

1 Michael J. McCue (Nevada Bar No. 6055)
mmccue@LRLAW.com
2 Jonathan W. Fountain (Nevada Bar No. 10351)
LEWIS AND ROCA LLP
3 jfountain@LRLAW.com
3993 Howard Hughes Parkway, Suite 600
4 Las Vegas, Nevada 89109
Tel: (702) 949-8200
5 Fax: (702) 949-8363

6 Attorneys for Plaintiff
Pardee Homes

7
8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**

10 PARDEE HOMES, a California corporation,)
11 Plaintiff,)
12 vs.)
13 BEAZER HOMES USA INC., a Delaware)
corporation; BEAZER HOMES HOLDING)
CORP., a Delaware corporation,)
14 Defendants.)
15

COMPLAINT

JURY DEMAND

16 For its complaint, Pardee Homes alleges as follows:

17 **NATURE OF THE CASE**

18 This is an action by Pardee Homes (“Pardee”) against Beazer Homes USA Inc. and
19 Beazer Homes Holding Corp. arising from their adoption and use of the trademarks
20 SMARTLIVING and BUY NOW . . . LIVE SMART, which infringe Pardee’s incontestable
21 federal trademark rights in the LIVINGSMART mark. Pardee seeks a temporary restraining
22 order, preliminary and permanent injunctive relief, damages, attorneys’ fees and costs.

23 **JURISDICTION AND VENUE**

- 24 1. This Court has subject matter jurisdiction over this action under 28 U.S.C. §§
25 1331 and 1338(a) & (b).
26 2. This Court has general and specific personal jurisdiction over the Defendants
27 because they regularly conduct business in this judicial district and the claims asserted by Pardee
28

1 arise out of their contacts with this judicial district. In addition, Defendant Beazer Homes
2 Holding Corp. is registered to conduct business in this judicial district.

3 3. Venue is proper under 28 U.S.C. § 1391(b)(1) and (2), because Defendants reside
4 in this judicial district within the meaning of 28 U.S.C. § 1391(c) and a substantial part of the
5 events giving rise to Pardee’s claims occurred in this judicial district.

6 **PARTIES**

7 4. Plaintiff Pardee Homes (defined above as “Pardee”) is a California corporation
8 with its principal place of business in Los Angeles, California.

9 5. Defendant Beazer Homes USA Inc. (“Beazer USA”) is a Delaware corporation
10 with its principal place of business in Atlanta, Georgia.

11 6. Defendants Beazer Homes Holding Corp. (“Beazer Holding”) is a Delaware
12 corporation with its principal place of business in Atlanta, Georgia.

13 7. Upon information and belief, Beazer Holding is a subsidiary of Beazer USA and
14 holds the trademarks used by Beazer USA. For convenience, Beazer USA and Beazer Holding
15 shall be collectively referred to as “Beazer.”

16 **FACTUAL ALLEGATIONS**

17 8. Pardee is a residential real estate developer, home builder and commercial builder
18 with active developments in Nevada and Southern California. Pardee is a wholly owned
19 subsidiary of Weyerhaeuser Real Estate Company, which also owns other home developers,
20 including, Trendmaker Homes, Inc. (collectively, “Weyerhaeuser Parties”).

21 9. In 2001, Pardee adopted and began using the LIVING SMART mark in
22 connection with building construction and real estate development services.

23 10. On December 12, 2001, Pardee Homes filed federal trademark applications for
24 the LIVING SMART word mark and for the LIVING SMART design mark for building
25 construction services and real estate development services in International Class 37, with a date
26 of first use of September 24, 2001. Both applications matured into registrations on October 8,
27 2002 and they bear U.S. Registration Nos. 2631476 and 2631473, respectively (“LIVING
28 SMART Registrations”).

1 11. Based on its LIVING SMART Registrations and its use of the LIVING SMART
2 mark in commerce, Pardee owns the exclusive right to use the LIVING SMART mark for
3 building construction services and real estate development services in the United States.

4 12. Pardee has spent substantial time, effort and money on advertising and marketing
5 its LIVING SMART mark. During its eight (8) years of use of the LIVING SMART mark,
6 Pardee has spent millions of dollars on advertising and marketing using the LIVING SMART
7 mark. Pardee has used the LIVING SMART mark on the Internet, in newspapers and
8 magazines, on billboards, and in other media.

9 13. Millions of consumers have been exposed to Pardee's LIVING SMART mark
10 since Pardee began using the mark in 2001. As a result of Pardee's extensive advertising and
11 marketing using the LIVING SMART mark, consumers uniquely associate the LIVING SMART
12 mark with Pardee. Pardee's LIVING SMART mark has become one of its most important
13 marks.

14 14. Pardee has spent substantial time, effort and money enforcing its rights in the
15 LIVING SMART mark against competitors who have attempted to trade off of Pardee's
16 goodwill and reputation symbolized by the LIVING SMART mark, including through cease and
17 desist letters and opposition proceedings in the Trademark Trial and Appeal Board of the United
18 States Patent and Trademark Office ("USPTO").

19 15. The LIVING SMART Registrations became incontestable on October 1, 2008.
20 As a result, third parties cannot contest the ownership or validity of the LIVING SMART
21 Registrations or the protectability of the LIVING SMART mark.

22 16. In addition to its LIVING SMART mark, Pardee owns other SMART-formative
23 trademarks including the following federal trademark registrations and applications (which have
24 been approved by the USPTO and published for opposition) for services including in
25 International Class 37:

- 26 (1) WHERE SMART SOLUTIONS LIVE (Reg. No. 3567106);
27 (2) SMART SOLUTIONS (Serial No. 77522537);
28 (3) ECO-SMART LIVING (Serial No. 77496100);

- 1 (4) WATERSMART (Serial No. 77596893);
- 2 (5) EARTHSMART (Reg. No. 3058763);
- 3 (6) EARTHSMART and design (Reg. No. 3057277);
- 4 (7) HEALTHSMART (Reg. No. 3119201); and
- 5 (8) HEALTH SMART and design (Reg. No. 3058786).

6 17. In addition, the Weyerhaeuser Parties own SMART-formative marks for various
7 services, including services in International Classes 36 and 37

8 18. Defendant Beazer is a home builder active in seventeen (17) states including
9 Nevada and California. Beazer generated more than \$2 Billion in revenue in 2008. Beazer is a
10 direct competitor of Pardee in Southern Nevada and Southern California.

11 19. Long after Pardee adopted and began using the LIVING SMART mark and other
12 SMART-formative marks, Beazer filed two federal trademark applications for SMART-
13 formative marks in International Class 37. In 2007, Beazer Holding filed a federal trademark
14 application for SMARTDESIGN in International Class 37 for “[p]lanning and laying out of
15 residential communities; Construction of residential communities; [h]ousing services, namely,
16 repair, improvement, and construction of residential real property.” In 2008, Beazer Holding
17 filed a federal trademark application for ESMART HOMES and ESMART BEAZER HOMES
18 both in International Class 37 for construction services, namely, planning, laying out and
19 construction of residential homes.

20 20. In February 2009, the Weyerhaeuser Parties filed an action to cancel Beazer’s
21 registration for SMARTDESIGN and an action opposing Beazer’s application to register
22 ESMART HOMES and ESMART BEAZER HOMES based on the Weyerhaeuser Parties’ rights
23 in several SMART-formative marks, including Pardee’s LIVING SMART mark. In its answer
24 filed on April 6, 2009, Beazer admitted that Pardee owns the LIVING SMART Registrations.
25 Accordingly, Beazer had actual knowledge of Pardee’s federal trademark registrations for the
26 LIVING SMART mark.

27 21. Despite Beazer’s actual knowledge of Pardee’s rights in the LIVING SMART
28 mark, Beazer recently has adopted marks that are confusingly similar thereto. Beazer adopted the

1 SMART LIVING mark, which is Pardee's LIVING SMART mark with the words in reverse
2 order. Beazer also adopted the BUY LOW . . . LIVE SMART mark, which contains a variation
3 of Pardee's LIVING SMART mark in its entirety. Pardee learned of Beazer's adoption of these
4 marks in June 2009.

5 22. Beazer is using the SMART LIVING mark in connection with the sale of homes.
6 Specifically, Beazer's web site offers SMART LIVING homes for sale.

7 23. Beazer is also using the SMARTLIVING mark as the title of a magazine to
8 promote its homes. The magazine prominently features the SMARTLIVING mark on the cover.

9 24. On June 1, 2009, Beazer issued a press release announcing its nationwide BUY
10 LOW . . . LIVE SMART sales event scheduled to take place June 12-14, 2009. Beazer is
11 prominently featuring the campaign on its web site at <beazer.com>. Beazer has also marketed
12 the sale through an email blast. The email blast states that "**living smart** means saving money
13 and energy with our eco-friendly home features." (Emphasis added.)

14 25. Beazer's SMARTLIVING and BUY LOW . . . LIVE SMART marks are
15 confusingly similar to Pardee's LIVING SMART mark.

16 26. Beazer is using the SMARTLIVING and BUY LOW . . . LIVE SMART marks
17 for the same services covered by Pardee's federal trademark registrations for LIVING SMART,
18 namely, building construction services and real estate development services and the promotion
19 thereof.

20 27. Beazer is using the SMARTLIVING and BUY LOW . . . LIVE SMART marks in
21 direct competition with Pardee. Beazer and Pardee directly compete with each other for home
22 sales in the Southern Nevada and Southern California markets. Moreover, Beazer and Pardee are
23 selling homes in these markets that are comparable in price.

24 28. Beazer is using the SMARTLIVING and BUY LOW . . . LIVE SMART marks in
25 the same marketing channels utilized by Pardee to promote its LIVING SMART mark, including
26 on the Internet and through email marketing.

27 29. Beazer adopted and began using the SMARTLIVING and BUY LOW . . . LIVE
28 SMART marks after knowing of Pardee's rights in the LIVING SMART mark. Given the

1 myriad of marks available, Beazer's selection of these marks knowing of Pardee's incontestable
2 federal trademark registration for LIVING SMART indicates that Beazer intended to cause
3 confusion among consumers and trade off of Pardee's goodwill and reputation. Beazer
4 knowingly and willfully adopted these marks despite the fact that Pardee has already opposed
5 Beazer's registration of other SMART-formative marks.

6 30. Beazer's use of the SMARTLIVING and BUY LOW . . . LIVE SMART marks
7 will cause Pardee to suffer irreparable injury. The development and sale of residential properties
8 is highly competitive and fragmented, particularly in the current weak housing market. Pardee
9 uses its LIVING SMART mark to distinguish its services from those of its competitors,
10 including Beazer. Now, Beazer is attempting to trade off of Pardee's goodwill and reputation
11 and its eight (8) years of use of the LIVING SMART mark by adopting confusingly similar
12 marks.

13 **COUNT I**
14 **(Trademark Infringement under**
15 **the Lanham Act, 15 U.S.C. § 1114)**

16 31. Plaintiff realleges each allegation set forth in the preceding paragraphs as if set
17 forth herein.

18 32. Defendants have used and/or are using in commerce the SMARTLIVING and
19 BUY LOW . . . LIVE SMART marks, which are reproductions, counterfeits, copies, or colorable
20 imitations of Pardee's registered LIVING SMART mark, in connection with the sale, offering
21 for sale, or advertising of services on or in connection with which such use is likely to cause
22 confusion, or to cause mistake, or to deceive.

23 33. By adopting the SMARTLIVING and BUY LOW . . . LIVE SMART marks,
24 Defendants have reproduced, counterfeited, copied, or colorably imitated Pardee's LIVING
25 SMART mark and are using such reproduction, counterfeit, copy, or colorable imitation in
26 advertisements in commerce in connection with the sale, offering for sale, or advertising of
27 services on or in connection with which such use is likely to cause confusion, or to cause
28 mistake, or to deceive.

34. As a direct and proximate result of such trademark infringement, Pardee has

1 suffered and will suffer monetary loss and irreparable injury to its business, reputation, and
2 goodwill.

3 35. Defendants have committed such acts with intent to confusion, or to cause
4 mistake, or to deceive.

5 **COUNT II**
6 **(Unfair Competition under the**
7 **Lanham Act, 15 U.S.C. § 1125(a))**

8 36. Plaintiff realleges each allegation set forth in the preceding paragraphs as if set
9 forth herein.

10 37. Defendants' use of SMARTLIVING and BUY NOW . . . LIVE SMART marks in
11 commerce in connection with the sale of its services constitutes a false designation of origin,
12 false or misleading description of fact, or false or misleading representation of fact, which is
13 likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or
14 association of Defendants with Pardee, or as to the origin, sponsorship, or approval of
15 Defendants' services, by Pardee.

16 38. As a direct and proximate result of such unfair competition, Pardee has suffered
17 and will suffer monetary loss and irreparable injury to its business, reputation, and goodwill.

18 **COUNT III**
19 **(Unfair competition under common law)**

20 39. Plaintiff realleges each allegation set forth in the preceding paragraphs as if set
21 forth herein.

22 40. Defendants have engaged in unfair competition under common law.

23 41. As a direct and proximate result of such unfair competition, Pardee has suffered
24 and will suffer monetary loss and irreparable injury to its business, reputation, and goodwill.

25 **PRAYER FOR RELIEF**

26 WHEREFORE, Plaintiff Pardee respectfully requests that the Court:

27 A. Grant temporary, preliminary and permanent injunctive relief prohibiting
28 Defendants from using the SMARTLIVING and BUY LOW . . . LIVE SMART marks and any
confusingly similar marks, in connection with any real estate development services and the

1 advertising, promotion and marketing thereof;

2 B. Award compensatory, consequential, statutory, exemplary, and other damages
3 (including, but not limited to, profits and an award for corrective advertising) to Pardee in an
4 amount to be determined at trial;

5 C. Award attorneys' fees and costs to Pardee; and

6 D. Grant to Pardee whatever other relief is just and proper.

7 **JURY DEMAND**

8 Plaintiffs hereby request a jury trial on all issues so triable.

9 DATED this 8th day of June 2009.

10 LEWIS AND ROCA LLP

11 By _____/s/_____

12 Michael J. McCue

13 Jonathan W. Fountain

14 3993 Howard Hughes Parkway, Suite 600

15 Las Vegas, Nevada 89109

16 Tel: (702) 949-8200

17 Fax: (702) 949-8363

18 Attorneys for Plaintiff

19 Pardee Homes