercised in good faith—a requirement that includes the duty to exercise the discretion reasonably." Craig v. Pillsbury Non–Qualified Pension Plan, 458 F.3d 748, 752 (8th Cir.2006) (applying Washington law) (quoting Goldstein v. Johnson & Johnson, 251 F.3d 433, 444 (3d Cir.2001). Accord *Restatement (Second) of Contracts § 205, cmt d* (1981) ("Good faith performance. … A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain … *abuse of a power to specify terms*, and interference with or failure to cooperate in the other party's performance.") (emphasis added). As the Ninth Circuit has explained: "[g]ood faith limits the authority of a party retaining discretion to interpret contract terms; it does not provide a blank check for that party to define terms however it chooses." Scribner v. Worldcom, Inc., 249 F.3d 902, 910 (9th Cir. 2001) (emphasis added). Accord 23 Williston on Contracts § 63:22 (4th ed.) ("A breach of the implied obligation of good faith and fair dealing is obviously present where a party acts in bad faith, but it may also be found where the defendant acts in a commercially unreasonable manner while exercising some discretionary power under the contract."). **"Price gouging," for example, even where the contract provides discretion to set a price, satisfies the bad faith requirement for a claim of breach of the implied covenant of good faith and fair dealing.** See Edwards v. North American Power and Gas, LLC, 120 F.Supp.3d 132, 147 (D. Conn. 2015) (electricity provider's express discretion to set rates was limited by implied covenant of good faith and fair dealing); see also Curtis v. N. Life Ins. Co., 147 Wash. App. 1030 (2008) (insurance company's interest rate credits were tempered by duty of good faith and fair dealing). **Stated another way, while the Lease grants VVWD discretion, it does not grant the political subdivision the right to abuse that discretion.**

In Edwards v. North American Power and Gas, LLC, 120 F.Supp.3d 132 (D. Conn. 2015), a consumer sued his residential electricity provider for, *inter alia*, breach of the implied covenant of good faith and fair dealing, relating to the provider's discretionary rate hike. North American Power and Gas, LLC (NAPG), like VVWD in the instant case, operated as a "middleman," buying electricity and re-selling it to end-users after a "mark-up," and like VVWD in the instant case, NAPG's prices were "not regulated." Edwards, 120 F.Supp.3d at 135. Accordingly, NAPG "lured customers with a teaser rate" and then increased their rates by 200-400%. Id. at 136, 147. The plaintiff in that case, like Paradise Canyon here, "plausibly allege[d]" a claim for breach of the implied covenant of good faith and fair dealing by alleging interference with his reasonable expectation that any price increase would be based on a "wholesale market price," as opposed to the "artificially high electricity prices" that NAPG was actually charging. Id. at 136. Although the parties' agreement gave NAPG express discretion to increase its rates, the plaintiff sufficiently alleged that he reasonably expected any price increase would be a market-based price, in light of NAPG's marketing statements and its written Terms of Service. Id. "While the contract left the price open to be set at NAPG's discretion," the court explained, "the covenant of good faith and fair dealing mandates that NAPG exercise that discretion reasonably by charging a commercially reasonable price." Id. at 147. Accordingly, NAPG's motion to dismiss the implied covenant claim was denied.

Also, in Curtis v. N. Life Ins. Co., 147 Wash. App. 1030 (2008), several plaintiffs brought a class action against an insurance company for, *inter alia*, arbitrarily adjusting interest rates on the plaintiffs' annuity investments. The plaintiffs, who bought annuities from Northern Life Insurance Company (Northern), appealed a trial court's order dismissing their claim for breach of the implied covenant of good faith and fair dealing. The claim was based on allegations that Northern acted arbitrarily in crediting interest and failed to disclose its interest crediting method to its customers. On appeal, the court held that the duty of good faith and fair dealing clearly applied, even though the annuity contracts gave Northern unfettered discretion to

credit the interest, and that there were questions of fact about whether Northern acted in good faith and reasonably when it set the interest rates. Curtis, 147 Wash. App. 1030.

In Curtis, the evidence suggested that Northern exercised its discretion for profit only, without regard to the plaintiffs' justified expectations, potentially violating the duty of good faith and fair dealing; the case was remanded for a jury determination on the issue of good faith and fair dealing. Id. Here, Paradise Canyon alleges that, based upon the parties' course of dealing beginning with their 2007 lease, as well as VVWD's representations during lease negotiations in 2011, it reasonably expected that any rate increase for irrigation water in 2020 would be based on a market rate (Comp. at ¶¶ 30, 40, 51, 53, 54). This is also what former board members Carl Gustaveson and Sandra Ramaker understood when they approved the Lease in 2011. See ***Exhibit 1*** at ¶¶ 15, 18, 21, 22, 29, 30, 32, 34.[2] And VVWD tacitly acknowledges as much when it states: "SNWA sets the market-rate for MIC shares" (Mot. at 4:17) (acknowledging that the new rate should be a "market-rate").

Like the electricity provider in Edwards and the insurance company in Curtis, there are questions of fact about whether VVWD is acting in good faith and reasonably by setting Paradise Canyon's new rate commensurate with the SNWA rate. Hilton Hotels Corp., 107 Nev. at 233, 808 P.2d at 923 ("Lewis's good faith relative to the Hilton–Dynamic Duo contract is a question of fact to be determined by the jury after presentation of all relevant evidence.").When parties agree to allow one of them discretion over a contract term, "they agree merely to the grant of a power, not to the grant of a right to abuse that power." Summers, "'Good Faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code," 54 Va. L.Rev. 195, 197-98 (1968). Accordingly, as in Edwards and Curtis, this case should be decided on its merits, and VVWD's motion to dismiss should be denied.

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[2] Notably, and as VVWD concedes, none of the current board members served on the board in 2011 and have no personal knowledge as to what the reasonable expectations of the parties where when the contract was formed. But as noted above, 2 of the 3 members that were present, negotiated and voted for the approval of the lease have submitted declarations in support hereof that clearly contract the board's arguments now presented.

C. The implied covenant does ***not*** contradict the Lease.

VWD further attacks the Fourth Cause of Action by asserting that the implied covenant will impermissibly contradict the express terms of the Lease (Mot. at 11:13). The Lease does not state how VVWD will set a new rate in 2020, nor does it specify that SNWA's lease rate will be the new rate for Paradise Canyon (Comp. at ¶ 39). Rather, VVWD's Board approved the SNWA rate in 2014 with official representations that the SNWA rate would ***not*** be the new rate for Paradise Canyon (Comp. at ¶ 38), and the implied covenant compliments the express terms of the Lease by ensuring that VVWD exercises its discretion reasonably.

Under VVWD's arguments however, VVWD has "sole and absolute discretion" to charge Paradise Canyon not only the SNWA rate (i.e., a 500% increase) but *any* rate at all, regardless of good faith or fair dealing (Mot. at 11-13). Stated another way, VVWD argues that the new rate in 2020 need not have any relationship to a "market rate," and need not be in accordance with the reasonable expectations of Paradise Canyon (Mot. at 11:13-15). Inexplicably, however, VVWD also argues that "SNWA sets the market-rate for MIC shares" (Mot. at 4:17), implicitly acknowledging that its discretion is limited to a market rate.[3]

As noted, Nevada law holds that "the implied covenant of good faith and fair dealing exists in *all* contracts," A.C. Shaw Const., 105 Nev. at 914, 784 P.2d at 10 (emphasis in original), and a majority of jurisdictions expressly hold that the implied covenant applies even where a party is granted "sole discretion" under a contract. Therefore, the issues at trial will be: (1) what did the parties understand was the relevant "market;" and (2) is a 500% rate hike consistent with the reasonable expectations of the parties?[4] In short, VVWD is plainly wrong

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[3]Additionally, VVWD recently approved an amended lease with Conestoga Golf Club that requires the rate to be equal to 90% of the "fair market rate," with no stated floor once again reinforcing the expectations that the water rate shall relate to the rate derived in the market. The definition of "market" is an issue that will be resolved by expert testimony.

[4]VVWD correctly notes that "none of the current District Board members were serving on the board back in 2011 when the lease was approved" and therefore cannot speak to what the board then intended with regard to the relevant "market" or what the expectations of the parties were.

that it can charge whatever rate it pleases, as such an interpretation would render the contract illusory.[5] And VVWD's reliance on Big Horn Coal Co. v. Commonwealth Edison Co., 852 F.2d 1259 (10th Cir. 1988) and Third Story Music, Inc. v. Waits, 41 Cal. App. 4th 798 (1995) for this proposition is alarmingly misplaced.

In Big Horn Coal, the Tenth Circuit determined that a power company with express contractual discretion was still required to comply with the duty of good faith. Big Horn Coal, 852 F.2d at 1267. There, coal sellers sued a power company for declaratory relief regarding the power company's exercise of express discretion to reduce its purchase obligations. The United States District Court for the District of Wyoming entered judgment in favor of the plaintiffs, and the Tenth Circuit affirmed, holding, *inter alia*, that the express contract provision allowing the power company to reduce its purchase obligations for environmental reasons simultaneously imposed a requirement of good faith in the exercise of that discretion. The Tenth Circuit noted two instances where parties can negotiate for "uncontrolled discretion" that renders good faith irrelevant – i.e., when either party is given an unconditional power to terminate the contract, or where either may reduce the supply of certain goods by merely giving written notice within a specified time – neither of which applies here. Big Horn Coal Co., 852 F.2d at 1268. VVWD's block quotation from this case is taken out of context, and intentionally misrepresents what the case stands for, i.e., that "discretion must be exercised in good faith…" Id., 852 F.2d at 1269.

In Third Story Music, Warner Communications contracted with Third Story Music ("TSM") for the right to sell and distribute the recorded music of Tom Waits; the contract

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However, **2 of the 3 board members that negotiated, deliberated and voted to approve the Lease have submitted declarations expressly disavowing the position taken by VVWD in this action**. See ***Exhibit 1***.

[5]Courts will limit the exercise of discretion by imposing an objective standard of good faith "to save an otherwise illusory agreement." Third Story Music, Inc. v. Waits, 41 Cal. App. 4th 798, 804-05 (1995) (unwittingly cited by VVWD); California Lettuce Growers, Inc. v. Union Sugar Co., 45 Cal. 2d 474, 484 (1955) (to avoid an illusory contract, "a duty is imposed to exercise that discretion in good faith and in accordance with fair dealing").

specified that Warner "may at [its] election refrain from any or all of the foregoing" actions of marketing, distribution, manufacturing, and so forth. 41 Cal. App. 4th at 801. TSM contracted to receive a royalty on Warner's sales, but Warner declined to market certain recordings, thus TSM sued Warner for breach of the implied covenant, alleging that the refusal to market was in bad faith. The court rejected TSM's argument because reading into the parties' agreement a requirement that Warner market certain records would contradict the express language of the agreement that allowed Warner to elect not to market any records at all. 41 Cal. App. 4th at 808-809. In other words, the agreement left no room for TSM to argue that Warner was interfering with its reasonable expectations, because the contract expressly provided Warner the right to refrain from marketing the recordings. The Lease between Paradise Canyon and VVWD has no analogous provision.

Paradise Canyon is not requesting that VVWD be made to perform an obligation it expressly contracted to "refrain" from performing. Rather, as the case law above clearly states, VVWD must perform its contractual obligation to set a new rental rate within the standards of good faith and fair dealing. The Lease does not grant VVWD the right to refuse to act, as in Third Story Music. Instead, what VVWD bargained for was the ability to exercise discretion, which must be exercised in good faith. **Indeed, the Third Story Music court discussed other cases where the implied covenant did apply, and noted, for instance, that a contract permitting the buyer of sugar beets to set the price *would* impose "an obligation to set the price fairly in accordance with the covenant of good faith and fair dealing."** Third Story Music, Inc., 41 Cal. App. 4th at 805 (citing Cal. Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474 (1955)).

Not only are Big Horn Coal and Third Story Music not supportive of VVWD's position, but these opinions (relied upon so heavily by VVWD) both expressly support Paradise Canyon's position that VVWD's discretionary rate-setting is subject to the implied covenant of good faith and fair dealing. There being no support for VVWD's argument, the Motion should be denied.

D. There is no "right-of-first-refusal" exception to the implied covenant.

VVWD's next baseless argument against the Fourth Cause of Action is that Paradise Canyon holds only a "right-of-first-refusal," and therefore the implied covenant cannot apply (Mot. at 13). For support, VVWD curiously relies on Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 805 N.E.2d 957 (Mass. 2004), a Massachusetts case that does not stand for the proposition that VVWD cites it for. Moreover, Massachusetts courts are clear: "[t]he office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependant, cooperative relationship might enable in the absence of such rule, particularly where that relationship places one party at the other party's mercy." Chokel v. Genzyme Corp., 65 Mass. App. Ct. 1122, 843 N.E.2d 1117 (2006), aff'd in part, rev'd in part, 449 Mass. 272, 867 N.E.2d 325 (2007). And in Nevada: "the implied covenant of good faith and fair dealing exists in *all* contracts," A.C. Shaw Constr., 105 Nev. at 914, 784 P.2d at 10 (emphasis in original), such that there is no such thing as a "right-of-first-refusal" exception. See Hilton Hotels Corp., 109 Nev. at 1046, 862 P.2d at 1209 ("It is well established within Nevada that *every contract* imposes upon the contracting parties the duty of good faith and fair dealing."). Accord Ainsworth v. Combined Ins. Co., 104 Nev. 587, 592 n. 1, 763 P.2d 673, 676 (1988), cert. denied, 493 U.S. 958 (1989) (covenant applies to *every commercial contract*). See also, NRS 104.1304 ("*Every contract* or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement.") (emphasis added).

Indeed, Uno Restaurants dealt with reasonable expectations, it did not create a right-of-first-refusal exception to the implied covenant. In that case, commercial parties negotiated a lease, at arm's length, which gave Uno a right-of-first-refusal to purchase the commercial condominium it was leasing. At trial, Uno offered evidence of additional terms to the right-of-first-refusal – i.e., that if the owner were to market the entire building, the price of Uno's leased unit would be apportioned at 9.3 percent of the total price – but the lease provided no such terms. The jury found that the owner breached the covenant of good faith and fair dealing by violating the additional terms, but the Supreme Judicial Court held that the judge should have

entered a directed verdict on Uno's claim, as the covenant could not be used to impose additional terms in the parties' contract. The court reasoned that absent evidence at trial of collusion or some other deliberate attempt on the owner's part to interfere with Uno's rights, the covenant would not supply the additional duty of policing third-party offers to provide a certain apportionment, which Uno could have sought when it negotiated the contract.

Here, by contrast, there is no right-of-first-refusal provision within the Lease, and Paradise Canyon is not seeking to add additional terms to the parties' agreement. As in Loftin v. Estate of Loftin, 103 Nev. 499, 746 P.2d 130 (1987), "[w]hile the pertinent provision states that the rights created were 'rights of first refusal,' the specific terms of the provision describe rights which constitute an option." On a form lease, VVWD drafted a perpetual option to renew the Lease, which also gives VVWD discretion to set a new rate in 2020:

> a lessee that holds a right of first refusal on January 1, 2020 *may continue to lease those same irrigation shares on a perpetual basis* provided that lessee pays the annual rent as determined by VVWD at that time in VVWD's sole and absolute discretion.

(Comp. at Ex. 2). In exchange for the payment of $25,575.00, Paradise Canyon invoked this option and triggered its right to continue leasing all 155 of its irrigation shares as well as VVWD's discretion to set a new lease rate in 2020 (Comp. at ¶ 41). Nothing about this lease provision resembles a right-of-first refusal; the parties employed that language to describe Paradise Canyon's option to renew the Lease in perpetuity, but the Lease says nothing about third party offers, duties to provide notice of the same, nor anything about rights triggered upon the making of such an offer. Nor could it, as there was no "matching" requirement during the initial term. Uno Restaurants is therefore easily distinguished, to the extent it even needs to be.

Tellingly, VVWD buries this Uno Restaurants argument deep within its libelous motion, because it has zero credibility. Indeed, in this particular argument, VVWD argues that Paradise Canyon has a right-of-first-refusal, as opposed to an option to renew, and thus no implied covenant can apply (Mot. at 13). But in the next breath, on pages 18-20, VVWD asserts that Paradise Canyon holds an indefinite option to renew, as opposed to a right-of-first-refusal, that

is void *ab initio* due to its indefiniteness (Mot. at 20:5-7). Moreover, even VVWD's description of the purported right of first refusal is inconsistent. There is no mention that VVWD will solicit additional offers for the Lease Shares and provide Paradise Canyon notice to match any such offers. Rather, the right of first refusal is simply that Paradise Canyon can lease the shares in perpetuity as long as it pays the rate determined by VVWD in its sole and absolute discretion – and not in any manner tied to a legitimate offer made by a third party. Taking VVWD's argument to its logical conclusion, in 2020 VVWD would arbitrarily and capriciously set the rate at any amount, e.g., $10,000 per share, and if Paradise Canyon did not agree to pay VVWD could terminate its rights to lease the shares thereby jeopardizing its financing and continued operations. Of course, that interpretation would render the contract illusory – which is only saved by the "gap-filling" requirements of good faith and fair dealing. VVWD's contradictions and outright misstatements of fact and law do not begin or end there, but this one highlights the speciousness of VVWD's arguments, and the Motion should be denied.

E. Contract interpretation is a question of law, not a political one.

VVWD next asserts that the Fourth Cause of Action must be dismissed because its rates are a political decision that is "not subject to oversight" by the judiciary (Mot. at 16). In this declaratory relief action, however, Paradise Canyon is requesting *contract interpretation* of its Lease with VVWD, to enforce VVWD's contractual duty of good faith and fair dealing. See NRS 30.040(1) ("Any person interested under a … written contract … may have determined any question of construction or validity arising under the … contract … and obtain a declaration of rights, status or other legal relations thereunder."). "Contract interpretation is a question of law," not a political question. Am. First Fed. Credit Union v. Soro, 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015). And "the implied covenant of good faith and fair dealing exists in *all* contracts," including public works contracts. A.C. Shaw Const., 105 Nev. at 914, 784 P.2d at 10 (emphasis in original). **"To hold otherwise would suggest that a governmental entity has a right to refrain from cooperation in a contract, or that a governmental entity could act in bad faith, calculated to destroy the benefit of that contract to the other contracting party."**

Id. In short, VVWD is (once again) plainly wrong.

Moreover, to the extent any deference is owed, the "political decision" vis-à-vis Paradise Canyon's lease of irrigation shares was made in 2011, when the Board approved $250 per share based on the market rate for similar irrigation shares. See ***Exhibit 1***. Thereafter, VVWD executed an Estoppel Certificate that states Paradise Canyon has a perpetual right to renew its lease (Comp. at ¶ 46). Next, VVWD made public representations to the express effect that SNWA's rate would not be Paradise canyon's rate in 2020 (Comp. at ¶ 53). Then, as recently as May 2017, VVWD considered all of its water share leases and noted that Paradise Canyon's lease is "perpetual."[6] *These* political decisions negate VVWD's posturing in its Motion.

VVWD's bombast about a "political question" and a wealthy golf course being subsidized by the senior citizens of the Virgin Valley (who VVWD pejoratively states cannot afford a round of golf) is pure theatrics. Paradise Canyon is within the Top Ten of all potable water ratepayers in the Virgin Valley, meaning if anyone is subsidizing the golf course – or perhaps the citizens of Mesquite – it is Paradise Canyon itself. If Paradise Canyon must pay the exorbitant rate for irrigation water that VVWD demands, it will become the number one ratepayer in the whole area (potable and non-potable), surpassing the casinos, the School District and even the City of Mesquite itself, in terms of overall payments to the VVWD. To suggest that VVWD is legally permitted to do this without judicial oversight, "would suggest that a governmental entity has a right to refrain from cooperation in a contract, or that a governmental entity could act in bad faith, calculated to destroy the benefit of that contract to the other contracting party." A.C. Shaw Const., 105 Nev. at 914, 784 P.2d at 10. That result being contrary to Nevada law, VVWD's Motion should be denied.

F. Paradise Canyon's option to renew is "indefinite but limited."

The Fifth Cause of Action requests a declaration that Paradise Canyon's option to renew the Lease *in perpetuity* is valid (Comp. at ¶ 100). VVWD attacks this claim by arguing the

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[6]Accessed at https://zdi5.zd-cms.com/cms/res/files/522/2017-05-16-Board-Packet.pdf.

option is void *ab initio*, in light of a supposed indefiniteness as to its term (Mot. at 18-20). For support, VVWD first lies about the allegations in the Complaint, and then falsely states that Nevada law declares Paradise Canyon's option to renew "void on its face" (Mot. at 19:1-3).

First, VVWD begins with a verifiably false premise: that Wolf Creek "claims" it has a perpetual right to renew its lease with VVWD at "$500 per share," the so-called "fictional Mesquite rate" (Mot. at 18:21-25). Such a "claim" does not appear *anywhere* in the Complaint, so the Motion is simply baseless on this point. The Complaint's reference to $500 per share is a reference to the parties' 2007 lease (Comp. at ¶ 30), *which forms part of Paradise Canyon's reasonable expectations regarding the rate hike in 2020*. Paradise Canyon is not asking for a declaration at $500 per share, although that would be consistent with VVWD's obligation to set a new rate in good faith, as noted in the authorities above.

The allegations in the Complaint are that Paradise Canyon urgently needs irrigation water for its golf course, and thus contracted with VVWD for the same, whereupon *VVWD drafted and approved a perpetual renewal option in the Lease*, in exchange for $25,575.00 from Paradise Canyon (Comp. at ¶¶ 27-49). VVWD then expressly represented at board meetings and in an Estoppel Certificate that Paradise Canyon has the right to lease its irrigation water "on a perpetual basis" so long as it is not in breach of the Lease (Comp. ¶¶ 45-49). The true facts are as alleged in the Complaint, not as written in VVWD's sensationalist Motion.

Second, the Nevada cases cited by VVWD, i.e., Mohr Park Manor, Inc. v. Mohr, 83 Nev. 107, 424 P.2d 101 (1967) and Loftin v. Estate of Loftin, 103 Nev. 499, 746 P.2d 130 (1987), do not declare Paradise Canyon's option to renew "void on its face." And the Virginia case supposedly supporting this point mentions options to renew but says nothing about their enforceability. See Cities Service Oil Company v. Estes, 208 Va. 44, 155 S.E.2d 59, 62 (1967) ("A right of first refusal is distinguished from an absolute option in that the former does not entitle the lessee to compel an unwilling owner to sell. Instead it requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the right of first refusal."). **VVWD overtly misstates the holdings from these three cases.**

Mohr Park Manor, Inc. v. Mohr, 83 Nev. 107, 424 P.2d 101 (1967) unequivocally favors Paradise Canyon. Although cited by VVWD for the proposition that "options with an indefinite duration are void as a matter of law" (Mot. at 19:11), **this Nevada case says the exact opposite.** In fact, the court reversed the trial court on that exact issue, **finding that the option in that case had an "indefinite but limited time," and was therefore enforceable.**

In Mohr Park Manor, the "main issue to be decided" was whether the option was "invalid because of uncertainty and indefiniteness as to time." 83 Nev. at 111. The trial court erroneously held, as VVWD urges here, "that the failure to specify a time within which the 'option' could be exercised rendered the instrument a nullity, a *nudum pactum*," incorrectly saying "the crux of the instant case is that no valid option agreement ever was executed." Id.

On appeal, the Supreme Court of Nevada acknowledged the general rule that "an option actually intended by the parties to run for an unlimited time (i.e. forever) is void," but went on to analyze the facts of the option contract at issue, which is analogous to the perpetual lease renewal provision in this case, and specifically declared that the court was not concerned with an option for an "unlimited" time but rather an option for an **"indefinite but limited time**." Mohr Park Manor, 83 Nev. at 113, 424 P.2d at 105. "According to the language of the agreement, that time was 'as soon as financing has been obtained,'" thus the judgment of the trial court was reversed and the case was remanded to give effect to the intent of the parties.

Similarly, here, the lease renewal option specifically states a duration: "a perpetual basis" for as long as "Lessee is not in breach of this Lease…" (Comp. at Ex. 2, page 2, ¶2(a)). The Estoppel Certificate executed by VVWD affirms as much, and also states that "[Paradise Canyon] shall have the right to continue to lease the same Irrigation Shares on a perpetual basis so long as [Paradise Canyon] is not in breach of the Lease…" See ***Exhibit 3***.

Like in Mohr Park Manor, the Lease "is no pearl of draftsmanship," but it was drafted by and is therefore construed against VVWD. As stated in Mohr Park Manor, the role of this Honorable Court is to interpret the contract "to carry out the intent of the parties and so as to make the agreement lawful, effective and reasonable." And according to the Complaint, the

parties specifically included this perpetuity language due to the critical importance of irrigation water to the Wolf Creek golf course and its secured lender (Comp., at ¶¶ 35-38).

Also, Loftin v. Estate of Loftin, 103 Nev. 499 (1987) involved the improper sale of a partnership interest, over the objection of an optionee who wished to purchase the interest. The 3-page opinion offers minimal guidance here, other than to specifically draw a distinction between an option and a right of first refusal, **regardless of how the parties describe those rights in their contract.** See Loftin, 103 Nev. at 502 ("While the pertinent provision states that the rights created were "rights of first refusal," the specific terms of the provision describe rights which constitute an option."). VVWD's citation to Loftin is a feigned attempt to bolster its misplaced reliance on Cities Services, for the lie that "pursuant to Nevada law" Paradise Canyon's perpetual option is "void on its face." Loftin does not support this lie, and neither does Citites Services.

In Cities Services "the issue presented" was whether a right of first refusal to buy certain property was exercisable at a judicial sale. There is no analogous issue in this case. Indeed, in that case, a lessee had both an option to buy the property at any time during the lease for $45,000 and a right of first refusal to match any offer made by a third party during the life of the lease. The Virginia court aptly pointed out the distinction between the right of first refusal "as different from" the option to purchase and noted that a right of first refusal requires notice and an opportunity to match the pending offer. **That is not at all what the lease between VVWD and Paradise Canyon provides; not even close.** As with all of VVWD's other arguments, the truth is to the contrary, and VVWD's reliance on this case is a total red herring.

"[T]he generally accepted rule, followed by a majority of [] jurisdictions, is that while the law does not favor a covenant to renew a lease perpetually, the covenant will be enforced where the language of the lease unmistakably indicates that the parties intended to provide for such renewal." Dixon v. Rivers, 37 N.C. App. 168, 171, 245 S.E.2d 572, 574 (1978). Stated differently, a perpetual lease, or a lease containing a covenant for perpetual renewal, does not violate the rule against perpetuities. See Restatement (First) of Property §

395 (1944) ("When a lease limits in favor of the lessee an option exercisable at a time not more remote than the end of the lessee's term ... to obtain a new lease or an extension of his former lease, then such option is effective, in accordance with the terms of the limitation, even when it may continue for longer than the maximum period described in § 374 [i.e., the Rule against Perpetuities]."); 61 Am. Jur. 2d Perpetuities, Etc. § 48. In fact, a lessee's option to renew a lease is considered a common law exception to the rule against perpetuities. Id. ("The common law exceptions to the rule against perpetuities provide that the rule does not apply to the following: (1) a lessee's option to renew a lease..."). See also Abbot, Leases and the Rule Against Perpetuities, 27 Yale L.J. 878 (1918) (stating that there seems to be no question that covenants for renewal at the option of the lessee, exercisable at any time during the term, are an exception to the rule against perpetuities, and are sustained by the great weight of authority in both England and America, even though the term of the lease may be so long that the option may be exercised at a time beyond the period of the rule). The "rationale" for this exception is as follows:

> Options of the sort described in this Section serve sufficiently useful ends to justify excepting them from the operation of the rule against perpetuities. A lessee in possession of lands, especially when the term is sufficiently long to make a question as to the rule against perpetuities possible, needs to be able so to plan for the future as to get the benefits of the full utilization of the land during his lease-term. This makes it important for such a lessee and for society in general, that extensions or renewals of the term and purchase of the lessor's ownership be facilitated rather than prohibited.

Restatement (First) of Property § 395, comment a (1944).

In other words, "the reason a lease containing a covenant for perpetual renewal does not contravene the rule against restraints on the power of alienation is that **the covenant to renew constitutes a part of the lessee's present interest**." 162 A.L.R. 1147 (Originally published in 1946). Or, as the court in Tipton v. North, 92 P2d 364 (Okla. 1939) observed: "It is obvious that a perpetual lease, or a lease containing a covenant for perpetual renewal, is not a restraint or limitation upon the power of alienation of the fee, for there are at all times persons in being who

by joining can convey the fee."

Thus, in Becker v. Submarine Oil Co., 55 Cal. App. 698, 204 P. 245 (Cal. Ct. App. 1921), for example, the court explained that an oil lease that contained a provision for perpetual renewal at the option of the lessee *was* enforceable, where it was clearly the intention of the parties that the lessee would have that right. The contention in Becker centered upon a clause of the lease which read as follows:

> To have and to hold the same unto the party of the second part, his heirs and assigns, for the term and period of 10 years from date hereof with *the right of renewal for a further term of 10 years at the end of such term, or at the end of any subsequent term for which it may be renewed*. (emphasis added).

Construing that language, the court held: "In the instant case the language is so plain that no room is left for construction. The parties have made it clear that it was their intention that the lessee should have the right of renewal in perpetuity." Becker, 55 Cal. App. at 700.

Here, on a form lease, VVWD chose the perpetual lease renewal language, and specifically included the word "perpetual" in two different places, to describe Paradise Canyon's option to renew:

> **Page 1, FN 5:** "…a lessee that holds a right of first refusal on January 1,20202 may continue to lease those same Irrigation Shares on a perpetual basis provided that the lessee pays the annual rent as determined by VVWD at that time in VVWD's sole and absolute discretion" (Comp. at Ex. 2).

> **Page 2, ¶2(a):** "a lessee that holds a right of first refusal on January 1, 2020 *may continue to lease those same irrigation shares on a perpetual basis* provided that lessee pays the annual rent as determined by VVWD at that time in VVWD's sole and absolute discretion" (id.).

Here, even more so than in Becker, there is *no ambiguity* in the Lease, as it expressly provides that Paradise Canyon has the right to continue leasing "on a perpetual basis" for as long as Paradise Canyon pays rent and is not in breach. As in Becker, the Lease clearly demonstrates the intent of the parties to confer a right of renewal in perpetuity. And in Nevada, contracts are construed to "effectuate the intent of the parties." Anvui, LLC v. G.L. Dragon, LLC, 123 Nev. 212, 215–16, 163 P.3d 405, 407 (2007) (further explaining that any ambiguity

"should be construed against the drafter," i.e., VVWD).

If, however, the Court finds some ambiguity in the Lease, and must determine the intent of the parties "in light of the surrounding circumstances," here is a short collection of facts completely debunking VVWD's arguments:

- In March 2011, VVWD's Board of Directors met for a regularly scheduled meeting, whereupon it took up the matter of the subject leases, and thereupon discussed the perpetual renewal provision, as follows: "[VVWD's General Manager Ken Rock] explained that the agreement would only lock in a rate for a certain period of time; *that they would still be guaranteed service after the term of the agreement*, but the rate per thousand gallons could change." See (Minutes of Virgin Valley Water District Regular Board Meeting, Virgin Valley Water District Office, MARCH 1, 2011, Item 12 (emphasis added).[7]

- When the board of directors considered and approved the 2014 SNWA Lease Agreement, and recognizing that the SNWA Lease Rate was "inflated" it affirmatively stated that the SNWA Lease Rate would not be used to establish the new Lease Rate for Paradise Canyon (and other golf courses) on the Lease Renewal Date. To that point, the Board expressly represented that the SNWA Lease Rate related solely to the lease of the irrigation shares the subject of the 2014 SNWA Lease Agreement, and that the SNWA Lease Rate would not affect or impact third parties like Paradise Canyon holding valid rights of first refusals or options (Comp. at ¶ 53).

- "[D]uring the negotiations, the District understood that Wolf Creek, and the other golf courses, for long term financial and operational purposes, required assurances from the District that it had rights to continue to lease the Leased Shares beyond the Initial Term." Exhibit 1 at ¶ 26. "In recognition of the operational and financial needs of Wolf Creek, and in exchange for the payment of $25,575.00 (the "Right of First Refusal Fee") the District provided Paradise Canyon the right of first refusal to continue leasing all of the Leased Shares ***on a perpetual basis***. Paradise Canyon paid the Right of First Refusal Fee and, as a result, has the right to the Leased Shares – and the use of the allocated water – in perpetuity." Id. at ¶ 27

- In 2012, Paradise Canyon applied to Nevada State Development Corporation ("Lender") for a loan in the principal amount of $2,125,000 having a term of twenty (20) years (the "SBA Loan") (Comp. at ¶ 45). In connection therewith, on November 16, 2012, the VVWD executed and delivered to Paradise Canyon and the Lender that document Styled "Estoppel and Consent to Assignment Agreement" (the "Estoppel Agreement") (id. at ¶ 46). VVWD understood that Paradise Canyon and its Lender sought assurances in advance of the SBA Loan that the terms and

[7] Accessed at https://zdi5.zd-cms.com/cms/res/files/522/M2011-03-01%20Final.pdf.

conditions of the Lease were enforceable (id. at ¶ 47). Pursuant to the Estoppel Agreement, VVWD represented to the Lender and Paradise Canyon, among other things, that Paradise Canyon has the right to lease the Leased Shares on a perpetual basis (id. at ¶ 48).

- As recently as May 2017, VVWD's Board of Directors met for a regularly scheduled meeting, whereupon it took up the matter of potentially seeking non-binding recommendations from the Public Utilities Commission (PUC) as to future, proposed rate increases affecting, *inter alia*, the subject leases. See Minutes and Agenda Packet for Virgin Valley Water District Regular Board of Directors' Meeting, May 16, 2017, Item 7.[8] In furtherance of this discussion, VVWD prepared and circulated to its Board of Directors a "lease irrigation shares spreadsheet," which lists pertinent identifying and substantive information regarding the subject leases, including the "Expiration Date" for each lease, with Footnote #1 stating, accordingly: "First Right of Refusal (Perpetual)."

To "effectuate the intent of the parties," the Lease must be construed by its terms – i.e., as an option to renew, in perpetuity, for as long as Paradise Canyon pays its rent and is not in breach. Here, as in Becker, *in light of the language utilized by VVWD in drafting its own form lease,* the parties have made it clear that it was their intention that Paradise Canyon should have the right of renewal in perpetuity. Here, as in Mohr Park Manor, the option runs for an "indefinite but not unlimited time," and is thus enforceable, as a matter of law.

G. The restraint on sub-leasing is *per se* invalid.

In its Third Cause of Action, Paradise Canyon requests a declaration that the restraint on sub-leasing is unenforceable as a matter of law (Comp. ¶ 89). The Lease restrains any attempt to sub-lease the water rights represented by the Leased Shares, e.g., to SNWA directly, as "void" (Comp. ¶ 66), making it *per se* "invalid." VVWD has threatened to declare a breach of the Lease if Paradise Canyon does not surrender its unused lease shares so that VVWD can turn around and lease those shares to SNWA, for a higher profit. Paradise has offered to sub-lease its unused shares to SNWA directly, so that Paradise Canyon can continue to control the shares to meet its future irrigation needs, and to pass on any profits it would receive directly to VVWD. The parties are in disagreement about the restraint and declaratory relief is thus appropriate.

[8] Accessed at https://zdi5.zd-cms.com/cms/res/files/522/2017-05-16-Board-Packet.pdf.

"At the very root of American property law is the concept of alienation, or the right of an owner of property to freely transfer real property." 33 E. Min. L. Found § 16.02, Chapter 16 Restraints on Alienation in Coal Leases, Background on Restraints on Alienation, 2012 WL 8018469 (2012). "It is a first principle of the law, that he who has a right to property, has the right to dispose of it, whether by grant or devise, as he may deem proper." Barnard's Lessee v. Bailey, 2 Del. 56, fn. a (Del. Super. Ct. 1836). And in Nevada, "[w]ater rights are freely alienable property interests." Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp., 124 Nev. 770, 774, 191 P.3d 1189, 1192 (2008).

Here, the Lease is an agreement for water rights, and states that all attempted assignments and subleases "shall be void." This is known in the law as a "disabling restraint," which is *per se* "invalid." See Restatement (First) of Property § 404 (1944) (definitions); Restatement (First) of Property § 405 ("Disabling restraints, other than those imposed on equitable interests under a trust, are invalid."). Accord New Home Fed. Sav. & Loan Ass'n v. Trunk, 22 Pa. D. & C.3d 399, 414 (Pa. Com. Pl. 1982) ("an absolute restraint is against public policy and, therefore, of no legal effect.").

VVWD cites Gramanz v. T-Shirts & Souvenirs , Inc., 111 Nev. 478 (1995) for the statement that "Nevada courts regularly enforce restrictions on transfers or assignments of stocks and shares" (Mot. at 21:6), but Gramanz **does not deal with water rights**, and the facts are very distinguishable. In that case, two men formed a partnership to own and operate a souvenir retail store and obtained several loans for that purpose. One of the men later desired to sell his interest in the company before the loans were repaid, and the other man objected, at least until the debt was fully repaid. The trial court found that "no provision in the [parties'] agreements provide[d] for such an event," and thus "properly looked to parole evidence to determine whether the parties intended the stock to be freely transferable at any time." Gramanz, 111 Nev. at 486. The trial court determined "that the parties intended less than free alienability of the stock," and prohibited the sale until the loans were repaid. Id. Here, VVWD proffers no reason for the restraint within the Lease, and as such, its argument lacks merit.

H. Countermotion: Paradise Canyon requests summary judgment on the First and Second Causes of Action.

In its First Cause of Action, Paradise Canyon requests a declaration that it is not in breach of the Lease for failure to use "effluent water" (Comp. ¶ 78). Section 5 of the Lease requires Paradise Canyon to use available recycled or "effluent" water from the City of Mesquite for its landscaping or irrigation before using the water represented by the Leased Shares (Comp. ¶ 43). To date, the City of Mesquite has not made treated, effluent water available to Paradise Canyon (id. ¶ 44). VVWD has repeatedly threatened to declare a breach for Paradise Canyon's purported failure to use effluent water, in an effort to compel Paradise Canyon to decrease its leased irrigation shares so that VVWD can lease those shares to SNWA (Comp. ¶¶ 64-65). VVWD knows that Paradise Canyon cannot return its unused shares because doing so will create uncertainty in the future viability of the Wolf Creek Golf Course, which desperately needs all the irrigation water it can get. In any event, VVWD now submits to the declaratory relief requested (Mot. at 2, 24), so Paradise Canyon requests summary judgment.

In its Second Cause of Action, Paradise Canyon requests a declaration that it is not required to amend the Lease to decrease its number of Leased Shares, and that the failure to establish beneficial use of the water allocated to the Leased Shares is not a breach (Comp. ¶ 84). The requirement to prove "beneficial use" does not appear in the Lease (mot. at Ex. 2), but is instead a scheme by MIC to forcibly reduce Paradise Canyon's number of leased shares so it can lease those shares (at a higher profit) to SNWA (Comp. ¶ 61). Nevertheless, VVWD has threatened to declare a breach of the Lease based upon the purported failure of Paradise Canyon to establish beneficial use (Comp. ¶ 62). VVWD now admits it lacks standing to enforce MIC's beneficial use "requirement" (Mot. at 3), thus Paradise Canyon requests summary judgment.

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IV.

CONCLUSION

Based upon the foregoing, VVWD's Motion to Dismiss must be denied in its entirety and summary judgment should be granted on the First and Second Causes of Action.

DATED this 9th day of August, 2018.

SYLVESTER & POLEDNAK, LTD.

By: */s/ Jeffrey R. Sylvester*

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CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of SYLVESTER & POLEDNAK, LTD. and that on this 9th day of August, 2018, I caused to be served a copy of the above-entitled document on the parties set forth below via electronic service pursuant to EDCR 8.05(a) and 8.05(f) to:

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DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE CANYON, LLC, a Nevada limited liability company, Plaintiff, v. STATE OF NEVADA ex. rel. VIRGIN VALLEY WATER DISTRICT, a political subdivision of the State of Nevada; and DOE Individuals I through X; and ROE Corporations and Organizations I through V, inclusive, Defendants.	Case No. A-18-774539-B Dept. No. XIII **SUPPLEMENT IN SUPPORT OF OPPOSITION TO VIRGIN VALLEY WATER DISTRICT'S MOTION TO DISMISS** Date: Aug. 15, 2018 Time: 9:00 AM

Plaintiff PARADISE CANYON, LLC ("Plaintiff" or "Paradise Canyon"), by and through its attorneys at the law firm of Sylvester & Polednak, Ltd., hereby files this SUPPLEMENT in Support of it Opposition to VIRGIN VALLEY WATER DISTRICT's ("VVWD") Motion to Dismiss. In the interest of judicial economy, Paradise Canyon addressed VVWD's arguments as to the Fourth and Fifth Causes of Action in the main Opposition, and hereby contemporaneously requests leave to exceed the 30-page limit set by EDCR 2.20(a) to file this Supplement. Paradise Canyon wishes to file this "Supplement" to address VVWD's misstatements of law and fact regarding the First, Second and Third Causes of Action. Good cause exists to allow this Supplement, inasmuch as over $1 million is at stake in this action, and VVWD filed a lengthy brief filled with *ad hominem* attacks that require a response. More specifically, this action is being reported on by the Mesquite Local News, and the aspersions cast by VVWD have already been circulated to the local citizenry. To correct VVWD's intentional misrepresentations and efforts to paint Paradise Canyon in a false light, the Supplement is necessary.

DATED this 9th day of August, 2018.

SYLVESTER & POLEDNAK, LTD.

By: */s/ Jeffrey R. Sylvester*
Jeffrey R. Sylvester, Esq.
Kelly L. Schmitt, Esq.
1731 Village Center Circle
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Attorneys for Plaintiff

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES

To correct VVWD's intentional misrepresentations and efforts to paint Paradise Canyon in a false light, on the First, Second and Third Causes of Action, this Supplement is necessary.

I. As to the First Cause of Action, Paradise Canyon is entitled to a declaration that the alleged failure to use effluent water does not constitute a breach of the Lease.

VVWD has repeatedly alleged that the failure to use effluent water is a breach of the Lease. More specifically, VVWD has alleged – on a number of occasions – that the City of Mesquite has made available for use effluent water and that the failure of Paradise Canyon to use effluent water constitutes a material breach of the Lease. Paradise Canyon responds that the City of Mesquite has ***not*** made available for use effluent water and that its failure to use effluent water does not constitute a material breach. More to the point, Wolf Creek believes – and discovery will establish - that the City of Mesquite has improperly designated its water as effluent when, in fact, it is not. Additionally, Wolf Creek will demonstrate that whether the water made available as "effluent" is in actuality "effluent" it is of an insufficient quantity to meet the watering needs of the golf course. This actual controversy has existed since 2014 and continues today.

On October 18, 2017 VVWD by and through its President, Nephi Julien, Vice-President, Ben Davis, Director Richard Bowler, Director Barbara Ellestad, and Director Travis Anderson, ***penned and signed*** correspondence to Wolf Creek demanding a return of what it perceived as excess water rights stating, in part, as follows:

> You have attempted to justify your refusal to use the city's effluent claiming that during the summer months the city is unable to provide enough effluent to meet your needs. Notably, the lease agreement does not include any temporal limitations on your obligation to use the city's effluent. It simply requires that the effluent be "available" and the District is informed there are times when it is not being used by anyone. ***Your failure to use the available effluent appears to constitute a material breach of your lease justifying rescission of the lease and a return of all shares.***

See ***Exhibit 4*** correspondence dated October 18, 2017 (emphasis added).

Doubling down on its threatened breach claim, VVWD, by and through Mr. Bingham, penned correspondence dated November 17, 2017 providing "one final opportunity to voluntarily amend the leases to reduce the number of shares in accordance with VVWD's letters of October 18, 2017." Mr. Bingham stated:

> Concerning available effluent, the leases expressly require your clients to use the city's effluent before the water associated with the leased shares and the city stated it was ready to commence delivery of effluent water more than six years ago. (See the enclosed 2011 correspondence from the city). However, the enclosed Effluent Flow Logs and related records show that Wolf Creek has taken no effluent and Conestoga last took effluent in November 2015.
>
> These matters are of paramount importance and time is of the essence. In the Amended Permits the State Engineer declared, "Water must be placed to beneficial use and proof of the application of water to beneficial use shall be filed on or before December 30, 2017." Additionally, the District must notify SNWA before December 31, 2017 how many shares the District will have available to lease to SNWA**. The District is giving the golf courses one final opportunity to voluntarily amend the leases to reduce the number of shares in accordance with the District's letters of October 18, 2017. Please respond no later than close of business on December 1, 2017. '**

See correspondence dated November 17, 2017 (emphasis added).

As the Leased Shares are the only source of water available to service the golf course, Wolf Creek was – understandably – concerned as VVWD overtly and expressly stated that failure to use the effluent water ***constitute[d] a material breach of your lease justifying rescission of the lease and a return of all shares***. Despite demand to retract the claim of breach, VVWD remained steadfast in its demand that Wolf Creek amend the lease to reduce the number of Leased Shares and to commence the use of effluent water. As VVWD refused to retract the demand or otherwise provide assurances that it would not attempt to rescind the Lease compelling a return of the Leased Shares –this declaratory relief action was filed. However, it is paramount to note that, in advance of filing the instant action, Wolf Creek implored VVWD to reconsider its position and advised that – given the critical importance of the water to the ongoing operation of the golf course -it would be required to remain proactive stance and seek a declaration for the court as to the parties rights and responsibilities under the terms of the Lease

and attached a draft complaint addressing the requested relief. In its cover, Wolf Creek stated:

> As you know, the District has alleged that Paradise Canyon has breached the terms and conditions of the lease agreement – though no formal notice of breach has been provided to Paradise Canyon or its lender. Additionally, it appears that the District intends to increase the lease price per share to $1,246 (the SNWA lease rate) upon the lease renewal date in 2020. Paradise Canyon disputes that it is in violation of any term or condition of the lease and further opines that the application of the SNWA lease rate would violate the covenant of good faith and fair dealing. **Given the critical nature of the utility provided, Paradise Canyon must be proactive in resolving these disputes. To that end, this firm has been authorized to commence an action seeking declaratory relief of the foregoing issues – a copy of which is attached. To be clear, if required to be filed, Paradise Canyon will not be seeking damages or other remuneration from the District. Rather it will simply seek a declaration of the rights and obligations of the parties relative to the terms and conditions (and performance) of the lease agreement.** Paradise Canyon does not desire conflict with the District or its board members and recognizes the important and, often times, difficult functions they perform. But, as an employer of more than 75 Mesquite area residents and as an integral part of the Mesquite community, it must be proactive in its approach to ensuring its ongoing vitality
>
> Please don't consider this correspondence a threat of litigation. Rather, I ask that you perceive it in the spirit in which it is written – an effort to open a productive dialogue to reach a mutually beneficial resolution to further our clients' respective interest and goals. **We have been directed to refrain from commencing this action to afford the District the opportunity to digest the offer and, hopefully, commence a productive dialogue. However, given the paramount importance to both the District and Paradise Canyon of an expedient resolution, if no response is received to this offer on or before the close of business January 18, 2018, we will file the same.** The deadline not intended to be punitive. Accordingly, if the District needs additional time to consider these most important issues, please do not hesitate to request the same prior to the stated deadline.
>
> Thank you in advance for your thoughtful consideration.

See correspondence dated January 12, 2018. (emphasis added).

No response was forthcoming and the action was filed. On July 9, 2018 (after the action was commenced) on the day VVWD's responsive pleading was due - and apparently in recognition that VVWD had no good faith defense to the declaratory relief claim - Mr. Bingham sent correspondence stating – contrary to their express representation and threats – that VVWD "did not intend to enforce that obligation." See Exhibit R to Virgin Valley Water District's Motion to Dismiss. It is based upon this correspondence that VVWD claims that the cause of

action is not ripe. The argument is without merit.

The Nevada Supreme Court has held that declaratory relief is available when (1) a justiciable controversy exists between persons with adverse interests, (2) the party seeking declaratory relief has a legally protectable interest in the controversy, and (3) the issue is ripe for judicial determination. Knittle v. Progressive Cas[.] Ins. Co., 112 Nev. 8, 10, 908 P.2d 724, 725 (1996). However, whether a determination in an action for declaratory judgment is proper is a matter for the district court's discretion and will not be disturbed on appeal unless the district court abused that discretion. Pierce v. Canyon Gate Med. Grp., LLC, No. 65832, 2015 WL 9484727, at *1–2 (Nev. Dec. 23, 2015).

As a threshold issue, ripeness is determined as of the commencement of the action and not the date that the adverse party concedes it has no good faith defense to the claim. Herbst Gaming, Inc. v. Heller, 122 Nev. 877, 887, 141 P.3d 1224, 1230–31 (2006) ("ripeness focuses on the timing of the action…"). Moreover, the statutory scheme does not engraft a requirement that a formal notice of default is required as a predicate to seeking judicial relief. Nor – given the critical interests at stake – should it. As the Nevada Supreme Court long ago stated:

> We are satisfied that appellant is arguing for too narrow a construction of our declaratory relief statute, and one which, if adopted, would seriously impair a statute which has already proved, and should hereafter increasingly prove, a valuable enlargement of the judicial power of our courts. **It was a defect of the judicial procedure which developed under the common law that the doors of the courts were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed upon a party who did not wish to violate the rights of another nor to have his own rights violated, thus compelling him, where a controversy arose with his fellow, to run the risk of a violation of his fellow's rights or to wait until the anticipated wrong had been done to himself before an adjudication of their differences could be obtained. Thus was a penalty placed upon the party who wished to act lawfully and in good faith which the statute providing for declaratory relief has gone far to remove. We feel that the courts should construe the statute with reasonable liberality so that, in the language quoted, supra, from Hess v. Country Club Park, [213 Cal. 613, 2 P.2d 782] it may not 'lose a large part of the value which, upon its enactment was supposed to attach to it."**

Kress v. Corey, 65 Nev. 1, 35–36, 189 P.2d 352, 368 (1948)(emphasis added).

As noted above, VVWD affirmatively represented that it deemed the failure to use the effluent water to be a ***material breach*** of the lease which could result in the rescission of the lease and return of the Leased Shares. Mr. Bingham echoed and reinforced VVWD's claim and provided "one last opportunity" to correct the deficiencies. And despite a good faith effort to avoid the instant litigation, VVWD continued its strong-arm attempts to compel a return of the Leased Shares and refused to retract the claim of breach.

Remarkably, VVWD affirmatively represents that "it wishes to avoid any unnecessary expenditures of public funds and the issue concerning both effluent and beneficial use are not genuinely in dispute" and that "litigating such matters would constitute a waste of money, the court's time and judicial resources." See Motion to Dismiss at p. 24 ll 7-11. The argument is disingenuous at best. Two points: (1) if VVWD did not intend to declare a breach of the Lease causing a rescission of the Lease and return of the Leased Shares, why did every board member expressly sign a letter asserting a "material breach" demanding a return of excess Leased Shares? And, (2) if VVWD was genuinely concerned about the waste of public funds and this Courts' resources, why did VVWD refuse to retract their claim of breach when it received the draft complaint outlining its claims for declaratory relief nearly 7 months prior to Mr. Bingham's July 9, 2018 correspondence. The questions are not rhetorical. As will be established in the case, the actions of the board are the efforts of a monopolistic public utility seeking to deprive Wolf Creek of the benefits of its contract.

II. Wolf Creek is Entitled to a Declaration that the Alleged Failure To Establish the Beneficial Use of the Water Does Not Constitute a Breach of the Lease.

On June 2, 2017 the State Engineer issued Amended Permits Nos. 83920, 83921 and 83922 (the "Amended Permits") for the purpose of clarifying that the total combined duty of surface water under the Amended Permits shall not exceed 12,009.56 acre-feet annually for the irrigation of 1,535.37 acres. The Amended Permits require Proof of Beneficial Use ("PBU") to be filed with the State Engineer by December 30, 2017 confirming the beneficial use of all of

the 12,009.56 acre-feet of water for a one year period. While required to demonstrate beneficial use, the failure to do so does not result in a forfeiture of all or any portion of the Water Rights as Nevada Revised Statute NRS 533.060 provides: "[r]ights to the use of surface water shall not be deemed to be lost or otherwise forfeited for the failure to use the water therefrom for a beneficial purpose."

By resolution dated June 22, 2017 (the "Resolution"), the MIC Board of Directors, by unanimous vote, directed the MIC Watermaster to file PBUs for the Amended Permits only when doing so will preserve, protect and perfect the Amended Permit's full combined annual duty of 12,009.56 acre-feet by showing the beneficial use as follows:

i. MIC requests that all irrigating shareholders, to the extent practical call for, take delivery of, and use of all their per share allocations of water in 2017 and 2018;

ii. The MIC watermaster shall as soon as possible prepare a "true-up" water delivery accounting of irrigation water delivered from June 22, 2017 forward;

iii. To the extent any irrigation (agricultural or golf course) shareholder water has not been delivered during a calendar month, the watermaster shall set up an "available unused water" account which aggregates a cumulative total in acre-feet of water available under the Amended Permits delivered during each calendar month remaining in 2017 and continuing through 2018;

iv. the MIC Board of Directors – ostensibly pursuant to the authority vested in its Bylaws – determined that any unused water shall be allocated to the shares controlled by SNWA for a consecutive 12 month period in order to demonstrate beneficial use as required pursuant to the Amended Permits – on such terms as the MIC Board deems proper, including compensation to be provided by SNWA to MIC.

Essentially, and not unlike VVWD, under the guise of establishing "beneficial use" MIC was attempting to "claw-back" any shares of water that were not being used for the express purpose of re-allocating (re-leasing) those same shares to SNWA for a profit.

VVWD advised that the failure of Wolf Creek to establish beneficial use of the purported "excess water" constituted a material breach of the Lease and subjected VVWD to a forfeiture of the water rights. Using the resolution as leverage, VVWD once again demanded an

amendment to the Lease reducing the number of shares in the irrigation company.

Understandably concerned about the newly manufactured requirement of establishing beneficial use, Wolf Creek offered to sub-lease the excess shares to SNWA (as both MIC and VVWD intended to do) and to return the difference between the Lease Rate and the sub-lease rate to VVWD which would (1) satisfy the requirement of establishing beneficial use; and (2) return the profit to VVWD. Inexplicably, VVWD rejected the proposal and maintained its position that the failure to establish beneficial use was a breach of the Lease.

Now, for the first time, VVWD states: "However, the water rights at issue belong to the Mesquite Irrigation Company and VVWD does not intent to take legal action against Wolf Creek relating to demonstrating beneficial use." See Ex. R to Motion to Dismiss.

It is clear that the continuing threats of VVWD to declare a default were nothing more than strong –arm efforts to compel an amendment to the Lease. What is becoming increasingly clear – by virtue of the misrepresentations and half-truths made to this Court, is that VVWD will do and say anything to claw-back what it perceives as excess water shares without regard to the continued viability of this valued community partner.

III. VVWD Pejoratively and Intentionally Mischaracterizes Wolf Creek's request to Sublease its Shares to Prejudice and Inflame this Court.

In 2014, SNWA and VVWD entered into a Lease Agreement wherein SNWA agreed to sublease MIC shares from VVWD at a price per share of $1,246.00. Moreover, SNWA committed to lease ***all available shares*** from VVWD at that price – subject to certain monetary benchmarks and thresholds. As a result of the SNWA commitment, VVWD began to audit the water use of its sublessees and thereafter engaged in a coordinated attempt to "shake down" these businesses to increase the number of shares available to lease to SNWA. Subsequently, and for the first time in the history of the leasing relationship, VVWD commenced a systematic, heavy-handed scheme to claw-back the Leased Shares from Wolf Creek. As early as 2014, VVWD began requesting that Wolf Creek voluntarily amend the Lease to reduce the number of Leased Shares and return the same to VVWD so that VVWD could release those same shares to

SNWA at a higher price. Wolf Creek was unable to return the Leased Shares for two reasons: (1) there existed an operational covenant with its lenders that it maintain the Leased Shares as condition of its financing; and (2) that the surplus, if any, of Lease Shares was necessary to guard against a draught. The bases for the reluctance to amend the Lease were explained to VVWD early and often.

Refusing to take no for an answer, VVWD commenced its heavy-handed and coordinated scheme to compel the return of the Leased Shares. Nothing is more indicative of its bad faith attempt to compel an amendment to the lease than the representations made to this Court that- ***despite threatening a rescission of the Lease and return of the Leased Shares*** - VVWD ***never intended to declare a default*** of the Lease based upon (1) the failure to use effluent water; or (2) the failure to establish beneficial use of the water. Rather, it is now clear that VVWD was attempting to strong-arm Wolf Creek upon the threat of rescission to allow it to line its pockets at the expense of depriving the golf course of its projected (and contractually required) water needs.

And, in a disingenuous attempt to inflame this Court, VVWD pejoratively mischaracterizes the request to sublease the Lease Shares. To that point, VVWD affirmatively ***but incorrectly*** states:

1) Wolf Creek wants this court to order VVWD to allow Wolf Creek to sublease the unused shares to SNWA for Wolf Creek's own profit;

2) Any grant of this disingenuous request necessarily comes at the further expense of the Virgin Valley ratepayers;

3) The District did not subsidize Wolf Creek with an artificially low rate so that Wolf Creek could make a buck (or more bucks); and

4) Wolf Creek wants to convert its sweetheart deal in to the proverbial goose that will continue to lay the golden eggs at the expense of the community forever more.

These express misrepresentations are made by VVWD to this Court for the purposes of coloring Wolf Creek as a selfish, bad actor, and are – beyond any doubt – demonstrably false. Equally disturbing, VVWD knows the representations to this Court are untrue. As noted in that Correspondence of January 12, 2018 Wolf Creek stated:

> As a threshold matter, Paradise Canyon understands the District's need to maximize its revenues for the purpose of funding its existing and future public improvement projects. It is, ostensibly, for that purpose that the District has demanded that Paradise Canyon voluntarily amend its lease to reduce the number of leased shares. As you have articulated, the reduction and return of leased shares would permit the District to re-lease those same shares to the Southern Nevada Water Authority ("SNWA") at the inflated price of $1,246.00 per share. ***Certainly, that would be beneficial to the District and its constituents as it would help defray the costs of those public improvement costs. Paradise Canyon conceptually supports the revenue increasing plan and has no desire to interfere with that laudable goal. More to the point, Paradise Canyon does not desire to retain (and pay for) the leased shares if the water allocated to those leased shares is unnecessary to the ongoing, successful operations of the golf course. Nor does Paradise Canyon desire to profit on the spread that exists between its lease rate and the SNWA lease rate.***
>
> However, there is a tension that exists between the needs of the District and Paradise Canyon. Paradise Canyon seeks to retain the leased shares to ensure that it will always have sufficient water to service and maintain its golf course. As you may know, it was the then District Manager that advised Paradise Canyon on the number of leased shares necessary to ensure sufficient water – which resulted in the total leased shared of 155. I am certain that the District shares Paradise Canyon's concern that it maintain a sufficient water supply as the golf course is an integral part of Mesquite's thriving community. ***To be sure, while a tension exists between the District's desire to maximize revenues and the Paradise Canyon's need to maintain a sufficient water supply, the two goals, in my view, are not mutually exclusive.***
>
> ***While Paradise Canyon can't agree to amend the lease to permanently divest it of its rights to the leased shares in perpetuity, it could agree to sublease those shares back to the District on a periodic basis at the same lease rate to allow the District to re-lease those shares to any third party (including SNWA) for whatever price it can achieve. Alternatively, the District could consent to allow Paradise Canyon to lease those excess shares to SNWA returning any amount in excess of its lease price to the District.*** The purpose of the foregoing is to allow Paradise Canyon to retain the ownership rights in the leased shares so that they are available to the extent they become necessary to the future, ongoing

> operational needs of its golf course while simultaneously permitting the District to increase its revenues.

See ***Exhibit 5*** (correspondence dated January 12, 2018) (emphasis added).

"The greatest weapon in the arsenal of an able trial lawyer" is the advocate's credibility" – Gerry Spense. "Moreover, misrepresentation, deception, and game playing can destroy an advocate's credibility with the jury. They plant seeds of doubt in the jury's mind, causing them to question both the truth of the advocate's statements, as well as what it is about the case that would make the advocate feel the need to exaggerate or deceive. From that point forward jurors may begin to doubt anything or everything the attorney tells them, and perhaps begin to question the things they previously believed. Worse yet, the jury may punish the attorney for attempting to deceive them or seek an unfair advantage. Either way, the damage to the advocate's case will be painfully evident." H. Mitchell Caldwell et. al., The Art and Architecture of Closing Argument, 76 Tul. L. Rev. 961, 977 (2002). Finally, as Mr. Spence observed: "One can stand as the greatest orator the world has known, possess the quickest mind, employ the cleverest psychology, and have mastered all the technical devices of argument, but if one is not credible one might just as well preach to the pelicans."

Contrary to the express representations made by VVWD to this Court, Wolf Creek ***does not seek*** to sublease its shares to profit or otherwise line its own pockets. Rather, it seeks to sublease the Leased Shares for the stated and laudable purposes of:

1) Allowing VVWD to profit from any sublease of the Leased Shares in any amount in excess of the Lease Rate; and
2) To permit VVWD to establish that the Leased Shares are being put to a beneficial use – to the extent that the showing is required by the State or MIC.

Moreover, and again contrary to the representations made by VVWD, Wolf Creek did not seek to preclude VVWD from increasing the Lease Rate. Indeed, Wolf Creek offered to nearly double the rate from $250 per share to $450 per share. Having misrepresented the factual basis for Wolf Creek's claim seeking declaratory relief as to the prohibition on alienation,

VVWD compounds its misrepresentation of the facts with the misrepresentation as to the claim for relief itself. VVWD affirmatively represents that the claim for relief is bottomed on an "unreasonable restraint on the alienation of ***real property***" when the complaint provides no such argument. The claim for relief actually states:

> The Lease's restraint on subleasing is in derogation of Nevada's longstanding policy of using water for beneficial purposes. The restriction is not reasonable or appropriate to any lawful purpose and is diametrically opposed to the role and purpose of enforcing public policy limitations on restraints on alienability or ***personal property.***

See Amended Complaint at paragraph 88 (emphasis added).

1. Any Restriction on the Transfer of Stock Must be Reasonable.

It is the unreasonable restraint on the alienation (sub-lease) of the Lease Shares that is the subject of this claim for declaratory relief. And, while it is true that corporations may place restrictions on the sale or transfer of shares of stock, those restraints must be reasonable. See NRS 78.242. As a threshold issues, there is no evidence, or argument, that the by-laws of MIC restrict the alienation of shares in the corporation. It is axiomatic that there is no such restriction as, according to VVWD, it leases all of its shares to third parties – including leases to golf courses, farmers and SNWA.

Moreover, courts uniformly establish that absolute prohibitions on share transfers are against public policy. See, e.g., Castriota v. Castriota, 268 N.J.Super. 417, 633 A.2d 1024, 1028 (1993) ("[a] restraint against alienation [that] is total and absolute ... [is] void as against public policy"); Witte v. Beverly Lakes Inv. Co., 715 S.W.2d 286, 291 (Mo.Ct.App.1986) ("absolute restriction on [stock] transfer is unreasonable per se and void"); Quinn v. Stuart Lakes Club, Inc., 57 N.Y.2d 1003, 457 N.Y.S.2d 471, 443 N.E.2d 945, 945 (1982) ("an absolute restraint on the power of alienation violat[es] the public policy in this State").

The District argues that Nevada courts regularly enforce restrictions on transfers of assignments of stocks and shares and cites this Court to Gramanz v. T-Shirts & Souvenirs , Inc., 111 Nev. 478 (1995) in support of its broad proposition. Succinctly, it does not.

In that case, Gramanz and Iliescu formed T–Shirts and Souvenirs, Inc. ("T–Shirts"), a Nevada corporation, for the purpose of operating a souvenir retail store in downtown Reno. T–Shirts obtained a $900,000 loan from Valley Bank (now Bank of America) with Iliescu and Gramanz jointly and severally liable on the loan; Iliescu and Gramanz also each contributed secured loans of $350,000 to the corporation. The loan agreement with Valley Bank provided that any material change in management or control of T–Shirts would give the bank the right to accelerate payment of the loan. Gramanz desired to sell his shares before the indebted was paid. Iliescu argued that the agreements between the shareholders precluded the sale until the debt was paid. At trial, both Iliescu and his attorney testified that the stock agreement was intended to prohibit the parties from selling their stock until the debt was paid. Furthermore, Gramanz's managerial acumen and business connections, and Iliescu's lack of the same, substantially support the conclusion that the parties intended less than free alienability of the stock.

The district court found that the documents and evidence revealed the parties' intent to remain in the partnership until the initial $1.6 million (Valley Bank loan of $900,000 plus $350,000 each from Iliescu and Gramanz) was retired. Thus, the district court prohibited Gramanz from selling his stock until the corporate debt was retired. The Supreme Court affirmed. Gramanz v. T-Shirts & Souvenirs, Inc., 111 Nev. 478, 483, 894 P.2d 342, 346 (1995).

Thus, and contrary to VVWD's argument, Courts do not permit wholesale prohibitions on the transfer of stock. Rather, any such restriction must be ***reasonable*** – which, of course, is a question of fact. VVWD proffers no reason or rationale for the prohibition and, as such, the argument lacks merit. Moreover, one or more other leases by and between VVWD and third party lessees reveal the absence of a similar restriction. VVWD attaches the SNWA Lease which provides:

> 6. Notwithstanding anything to the contrary in this Agreement, SNWA shall have the right, in SNWA's sole and absolute discretion, to assign this Agreement or any right hereunder, to any person

See Exhibit "D" to Motion to Dismiss; Section 6. Query: if the restriction on subleasing shares

is either prohibited by the MIC by-laws or is otherwise has a reasonable basis, why, then, does SNWA have the sole and absolute discretion to assign its shares? The answer is, as discovery will show, there is no reasonable basis and the restriction is an improper restraint on alienation.

2. Restrictions on Personal Property are Void as Against Public Policy.

Even when a property right is created by contract, there are limits on the restrictions that can be imposed. The law governing restricting relating to the alienation of real property is well established. These rules apply to personal property as well. In re Estate of Walkerly, 108 Cal. 627, 657 (1895) ("The common-law rule against perpetuities does not, as counsel argue, apply only to landed estates. Executory devises, springing and shifting uses, and trusts whether of realty or personalty were all within its terms."). As with real property, "[t]he right of alienation is one of the essential incidents of a right of general property in movables, and restraints upon alienation have been generally regarded as obnoxious to public policy, which is best subserved by great freedom of traffic in such things as pass from hand to hand." Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 404 (1911); see also Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834, 846 (D.N.J. 1972) ("there is a general public policy against restraints on the transfer of personal property"); Ritchie v. Rupe, 339 S.W.3d 275, 292 (Tex. App. 2011) ("One of the general reasonable expectations of any property owner ... is the right of free alienation of that property."). As the Supreme Court of Florida observed long ago that "[p]ersonal property, as well real property, at common law was subjected to the rule against restraints on alienation." Reimer v. Smith, 105 Fla. 671, 675, (1932).

As noted in the complaint, the Lease's restraint on subleasing is in derogation to Nevada's longstanding policy of using water for beneficial purposes. The restriction is not reasonable and appropriate to any lawful purpose and is contrary to the role and purpose of enforcing public policy limitations on restraints on alienability of personal property. VVWD offers no argument in response.

3. Shares in Mutual Water Companies are Considered Realty

While Nevada has not addressed the precise issue, it is well-settled in Colorado, and other states, that mutual ditch company shares are "unlike ownership of stock in other corporate entities." Great Western Sugar Co. v. Jackson Lake Reservoir & Irrigation Co., 681 P.2d 484, 491 (Colo.1984); see also Southeastern Colo. Water Conservancy Dist. v. Fort Lyon Canal Co., 720 P.2d 133, 141 (Colo.1986) ("it is clear that stock ownership in a mutual ditch company constitutes ownership of a real property interest in water rights rather than a personal property interest in corporate stock") (Fort Lyon Canal); Jacobucci, 189 Colo. at 387, 541 P.2d at 672. This is so because a mutual ditch company is "merely the vehicle by which its owners operate and manage its affairs" and is "organized solely for the convenience of its members in the management of the irrigation and reservoir systems." Jacobucci, 189 Colo. at 387, 541 P.2d at 672 (citing Billings Ditch Co. v. Indus. Comm'n, 127 Colo. 69, 74, 253 P.2d 1058, 1060 (1953)). Mesa Cty. Land Conservancy, Inc. v. Allen, 2012 COA 95, ¶ 36, 318 P.3d 46, 55. See also, Locke v. Yorba Irr. Co., 35 Cal. 2d 205, 217 P.2d 425 (1950)(Water rights, evidenced by shares in a mutual company, are a species of real property capable of acquisition by adverse possession even when such acquisition results in severance from the land.). Accordingly, as a species of real property, any unreasonable restraint on alienation is prohibited.

IV. CONCLUSION

Based upon the foregoing, VVWD's Motion to Dismiss must be denied in its entirety and summary judgment should be granted on the First and Second Causes of Action.

DATED this 9th day of August, 2018.

SYLVESTER & POLEDNAK, LTD.

By: */s/ Jeffrey R. Sylvester*
Jeffrey R. Sylvester, Esq.
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of SYLVESTER & POLEDNAK, LTD. and that on this 9th day of August, 2018, I caused to be served a copy of the above-entitled document on the parties set forth below via electronic service pursuant to EDCR 8.05(a) and 8.05(f) to:

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Bingham Snow & Caldwell
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Attorneys for Virgin Valley Water District

/s/ Bridget Williams
An employee of SYLVESTER & POLEDNAK, LTD.

EXHIBIT "1"

EXHIBIT "1"

DECL

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DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE CANYON, LLC, a Nevada limited liability company, Plaintiff, v. VIRGIN VALLEY WATER DISTRICT, a political subdivision of the State of Nevada; and DOE Individuals I through X; and ROE Corporations and Organizations I through V, inclusive, Defendants.	Case No. Dept. No.

DECLARATION
KARL GUSTAVESON

1. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently to those facts.
2. The Virgin Valley Water District ("District") is a political subdivision of the State of Nevada created by the Nevada Legislature's enactment of the Virgin Valley Water District Act in 1993. The established purpose of the District is to provide adequate and efficient potable water service for the residents of Virgin Valley, including the

communities of Mesquite and Bunkerville.

3. I was an elected Director of the Virgin Valley Water District in 2011.
4. The District owns/holds various water rights in potable and non-potable water within the Virgin Valley.
5. The Mesquite Irrigation Company ("MIC") is a private mutual water company that diverts surface (non-potable) water from the Virgin River in the amount guaranteed by the water rights owned by the companies' shareholders. The irrigation company maintains the infrastructure and facilities that collect, store and deliver irrigation water.
6. The water companies hold the water rights of various owners and provide shares of stock in the company. The number of shares of stock in the company represents the shareholder's proportionate right to make use of the water rights held by the company. Accordingly, each share in the company is equal in the quantity and quality of the water, making them readily deliverable to and transferable among or by all shareholders.
7. The shares of stock in a water company are commonly referred to as "water shares." Water shares are not the equivalent of water rights. Water shares constitute the measure by which water rights owners receive their proportionate amount of water held by the water company. Typically, the shareholders either use the water or lease it to other private and governmental entities.
8. In 2011, the District owned shares in MIC. Historically, the District leased all or a portion of the water shares it held in MIC to third parties – including, but not limited to farmers, golf course operators and the Southern Nevada Water Authority ("SNWA").
9. During my tenure as a member of the Board of Directors I became familiar with, and participated in discussions, relating to the establishment of rate and pricing for the lease

of Irrigation Shares to third parties in the greater Mesquite area.

10. Prior to June of 2011, the District leased irrigation shares to SNWA and to Paradise Canyon Paradise Canyon, LLC ("Paradise Canyon").

11. Paradise Canyon owns and operates Wolf Creek Golf Club ("Wolf Creek") located in Mesquite, Nevada.

12. While I was not a member of the board of directors at the time, I became familiar with the terms and conditions of the lease with Paradise Canyon in connection with discussions relating to the renewal of that lease in 2011.

13. In June 2011, Paradise Canyon and the District entered into that lease of irrigation shares styled "Virgin Valley Water District Lease of Irrigation Shares" (the "Lease").

14. Pursuant to the terms and conditions of the Lease, the District leased 155 Irrigation Shares (the "Leased Shares") to Paradise Canyon for $250.00 per share - resulting in an annual rental sum of $38,750 for the Leased Shares (the "Lease Rate").

15. I understand that the goal in setting the rate was to provide stability to the golf courses for both lending and financing purposes while setting a rate that was comparable to rates paid by other users within the District.

16. As a member of the Board, I recognized the benefits to the community provided by Wolf Creek and the other golf courses in terms of both the employment of Mesquite residents and the tourism generated by the maintenance of the golf courses.

17. During the course of the negotiations regarding the lease rate, Wolf Creek offered to pay an up-front assessment in the form of an impact rate-lock that would set the rate and avoid any incremental increases to the lease rate during the term of the lease.

18. The Lease Rate was the market value for Irrigation Shares paid by other lessees whose place of use was the greater Mesquite area.

19. As of 2011, the District was a party to two leases SNWA – dated 2000 and 2008.

20. On June 7, 2011 (the same day the Board considered and approved the Lease with Paradise Canyon establishing the Lease Rate of $250), the District amended its lease with SNWA agreeing to lease Irrigation Shares to SNWA for $1,620 per share or 6.5 times more than what the District had concurrently agreed to lease the Irrigation Shares to Wolf Creek and other golf courses.

21. The District understood that the lease rates paid by SNWA to the District were not to be used as the market rate for the lease of Irrigation Shares to lessees whose place of use was the Greater Mesquite area.

22. The District recognized that local users of the water could not match, or otherwise compete with, the prices paid for water by the SNWA and that to require local uses to pay SNWA prices would be inconsistent with the goal of the District to provide sufficient water at affordable rates.

23. The number of Leased Shares was based upon the historical, actual and projected irrigation needs of Wolf Creek.

24. The continued and perpetual use of water was critical to the operations of the golf course. As a result of the necessity, and in order to ensure an uninterrupted and continuous water source, Paradise Canyon negotiated for, and received the Leased Shares.

25. During the lease negotiations, the District was aware that the number of Leased Shares – and the water allocated for those shares – may exceed, on an annual basis, the actual

water use. However, the number of Leased Shares was necessary to provide adequate assurance that there would always be sufficient water available to the golf course.

26. The initial term of the Lease was eight years commencing June 1, 2011 and continuing until June 1, 2020 (the "Initial Term"). However, during the negotiations, the District understood that Wolf Creek, and the other golf courses, for long term financial and operational purposes, required assurances from the District that it had rights to continue to lease the Leased Shares beyond the Initial Term.

27. In recognition of the operational and financial needs of Wolf Creek, and in exchange for the payment of $25,575.00 (the "Right of First Refusal Fee") the District provided Paradise Canyon the right of first refusal to continue leasing all of the Leased Shares on a perpetual basis. Paradise Canyon paid the Right of First Refusal Fee and, as a result, has the right to the Leased Shares – and the use of the allocated water – in perpetuity.

28. While the Lease provides that Paradise Canyon has the right to continue leasing the Leased Shares on a perpetual basis beyond the Initial Term, the District is permitted to increase the Lease Rate for the Leased Shares after January 1, 2020 (the "Lease Renewal Date") in its sole and absolute discretion.

29. The District understood that while it had the right to increase the Lease Rate at the expiration of the Initial Term, that any increase would be constrained by the market rate charged which would, again, require a balancing of the market rate for the irrigation shares leased and used in the Mesquite area and the need to provide a reasonable rate to businesses that support Greater Mesquite Area.

30. Historically, the market rate for irrigation shares was not established by the lease rate charged by the District to SNWA. And, at no time during the negotiations or

deliberations of the Lease Rate to be charged during the Initial Term, did the District intend that the Lease Rate beyond the Initial Term would be based upon, or otherwise dictated by, the rate charged, offered or paid by SNWA.

31. Three years subsequent to the execution and delivery of the Lease, in September 2014, the District entered into an agreement to lease all of its available MIC shares to SNWA for $1,246 per MIC (the "SNWA Lease Rate") share per year (the "2014 SNWA Lease Agreement"). The agreement terminates upon the earlier of (1) that date that payments made by SNWA under the 2014 SNWA Lease Agreement total four million dollars or (2) 20 years.

32. When the board of directors considered and approved the 2014 SNWA Lease Agreement, and recognizing that the SNWA Lease Rate was "inflated" it affirmatively stated that the SNWA Lease Rate would not be used to establish the new Lease Rate for Paradise Canyon (and other golf courses) on the Lease Renewal Date.

33. I understand that the District intends to increase the Lease Rate charged to Wolf Creek to the SNWA Lease Rate commencing upon the expiration of the Initial Term, which, if permitted, would result in a 500% increase to the Lease Rate.

34. The stated or projected increase in the Lease Rate is contrary to the District's lease rate policy as of the date that Lease Rate was established and contrary the representations made by the District to Wolf Creek in advance of the execution and delivery of the Lease.

KARL GUSTAVESON

DECL

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JEFFREY R. SYLVESTER, ESQ.
Nevada Bar No. 4396
1731 Village Center Circle
Las Vegas, Nevada 89134
Telephone: (702) 952-5200
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jeff@sylvesterpolednak.com
Attorneys for Plaintiff Paradise Canyon, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

PARADISE CANYON, LLC, a Nevada limited liability company, Plaintiff, v. VIRGIN VALLEY WATER DISTRICT, a political subdivision of the State of Nevada; and DOE Individuals I through X; and ROE Corporations and Organizations I through V, inclusive, Defendants.	Case No. Dept. No.

DECLARATION
SANDRA RAMAKER

1. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently to those facts.

2. The Virgin Valley Water District ("District") is a political subdivision of the State of Nevada created by the Nevada Legislature's enactment of the Virgin Valley Water District Act in 1993. The established purpose of the District is to provide adequate and

efficient potable water service for the residents of Virgin Valley, including the communities of Mesquite and Bunkerville.

3. I was elected to the District Board of Directors in 2010 and served as a District Board Member until 2014.
4. The District owns/holds various water rights in potable and non-potable water within the Virgin Valley.
5. The Mesquite Irrigation Company ("MIC") is a private mutual water company that diverts surface (non-potable) water from the Virgin River in the amount guaranteed by the water rights owned by the companies' shareholders. The irrigation company maintains the infrastructure and facilities that collect, store and deliver irrigation water.
6. The water companies hold the water rights of various owners and provide shares of stock in the company. The number of shares of stock in the company represents the shareholder's proportionate right to make use of the water rights held by the company. Accordingly, each share in the company is equal in the quantity and quality of the water, making them readily deliverable to and transferable among or by all shareholders.
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34. The stated or projected increase in the Lease Rate is contrary to the District's lease rate policy as of the date that Lease Rate was established and contrary the representations made by the District to Wolf Creek in advance of the execution and delivery of the Lease.

Sandra K Ramaker

EXHIBIT "2"

EXHIBIT "2"

VV Water District Vindicated in Civil Lawsuits

MARCH 19, 2015 BY SPECIAL TO THE MLN

LEAVE A COMMENT

By Barbara Ellestad

(Author's note: As Editor/Publisher of the Mesquite Citizen Journal, I wrote numerous articles about the Virgin Valley Water District civil lawsuit from its beginning in 2011. It's

only fitting to write one more article detailing its conclusion. All information in this article comes from public documents without any disclosure of attorney/client privileged information I may have received since my election to the VVWD Board of Directors. I write this article as a private citizen and not in any official capacity with VVWD.)

In 2011 the Virgin Valley Water District filed a civil lawsuit against its former General Manager Mike Winters, former Chief Hydrologist Michael Johnson, then-Deputy State Water Engineer Robert Coache, and wealthy businessman and landowner John Lonetti, Jr. The lawsuit alleged the District lost almost $8 million dollars in two separate water share sale transactions in 2005 and 2008 because of an alleged conspiracy among the men.

After investigations by VVWD and the Las Vegas Metropolitan Police Department, Johnson admitted that he accepted $1.3 million from Lonetti as payment for his part in both transactions. Facing certain termination, Johnson resigned from his position in August 2010. Subsequent investigations showed that Johnson split the $1.3 million with Coache and "loaned" Winters $15,000 from the payoff.

Coache retired from his State job in May 2010.Winters was fired from his position in February 2010. In June 2010 the Clark County District Attorney (DA) charged him with criminal Misconduct of a Public Officer for his role in a

separate land purchase. The DA also filed criminal charges against Johnson and Coache in May 2011, later adding Winters to the indictment.

Lonetti agreed to a "proffer" from the DA which kept him from being charged in criminal proceedings if he cooperated with the investigation and prosecution of the others.

In an unusual move by District Court Judges Abbey Silver and Michael Villani who were appointed to adjudicate the criminal trials, those proceedings were stayed until after the civil case was completed. Criminal trials usually precede civil trials.

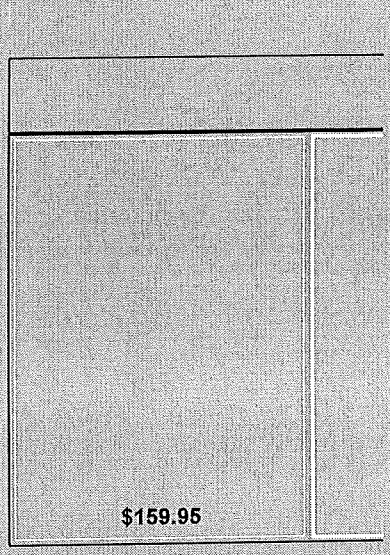
Over the next three years numerous court document filings, hearings, and depositions took place as the District struggled to prove its case against the four men in front of Clark County District Court Judge Rob Bare. In all the District spent close to one million dollars on attorney fees, expert witnesses, investigative costs, depositions, and court fees.

Shortly before a scheduled April 2014 jury trial began, Judge Bare ruled that Winters and Johnson indeed owed VVWD fiduciary duties as employees. All four men agreed to settle with the District thereby canceling a potential six-week trial.

Below is a synopsis and current status of those settlements.

John Lonetti, Jr – Still no money

Lonetti agreed to 'buy back' 1,200 acre feet of non-potable Virgin River water from VVWD for $3.240 million that he had sold to the District in the 2008 transaction. The water had very little value to the District and Lonetti is restricted to using it only for irrigation on his Meadowland Farm south of Bunkerville. Lonetti also purchased 100 acre feet of ground water rights from the District for $1.5 million that was part of the 2005 transaction. Because Winters and Johnson failed to file necessary paperwork with the Nevada State Water Engineer, the water lost its valuable pre-1929 priority date, rendering it virtually worthless.



After depositing $50,000 in earnest money Lonetti was required to pay $3.240 million by October 2014 and $1.5 million by December 2014 but failed to do so. In January 2015, the VVWD Board of Directors granted an extension of the due dates until April. According to Lonetti's attorneys, he is seeking a bank loan for the money and payment is "imminent." Lonetti agreed to pay interest on the overdue money but the interest rate is still being negotiated.

Winters – All criminal charges dropped

Winters has paid the District $15,000 that he allegedly received as part of the $1.3 million bribe for the 2008 water transaction. He did not admit guilt in the civil or criminal actions against him.

In connection with Winters agreeing to pay the District, all criminal charges against him were

dropped by the DA after the Water District expressed approval of the action.

Winters filed a claim with the District's insurance company for payment of the $15,000 and his attorney fees and legal costs associated with the civil lawsuit and criminal charges. The insurance company has refused to release any information regarding his claim or payment thereof.

However, the District received a $500 bill from the insurance company as payment of the deductible towards Winters' claim and PoolPact wrote the check for $15,000 to the District.

Johnson – Violated his fiduciary responsibility

Johnson reached a settlement with the District in May 2014 which he was required to sign by Sep. 2, 2014. Based on his failure to do so, Judge Bare signed a judgment against him in February enforcing the settlement. Johnson is required to pay the District's additional attorney fees totaling $11,444 stemming from that court action.

While Johnson's settlement requires him to pay $100,000 cash to the District, if he pays by May 1, 2015 he only has to hand over $80,000. If he pays by May 1, 2015, it's only $90,000. It goes up to $100,000 if paid by May 1, 2019 or $200,000 if paid after May 1, 2019. The agreement does not allow him to discharge the debt in any future bankruptcy action.

Johnson must also sign over the first $100,000 he receives from his mineral (oil) rights.

In addition, the District will receive his interests in assets seized by Metro Police which include two houses and proceeds from the sale of a third house, all located in Las Vegas.

The DA intends to pursue its criminal charges against Johnson and Coache with a trial set to begin in July. It's unlikely that date will hold since a new Judge was recently assigned to the case.

Coache – Seized assets could go to Water District

The Water District holds first position to accept assets which Coache allegedly purchased with his share of the $1.3 million payoff should he be convicted (or enter into a plea agreement) in the criminal proceedings stemming from the 2008 water transaction. That includes the same three houses Johnson's agreement refers to.

Southern Nevada Water Authority (SNWA)

Even though SNWA was not named as a defendant in any civil or criminal proceedings involving the 2008 water share transaction, it has agreed to lease irrigation water shares from VVWD for a total of $4 million over 20 years. It has already given the District $200,000 towards that sum and is currently leasing 14 water shares at inflated prices towards reaching the total amount.

LOCAL LINKS

Animal Shelter
Clark County
City of Mesquite
Desert Dames
GMAF Arts Foundation
Mesquite Senior Games
Mesquite Shooters
Mesquite-Toes

AFFILIATES

The Ely Times
Lincoln County Record
Mineral County Independent News
The Eureka Sentinel
Sparks Tribune

Insurance Claims – Up in the air

The District's insurance policy with Nevada Public Agency Insurance Pool (PoolPact) expressly states it is covered up to $500,000 per transaction for breaches of fiduciary duty by employees. When Judge Bare found Johnson guilty of breaching his fiduciary duty as Chief Hydrologist in both the 2005 and 2008 transactions, that met the requirements of the District's insurance policy. The District filed two claims for $500,000 related to each breach Johnson was found guilty of.

So far PoolPact has held out on paying the District's claims.

FILED UNDER: LOCAL NEWS, TOP STORIES

Local Weather
Reliance Connects
VVAA Artists
VV Theatre Group
VV Water District
VVHS
We Care for Animals

SPEAK YOUR MIND

Name *

Email *

Website

POST COMMENT

Return to top of page

EXHIBIT "3"

EXHIBIT "3"

2/14/13

COPY

ESTOPPEL CERTIFICATE
(Lease of Irrigation Shares)

TO: First Independent Bank, a division of Western Alliance Bank
5335 Kietzke Lane
Reno, Nevada 89511

RE: That certain agreement entitled Virgin Valley Water District Lease of Irrigation Shares, dated June 20, 2011, by and between Paradise Canyon, LLC, a Nevada limited liability company, d/b/a Wolf Creek Golf Club ("Borrower") and the Virgin Valley Water District, a political subdivision of the State of Nevada ("District") (the "Lease Agreement").

Ladies and Gentlemen:

This Estoppel Certificate ("Estoppel Certificate") is provided to you with respect to the Lease Agreement.

The District understands that: (i) Borrower holds a fee simple interest and leasehold interest, as applicable, in and to certain real property and improvements including, without limitation, a golf course facility, located in the City of Mesquite, State of Nevada, more commonly known as the Wolf Creek Golf Club ("Club Property"); (ii) First Independent Bank, a division of Western Alliance Bank ("Lender") intends to make loans to Borrower (collectively, the "Loan") secured by the Club Property; and (iii) except for the potable water utilized for the golf course greens, the primary source of water for the irrigation, operation and maintenance of the remainder of the Club Property is pursuant to the Lease Agreement.

In connection with the foregoing, and with the understanding that Borrower and Lender are each relying upon the agreements and certifications referenced or contained herein, as of the date hereof, the District agrees and certifies the following to Borrower and Lender and their respective successors and assigns, with the intention that Borrower and Lender may rely thereupon.

1. Entire Agreement. The Lease Agreement, a true and correct copy of which is attached hereto as Exhibit "1", represents the entire agreement with the District with respect to the water shares that are the subject of the Lease Agreement, and such agreement has not been modified, changed, altered or amended in any respect (either orally or in writing). The Lease Agreement is in full force and effect, and the duties, liabilities and obligations thereunder are binding on the applicable parties. To the best of the District's knowledge, after reasonable inquiry, neither the District nor the Borrower have commenced any action or given or received any notice for the purpose of terminating the Lease Agreement.

2. No Breach. There is no default by the District, the Borrower or any other party under the Lease Agreement for which a notice was sent to the defaulting party and such default was not cured within any applicable cure period. Additionally, to the best of the District's knowledge, no event has occurred and no condition exists which, with notice or the passage of time or both, would constitute a default by the District, the Borrower or any other party under the Lease Agreement.

3. Water Shares; Market Value. As of the date of this Estoppel Certificate, the District holds title to the one hundred fifty-five (155) shares ("Irrigation Shares"), which are the subject of the Lease Agreement, free and clear of any liens and encumbrances. The current annual rent for the Irrigation Shares is equal to Two Hundred Fifty Dollars ($250.00) per share

4. Right of First Refusal. The Lease provides Borrower with a right of first refusal for eight (8) subsequent years following the initial one year term. Borrower shall have the right, but not the obligation, to exercise such right of first refusal as to all or any portion of the Irrigation Shares for each subsequent year of said Lease, upon the same terms as set forth in the Lease; provided, however, the One Year Rent amount for such year shall be reduced in proportion to the number of shares actually leased for that subject year, as applicable. On or after January 1, 2020, if Borrower continues to hold a right of first refusal as to any of the Irrigation Shares, Borrower shall have the right to continue to lease the same Irrigation Shares on a perpetual basis so long as Borrower is not in breach of the Lease, and in such event, the rent amount for such Irrigation Shares shall be determined in the sole discretion of the District. Borrower has prepaid to the District a one-time, non-refundable Right of First Refusal Fee (as defined in the Lease Agreement), in the amount of Twenty-Five Thousand Five Hundred Seventy-Five Dollars ($25,575.00), which Right of First Refusal Fee shall be in addition to Borrower's payment of the applicable One Year Rent for each subsequent year that Borrower leases all or any portion of the Irrigation Shares.

5. Termination of Lease. Upon the termination of the Lease, Borrower may lease the same Irrigation Shares or other irrigation shares provided such shares are available and provided Borrower pays the then current annual rent for such shares.

6. Performance of Duties by Borrower. To the best of the District's knowledge, as of the date hereof, Borrower has performed all of its duties, liabilities and obligations that were due to be performed by Borrower under the Lease Agreement and has paid all costs, fees and expenses, if any, that were due to be paid by Borrower under the Lease Agreement.

7. Performance of Duties by District. As of the date hereof, the District has performed all of its duties, liabilities and obligations that were due to be performed by the District under the Lease Agreement and has paid all costs, fees and expenses, if any, that were due to be paid by the District under the Lease Agreement.

8. No Prior Assignments. The District has not assigned any of its rights, privileges or obligations under the Lease Agreement.

9. Consent to Assignment. The District hereby consents to and ratifies the collateral assignment by Borrower to Lender of all the right, title, interest and privileges of Borrower in, to and under the Lease Agreement.

10. Notice of Default; Opportunity to Cure. In the event of the occurrence of a breach or default by Borrower under any of the provisions of the Lease Agreement, in addition to any written notice that may be required to be delivered by the District to Borrower pursuant to the Lease Agreement, the District agrees to reasonably attempt to give to Lender a separate written notice of the occurrence of each such breach or default. In such event, the District hereby acknowledges and agrees that the following provisions shall apply:

(a) Lender shall have the right, but not the obligation, to cure any breach or default by Borrower under the Lease Agreement, and the District hereby agrees to and shall accept such performance by or at the insistence of Lender as if the same had been made by Borrower pursuant to the Lease Agreement. If the Lender elects to cure any such breach or default, the District shall grant Lender a period of thirty (30) days to cure the same.

(b) Neither the bankruptcy nor insolvency of Borrower shall be grounds for terminating the Lease Agreement, so long as Borrower satisfies its payment obligations to the District under the Lease

Agreement or Lender timely cures and satisfies such monetary and payment obligations of Borrower. In the event Borrower fails to satisfy the payment obligations under the Lease Agreement and Lender fails to timely cure and satisfy the payment obligations of Borrower, such failure shall constitute a default of the Lease Agreement and the District shall have all rights and remedies available at law or in equity.

11. Obligations of Lender in Possession. During any time period in which Lender is in possession of the Club Property as a result of either a foreclosure or acceptance of any assignment or deed in lieu of foreclosure, or by any other legal proceedings with respect to the Club Property ("Lender's Ownership Period"), the District hereby acknowledges and agrees that the following provisions shall apply:

(a) During Lender's Ownership Period, Lender will be obligated to pay to the District all sums, if any, which are payable by Borrower to the District pursuant to the Lease Agreement and which accrue during Lender's Ownership Period.

(b) All sums, if any, which may be payable or become due by the District to Borrower pursuant to the Lease Agreement during Lender's Ownership Period shall be payable directly to Lender.

(c) The District shall recognize and attorn to Lender and perform all obligations to be performed by the District pursuant to the Lease Agreement for the benefit of Lender.

Following the sale, transfer or other disposition of the Club Property by Lender: (i) the foregoing provisions shall terminate and Lender shall no longer be liable for the performance of any additional duties or responsibilities pursuant to the Lease Agreement; provided, however, Lender shall remain responsible and liable for the payment of any sums to the District pursuant to the Lease Agreement which accrue up to and during Lender's Ownership Period; and (ii) any subsequent purchaser, transferee or lessee of the Club Property shall be obligated to perform all of the duties and responsibilities of Borrower pursuant to the Lease Agreement, and notwithstanding the provisions of Section 6 of the Lease, District shall recognize and attorn to such subsequent purchaser, transferee or lessee of the Club Property and perform all obligations to be performed by the District pursuant to the Lease Agreement for the benefit of such purchaser, transferee or lessee.

12. No Offsets. There exists no offsets or defenses which would interfere with, hinder or limit the enforceability of any of the provisions of the Lease Agreement.

13. Notification. The District hereby covenants and agrees that the District will not assign, modify, amend, terminate or surrender the Lease Agreement without Lender's prior written consent.

14. Successors and Assigns. This Estoppel Certificate is for the benefit of and may be relied upon by Borrower, District, Lender and any of their respective successors or assigns. In connection with the foregoing, Borrower, Lender and/or any of their respective successors or assigns shall have the right to enforce the agreements and certifications contained in this Estoppel Certificate.

15. Authority. The person(s) whose signature(s) appear(s) below is/are duly and fully authorized to execute this Estoppel Certificate on behalf of the District, has/have knowledge of the facts and statements set forth herein and acknowledge(s) full and proper execution of the Lease Agreement by the District.

Dated: October 11, 2012.

VIRGIN VALLEY WATER DISTRICT,
a political subdivision of the State of Nevada

By: Kenneth Rock
Name: Kenneth Rock
Title: General Manager

EXHIBIT "1"
TO
DISTRICT ESTOPPEL CERTIFICATE

COPY OF LEASE OF IRRIGATION SHARES

EXHIBIT "4"

EXHIBIT "4"

October 18, 2017

Wolf Creek Golf Course
Attn: Cory Clemetson
403 Paradise Parkway
Mesquite, NV 89027

Dear Wolf Creek Golf Club,

The purpose of this letter is to address some important issues related to your Lease of Irrigation Shares with the Virgin Valley Water District. The District believes the lease must be promptly amended so that shares you are not using are returned to the District. Based on metered water use records, you are only using 110 of the 155 leased shares. That means that the water associated with the other 45 shares is unused and is effectively being wasted. Stated another way, you are paying $11,250 (45 shares x $250/share) every year for water you are not even utilizing.[1] The District is also losing out on $44,842.50 of lease income (45 shares x $1246.50 - $11,250) every year since the District could be leasing the unused shares to one or more third parties for $1,246.50 per share annually.

This lost revenue is problematic for several reasons. The District has a number of capital improvement projects that need to be completed and which will require substantial outlays of cash. Additionally, while lease rates for the District's irrigation shares have remained quite low for many years, rates for standard water services have increased significantly to keep up with the District's necessary operating and capital expenditures. As a result, the District's standard rate payers are effectively subsidizing your below-market lease rates.

In addition to these financial reasons, there are other important reasons for amending the lease and ensuring that the unused shares are put to beneficial use. First, unused water is contrary to Nevada's longstanding policy of using water for beneficial purposes and all sources of water within the boundaries of the state belong to the public. That is way to acquire a water right there must be a showing that the desired water will be put to beneficial use. Once granted, a water right holder must also generally continue using the water for a beneficial purpose otherwise the right can revert back to the state. While circumstances vary, unused water benefits no one.

Similarly, the District has been recently informed of efforts by Mesquite Irrigation Company (MIC) to demonstrate the beneficial use of all water associated with all MIC irrigation shares. MIC has encouraged and stressed to MIC shareholders, including the District, the importance of

[1] Additionally, the District is willing to prorate and return a portion of the right of first refusal fee you paid previously.

diverting and using all water associated with MIC shares, especially during 2017 and 2018, so that MIC may file Proofs of Beneficial Use with the state for the entire amount of MIC's water rights. The District acquired its irrigation shares at great expense and is committed to preserving and protecting their value, rights, and benefits in the best interests of the District and its rate payers.

The unused water is also problematic because there is at least one other water source available to you, namely, the City of Mesquite's effluent and using the District's shares before the city's effluent violates the terms of your lease. The lease states, "Lessee shall use available recycled or effluent water from the City of Mesquite for Lessee's landscaping or irrigation needs before using the Water represented by the Irrigation Shares." Your failure to use available effluent from the city under these circumstances is also contrary to Nevada public policy. The Nevada legislature has declared, "It is the policy of this State: To encourage and promote the use of effluent, where that use is not contrary to the public health, safety or welfare..." (NRS 533.024).

You have attempted to justify your refusal to use the city's effluent claiming that during the summer months the city is unable to provide enough effluent to meet your needs. Notably, the lease agreement does not include any temporal limitations on your obligation to use the city's effluent. It simply requires that the effluent be "available" and the District is informed there are times when it is not being used by anyone. Your failure to use the available effluent appears to constitute a material breach of your lease justifying rescission of the lease and a return of all shares to the District.

Nevertheless, the District prefers an amiable resolution of this issue. The District is informed that the Mesquite Irrigation Company recently provided you with assurance in connection with recent discussions with the State Engineer that your water needs would still be met, including during the peak summer months, with the reduced number of shares. This assurance should also be sufficient to address any concerns your lender may have since your lender's interest relates to ensuring that the golf course would have sufficient water in the event your lender ever took possession of the course. Additionally, your lender should readily consent to an amendment of the lease as it will serve to put you in a better financial position since you will no longer be paying for water you don't use and will have more available cash to make your loan payments.

Therefore, the District is providing you with one more opportunity to voluntarily agree to amending the lease to reduce the number of leased shares to 110. Please respond within ten days of the date of this letter as the District must make important decisions relating to these matters and time is of the essence.

Sincerely,
Virgin Valley Board of Directors

President, Nephi Julien

Vice-President, Ben Davis

Richard Bowler, Director

Barbara Ellestad, Director

Travis Anderson, Director

EXHIBIT "5"

EXHIBIT "5"

From: Jeff Sylvester
Sent: Friday, January 12, 2018 9:49 AM
To: Bo Bingham (bo@binghamsnow.com)
Subject: Paradise Canyon; Amendment Proposal

Mr. Bingham,

As you know, this firm represents the interests of Paradise Canyon, LLC – the owner and operator of Wolf Creek Golf Course located in Mesquite, Nevada. The purpose of this correspondence is to open a dialogue, and hopefully reach an agreement, relating to the terms and conditions of the lease agreement by and between Paradise Canyon and the Virgin Valley Water District (the "District").

As a threshold matter, Paradise Canyon understands the District's need to maximize its revenues for the purpose of funding its existing and future public improvement projects. It is, ostensibly, for that purpose that the District has demanded that Paradise Canyon voluntarily amend its lease to reduce the number of leased shares. As you have articulated, the reduction and return of leased shares would permit the District to re-lease those same shares to the Southern Nevada Water Authority ("SNWA") at the inflated price of $1,246.00 per share. Certainly, that would be beneficial to the District and its constituents as it would help defray the costs of those public improvement costs. Paradise Canyon conceptually supports the revenue increasing plan and has no desire to interfere with that laudable goal. More to the point, Paradise Canyon does not desire to retain (and pay for) the leased shares if the water allocated to those leased shares is unnecessary to the ongoing, successful operations of the golf course. Nor does Paradise Canyon desire to profit on the spread that exists between its lease rate and the SNWA lease rate.

However, there is a tension that exists between the needs of the District and Paradise Canyon. Paradise Canyon seeks to retain the leased shares to ensure that it will always have sufficient water to service and maintain its golf course. As you may know, it was the then District Manager that advised Paradise Canyon on the number of leased shares necessary to ensure sufficient water – which resulted in the total leased shared of 155. I am certain that the District shares Paradise Canyon's concern that it maintain a sufficient water supply as the golf course is an integral part of Mesquite's thriving community. To be sure, while a tension exists between the District's desire to maximize revenues and the Paradise Canyon's need to maintain a sufficient water supply, the two goals, in my view, are not mutually exclusive.

While Paradise Canyon can't agree to amend the lease to permanently divest it of its rights to the leased shares in perpetuity, it could agree to sublease those shares back to the District on a periodic basis at the same lease rate to allow the District to re-lease those shares to any third party (including SNWA) for whatever price it can achieve. Alternatively, the District could consent to allow Paradise Canyon to lease those excess shares to SNWA returning any amount in excess of its lease price to the District. The purpose of the foregoing is to allow Paradise Canyon to retain the ownership rights in the leased shares so that they are available to the extent they become necessary to the future, ongoing operational needs of its golf course while simultaneously permitting the District to increase its revenues.

In exchange, Paradise Canyon seeks an agreement as to the lease rate to be applied commencing in 2020. Again, recognizing the District's desire to increase revenues for the benefit of the community and further acknowledging that the market value of the leased shares *may exceed* $250.00, Paradise Canyon proposes to increase the rate to $450.00 per share ***commencing immediately***. The new rate would remain in effect for 20 years without increase. An agreement today provides an immediate increase in revenues for the District and simultaneously provides stability for Paradise Canyon's projected operating expenses. This offer is, as it must be, subject to approval by Paradise Canyon's lender and, of course, a mutually acceptable, written agreement.

As you know, the District has alleged that Paradise Canyon has breached the terms and conditions of the lease agreement – though no formal notice of breach has been provided to Paradise Canyon or its lender. Additionally, it appears that the District intends to increase the lease price per share to $1,246 (the SNWA lease rate) upon the lease renewal date in 2020. Paradise Canyon disputes that it is in violation of any term or condition of the lease and further opines that the application of the SNWA lease rate would violate the covenant of good faith and fair dealing. Given the critical nature of the utility provided, Paradise Canyon must be proactive in resolving these disputes. To that end, this firm has been authorized to commence an action seeking declaratory relief of the foregoing issues – a copy of which is attached. To be clear, if required to be filed, Paradise Canyon ***will not*** be seeking damages or other remuneration from the District. Rather it will simply seek a declaration of the rights and obligations of the parties relative to the terms and conditions (and performance) of the lease agreement. Paradise Canyon does not desire conflict with the District or its board members and recognizes the important and, often times, difficult functions they perform. But, as an employer of more than 75 Mesquite area residents and as an integral part of the Mesquite community, it must be proactive in its approach to ensuring its ongoing vitality.

Please don't consider this correspondence a threat of litigation. Rather, I ask that you perceive it in the spirit in which it is written – an effort to open a productive dialogue to reach a mutually beneficial resolution to further our clients' respective interest and goals. We have been directed to refrain from commencing this action to afford the District the opportunity to digest the offer and, hopefully, commence a productive dialogue. However, given the paramount importance to both the District and Paradise Canyon of an expedient resolution, if no response is received to this offer on or before the close of business January 18, 2018, we will file the same. The deadline not intended to be punitive. Accordingly, if the District needs additional time to consider these most important issues, please do not hesitate to request the same prior to the stated deadline.

Thank you in advance for your thoughtful consideration.

Jeffrey R. Sylvester, Esq.
Sylvester & Polednak Ltd.
1731 Village Center Circle
Las Vegas, NV 89134
(702) 952-5200