

Case No. _____

PROSPECT DEVELOPMENT COMPANY, INC.,	§	In the District Court of
	§	
	§	
Plaintiff	§	
	§	
vs.	§	Harris County, Texas
	§	
	§	
DIAMOND MCCARTHY, LLP; J. GREGORY TAYLOR; AND STEPHEN T. LODEN,	§	
	§	
	§	
Defendants	§	____ Judicial District

PLAINTIFFS’ ORIGINAL PETITION AND JURY DEMAND

Plaintiff Prospect Development Company, Inc. (“**Prospect**” or “**Plaintiff**”) files this Original Petition and Jury Demand against Defendants Diamond McCarthy, LLP; J. Gregory Taylor, and Stephen T. Loden, as follows:

DISCOVERY – CONTROL PLAN

1. Plaintiff intends to conduct discovery under Level 3 of Texas Rule of Civil Procedure 190.4 and affirmatively pleads that this suit is not governed by the expedited-actions process in Texas Rule of Civil Procedure 169 because Plaintiff seeks monetary relief over \$250,000.

RELIEF

2. Plaintiff seeks monetary relief over \$1 million.

PARTIES

3. Plaintiff Prospect Development Company, Inc. is a corporation organized and in good standing under the laws of Colorado.

4. Defendant Diamond McCarthy, LLP (“**Diamond McCarthy**”) is a Texas limited liability partnership. Diamond McCarthy’s principal place of business is 909 Fannin, 37th Floor,

Houston, Texas 77010. Diamond McCarthy may be served with process through its registered agent, Mr. Allan B. Diamond, 909 Fannin, 37th Floor, Houston, Texas 77010.

5. Defendant J. Gregory Taylor (“**Taylor**”) is a lawyer licensed to practice law in the State of Texas, State Bar No. 19706100. Taylor is a partner in Diamond McCarthy. Taylor may be served with process at 2711 N. Haskill Avenue, Suite 3100, Dallas, Texas 75204.

6. Defendant Stephen T. Loden (“**Loden**”) is a lawyer licensed to practice law in the States of Texas, State Bar No. 24002489, and Colorado, Attorney Registration No. 45592. Loden is a partner in Diamond McCarthy. Loden may be served with process within Gunnison County, Colorado or at 909 Fannin, 37th Floor, Houston, Texas 77010.

7. At all times relevant to the allegations of this Petition, Taylor and Loden were acting within the scope and authority of their employment and agency with Diamond McCarthy as an employee and/or partner with Diamond McCarthy.

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction of this civil action because the amount in controversy exceeds this Court's minimum jurisdictional requirements.

9. Venue is proper in Harris County, Texas.

FACTUAL ALLEGATIONS

Introduction

10. This is an action against Diamond McCarthy, LLP (“Diamond McCarthy”) and its lawyers who were litigation counsel to plaintiff Prospect Development Company, Inc. (“Prospect”).

11. Prospect engaged Diamond McCarthy to advise Prospect regarding causes of action for negligence and breach of fiduciary duty that Prospect possessed against another law firm, Holland & Knight, LLP (“H&K”). H&K had represented Prospect in preparing property reports with required disclosures concerning a residential subdivision that Prospect developed in Gunnison County, Colorado. Because of erroneous statements in the property reports, Prospect became embroiled in disputes and in litigation concerning the development, costing Prospect millions of dollars to resolve the disputes and millions of dollars in legal fees. Defendants advised Prospect to pursue claims against H&K for its malpractice but miscalculated the deadline for filing suit. After Diamond McCarthy ultimately filed the complaint against H&K, the trial court granted H&K’s motion for summary judgment and dismissed the lawsuit, finding that Prospect’s claims were barred by the statute of limitations. The trial court also found that Prospect’s lawsuit lacked “substantial justification” because the lawsuit was so clearly time-barred. On that basis, the court awarded H&K attorney fees and costs in the amount of \$570,144.81. Following Diamond McCarthy’s advice, Prospect appealed the trial court’s order

granting summary judgment, but the appeals court affirmed the dismissal. H&K obtained a second judgment for attorney fees for defending the appeal, this one in the amount of \$65,696.50.

12. With the dismissal of Prospect's lawsuit against H&K, Prospect lost the chance to recover from H&K the millions of dollars in damages Prospect suffered as a result of H&K's negligence in drafting the property reports and breach of fiduciary duty in concealing the negligence. Not only did Prospect lose the ability to recover its damages from H&K, it is now indebted to H&K for H&K's attorneys fees and costs.

13. Defendants are responsible for the untimely commencement of the lawsuit against H&K, the dismissal of Prospect's complaint against H&K, and the judgments entered against Prospect and in favor of H&K.

Prospect's Development in Mt. Crested Butte

14. For many years, Prospect was in the business of selling lots consisting of undeveloped land in a residential development community (the "Development") in the town of Mt. Crested Butte, Colorado. A corporate affiliate of Prospect purchased land in the Development from its original developer, CBMR, in 2004.

15. The Development is located within the boundaries of Reserve Metropolitan District No. 2 (the "Financing District" or "District 2"), a special district organized under Colorado's Special District Act.

16. A related special district, Reserve Metropolitan District No. 1 (the "Service District" or "District 1") is located near the Financing District. Pursuant to a Consolidated Service Plan (the "Service Plan") governing their creation and inter-governmental agreements between them, the Service District provides services for the property owners in the Financing District, and the Financing District raises money to fund the activities of the Service District by levying property taxes on real property located within the Financing District. The Service Plan has been in place since August 15, 2000 and has been publicly filed in the Gunnison County property records since 2001.

17. As provided in the Service Plan, District 1 was established as the "Service District" to fund and construct the public facilities throughout the Development. Since its inception, the Service District accordingly created and/or acquired the infrastructure necessary to turn the undeveloped land within the Financing District into a community suitable for residential life. In the early 2000's, the Service District paid CBMR to create infrastructure. Later, after Prospect's affiliate acquired the property, Prospect constructed infrastructure at its own expense then sold the completed infrastructure to the Service District.

18. Pursuant to the Service Plan, District 2 was established as the "Financing District to "generate the tax revenue sufficient to pay the costs of the capital improvements." Since the early 2000's, the Financing District has contracted for or incurred general obligation debt to pay

for the infrastructure constructed and/or acquired by the Service District. The Financing District subsequently taxed property owners within the Financing District to make required payments on that debt.

H&K Represents Prospect

19. Before 2004, H&K represented CBMR in connection with the preparation of the federally-mandated property reports that were distributed to prospective purchasers of land in the Development (collectively, the “Property Reports”). After 2004, H&K began representing Prospect and related companies in connection with the preparation of the Property Reports. The Property Reports are mandated by the Department of Housing and Urban Development for property offered for sale within the Development. H&K held itself out as an expert in the preparation of such reports and in the federal and state laws relating to the sale of undeveloped property.

20. At all times, H&K was aware, and in possession, of the publicly-filed Service Plan describing the Service and Financing Districts and their stated purposes. Indeed, H&K filed a copy of the Service Plan with the Department of Housing and Urban Development in connection with other filings relating to the Development.

21. Prospect had no prior experience with the sale of undeveloped property and the property reports required for the sale of the lots, and relied on H&K’s professional advice and claimed experience in connection with the preparation of the Property Reports to be provided to potential purchasers of property in the Development.

22. The Property Reports drafted by H&K stated that the Developer “was responsible for” the construction cost of roads, water distribution mains, sewage collection systems, extension of primary electrical service lines, telephone service lines and natural gas lines. The Property Reports advised potential purchases that “you will not be responsible” and that “you will not be required to pay” for such costs. At no time did H&K ever advise Prospect that such language was improper or potentially inconsistent in any way with the provisions of the Service Plan or any other documents governing the construction, acquisition and funding of infrastructure in the Development.

23. Prospect had no reason to doubt that the language drafted by H&K was proper under the laws and regulations governing Property Reports and the sale of undeveloped land. Prospect did, in fact, construct such infrastructure at its own cost, and was only paid for such infrastructure later when the Service District acquired such infrastructure with funds raised by the Financing District.

Lot Owners Complain About Being Taxed for Infrastructure

24. In late 2009 and early 2010, Lot Owners started complaining that they were being taxed to pay the cost of infrastructure contrary to representations in the Property Reports that the Developer would pay such costs. These Lot Owners complained that the Developers had

represented in the Property Reports that the Developers would pay for the cost of creating infrastructure in the Development without disclosing that the Financing District would pay for the Service District's construction and/or acquisition of such infrastructure by contract or the issuance of general obligation debt. Likewise, they complained that they were not told that the Financing District would raise money to repay such obligations through property taxes assessed on property located within the Financing District. In other words, the lot owners complained that the Property Reports did not disclose that they would ultimately pay the cost of infrastructure in the Development through property taxes assessed against their lots.

Prospect Hires Diamond McCarthy as Litigation Counsel

25. After receiving the Lot Owners' complaints and threats, Prospect hired Diamond McCarthy as its "litigation counsel."

26. Through Diamond McCarthy, Prospect instructed H&K to change the Property Reports to disclose that Prospect was reimbursed for infrastructure costs by the Reserve Metropolitan Districts that served the Prospect Subdivision. Diamond McCarthy partner Taylor was involved in these 2010 discussions about revisions to the Property Reports.

27. On June 7, 2010, Taylor provided to Prospect's insurance carrier "written notice of circumstances which may reasonably be expected to give rise to a Claim." Taylor's letter stated that the Lot Owners were threatening claims based on alleged negligent misrepresentations in the Property Reports that H&K had prepared and for Prospect's liability for violation of the Interstate Land Sales Full Disclosure Act.

The Lot Owners Threaten Litigation

28. By September 13, 2010, the Lot Owners had hired a lawyer, Mr. Jay Horowitz, to represent them in discussions with Prospect. On September 13, 2010, Mr. Horowitz emailed Diamond McCarthy lawyer Mr. Paul Berry and stated that the imposition of taxes on the Lot Owners was inconsistent with statements made orally and in writing when the Lot Owners acquired their property. Mr. Horowitz proposed a tolling agreement to discuss settlement.

29. Prospect and the Lot Owners entered into a tolling agreement effective as of September 25, 2010. Mr. Taylor signed the tolling agreement for Prospect as "counsel for Developer." The tolling agreement stated that the Lot Owners allege that "they have cognizable claims for relief against the Developer."

30. On October 7, 2010, Prospect entered into a settlement agreement with the Seymours, two of the complaining Lot Owners. Prospect repurchased the Seymours' lot for \$739,500 and paid \$150,000 in settlement of the Seymours' claim. Diamond McCarthy represented Prospect in this settlement negotiation and transaction.

31. On November 2, 2010, H&K sent to Prospect revised Property Reports disclosing that purchasers of lots in the Prospect Development were responsible for paying the costs of the infrastructure through property taxes.

Diamond McCarthy Puts H&K on Notice of Potential Malpractice Claim

32. On February 3, 2011, Mr. Taylor sent a letter to H&K informing H&K that Lot Owners were alleging that the Property Reports contained misrepresentations and were threatening to sue Prospect. He attached Mr. Horowitz's September 13, 2010 email and the tolling agreement between Prospect and the Lot Owners. Diamond McCarthy put H&K on notice of Prospect's potential claims against H&K in the event that the Lot Owners prevailed in their claims against Prospect.

33. On April 27, 2011, H&K put its malpractice carrier on notice that Prospect had asserted a potential legal malpractice claim.

34. On May 9, 2011, H&K terminated its relationship with Prospect because of the February 3, 2011 letter.

The Lot Owners Accuse H&K of Legal Malpractice

35. On August 19, 2011, the Lot Owners' lawyer Mr. Horowitz sent Taylor a 43-page letter stating, among other things, that the Lot Owners believed that the lawyers who prepared the Property Reports (H&K) committed malpractice. Mr. Horowitz stated that "[t]here is, in our view, a powerful case which can be brought against this law firm [H&K] which authored a HUD report which is remarkably flawed. . . . We have virtually no question that the evidence supports claims for relief charging this law firm with gross negligence" and, if sued, the Developer would argue that "the Developer's lawyers were responsible for the problem and bear responsibility for the entirety of the damages which the [Prospect Owners Association] has suffered and seeks to recover."

36. On September 12, 2011, Mr. Taylor responded to Mr. Horowitz's letter and said that Diamond McCarthy would invite H&K to participate in a mediation with the Lot Owners and Prospect. Mr. Taylor stated that he was not optimistic that H&K would participate.

37. On November 17, 2011, Prospect and the Lot Owners attended a mediation at which the Lot Owners demanded that Prospect pay \$8 million. Prospect offered \$2 million to settle the Lot Owners' claims. The mediation was unsuccessful.

The Metro District Sues Prospect

38. On December 10, 2012, the Financing District voted to increase the property tax levied against property within its boundaries to pay for legal counsel separate from the Service District. Asserting that this tax was illegal under the Service Plan, the Service District and the town of Mt. Crested Butte initiated a lawsuit to enjoin the Financing District from imposing the

tax. This lawsuit was captioned *Reserve Metropolitan District No. 1, et al. v. Reserve Metropolitan District No. 2, et al.*, Case No. 2013CV18 (Gunnison County Dist. Ct.) (the “Special District Litigation”).

39. On March 19, 2013, Reserve Metropolitan District 2 as the Financing District for the Prospect Subdivision sued Prospect as a third-party defendant in the Special District Litigation alleging that Prospect had illegally received funds from District 1 as reimbursement for the costs of infrastructure construction in contravention of the Property Reports.

40. The Financing District’s counterclaims alleged that its Directors negligently and/or intentionally breached various duties to the Financing District and wrongfully caused the Financing District to incur debt to pay for the Service District’s acquisition of infrastructure. The Financing District further claimed that the Directors committed this alleged misconduct as employees or agents of Prospect, and that Prospect was liable for alleged damages that the Directors caused the Financing District.

41. In addition to its allegations of Prospect’s vicarious liability for the Directors’ alleged misconduct, the Financing District claimed that Prospect was directly liable under a variety of theories for improperly receiving funds from the Financing District. Specifically, the Financing District alleged that the funds Prospect received from the Service District for the purchase of infrastructure were illegally paid and received and that Prospect should be required to return all such funds, plus interest.

42. Taylor and Loden represented Prospect and its affiliates in defending against such claims.

The Lot Owners Sue Prospect

43. On April 2, 2013, several Lot Owners sued Prospect and several of its affiliates in Gunnison County Case No. 2013CV30000 (the “Lot Owner Litigation”) alleging that Prospect had misrepresented in the Property Reports that it would pay the costs of infrastructure construction when, in fact, District 2 was taxing the Lot Owners to pay such costs and to recoup what it had paid Prospect. The Lot Owners brought a wide range of claims relating to the sale of lots in the Development against Prospect and related parties, including negligent misrepresentation and breach of the Interstate Land Sales Development Act. The gravamen of the case was the allegation that the Property Reports told the Lot Owners that the Developers would bear the cost of infrastructure construction but did not state that the Financing District would take on public debt to enable the Service District to acquire that infrastructure and then tax owners of property accordingly.

44. Again, Diamond McCarthy lawyers Taylor and Loden represented Prospect and its affiliates in defending against such claims.

45. On May 16, 2013, several Lot Owners filed a complaint in intervention in the Special District Litigation and asserted claims against Prospect.

46. Diamond McCarthy ultimately became concerned about the accrual of Prospect's malpractice claims against H&K. On behalf of Prospect, Mr. Taylor approached H&K about entering into a tolling agreement. H&K entered into a tolling agreement with an effective date of January 26, 2015. Thus, any negligence claim that accrued before January 26, 2013 would be time-barred, and any claim for breach of fiduciary duty that accrued before January 26, 2012 would be time-barred.

47. On September 1, 2015, Prospect settled the Lot Owners' claims. The following month, Prospect settled the Financing District's claims. Prospect paid \$2,575,000 to settle the claims of the Lot Owners, the Seymours, and the Financing District. Prospect also forgave \$3,600,000 in indebtedness owed by the Financing District as part of the settlement.

Prospect Sues H&K

48. Through Diamond McCarthy and its lawyers Taylor and Loden, Prospect filed its lawsuit against H&K on October 31, 2016 asserting claims for professional negligence and breach of fiduciary duty. That case was captioned "*Prospect Development Company, Inc. v. Holland & Knight, LLP*," Case No. 2016CV30071 in the District Court of Gunnison County, Colorado (the "Underlying Case" or the "H&K Lawsuit").

49. In the complaint Diamond McCarthy authored and filed in the Underlying Case, Diamond McCarthy alleged that had it not been for the negligent actions of H&K, first in preparing the Property Reports, and thereafter in repeatedly insisting that the Property Reports were complete, accurate, and required no modifications, Prospect would not have been exposed to any of the litigation described above and would not have had to settle those disputes. Diamond McCarthy further alleged that as a direct and proximate result of H&K's negligence, Prospect sustained monetary damage.

50. Diamond McCarthy alleged that Prospect was entitled to a judgment against H&K awarding it the actual damages Prospect suffered, plus consequential damages (including costs and fees) permitted by law, as a result of H&K's malpractice.

The Trial Court Dismisses Prospect's Lawsuit as Time-Barred, and the Court of Appeals Ultimately Affirms the Dismissal

51. In January 2017, H&K filed a motion to dismiss Prospect's complaint on the basis that it was filed late. The trial court dismissed the complaint, but the Court of Appeals reversed the dismissal based on the trial court's procedural error and returned the case to the trial court for further proceedings. The Court of Appeals noted that its decision did not foreclose H&K's opportunity to file a motion for summary judgment based upon its statute of limitations defense, "if appropriate."

52. The H&K Lawsuit proceeded with the parties' making initial disclosures. On Prospect's behalf, Diamond McCarthy disclosed that Prospect's damages based on H&K's

malpractice included \$2,575,000 based on amounts paid in settlement of the previous litigation and attorneys' fees involved defending those claims.

53. H&K sought discovery relating to Prospect's damages, including Diamond McCarthy's invoices and correspondence reflecting the attorney fees incurred in defending Prospect, but Diamond McCarthy refused to produce those documents in an unredacted form. H&K filed a motion to strike Prospect's damages claim. Prospect to produce the documents. H&K also threatened to move to disqualify Diamond McCarthy based on Diamond McCarthy's involvement in the previous litigation and its lawyers' role as potential witnesses concerning when Prospect's claims against H&K accrued.

54. In July 2019, H&K filed its motion for summary judgment seeking dismissal of the Underlying Action. In its motion, supported by 48 exhibits, H&K argued that Prospect filed the Underlying Action too late because (i) Prospect's negligence claim accrued more than two years before the effective date of the tolling agreement between Prospect and H&K (*i.e.*, before January 26, 2013) and (ii) Prospect's breach of fiduciary duty claim accrued more than three years before the tolling agreement (*i.e.*, before January 26, 2012).

55. H&K cited "13 Separate and Independent Grounds Establishing as a Matter of Law the Legal Malpractice Claims are Time-Barred" because the negligence and breach of fiduciary duty claims accrued before January 26, 2012. They included:

- a. Prospect settled with the Seymours on October 7, 2010.
- b. By September 2010, Prospect knew from Mr. Horowitz's September 13 email that the Lot Owners were asserting claims based on the Property Reports; also, the Lot Owners and Prospect entered into a tolling agreement effective September 25, 2010. Diamond McCarthy attorneys were involved in these matters.
- c. In 2010, Prospect instructed H&K to amend the Property Reports, and Prospect paid Diamond McCarthy to assist in the process.
- d. In 2010, Prospect hired Diamond McCarthy as "litigation counsel" in anticipation of litigation with the Lot Owners based on the Property Reports.
- e. On February 3, 2011, Prospect put H&K on notice of a legal malpractice claim.
- f. Mr. Horowitz's August 19, 2011 letter to Diamond McCarthy identified Prospect's legal malpractice claim against H&K.

56. The trial court granted H&K's motion for summary judgment and dismissed the H&K Lawsuit by order entered September 25, 2019. Gunnison County District Judge J. Steven Patrick stated that "the record conclusively shows that Prospect knew or should have known the factual basis of its claims against H&K no later than between the fall of 2010 and early 2011." Judge Patrick cited the October 2010 Seymour settlement and Diamond McCarthy's February

2011 letter to H&K about Prospect’s “potential claims” as proof that “Prospect knew about the essential facts of its legal malpractice claim no later than February 2011.” Further, Judge Patrick stated that “the record shows and it is undisputed that in November 2010, Prospect’s litigation and transactional attorneys knew that H&K had improperly drafted the property reports.”

57. Judge Patrick concluded that Prospect’s claims were so clearly time-barred that the commencement of the Gunnison Lawsuit entitled H&K to an award of its attorney fees. Under Colorado statute, a court shall impose attorney fees against a party who files a claim that lacks “substantial justification.” C.R.S. § 13-17-102(4). A claim lacks substantial justification if it is “substantially frivolous, substantially groundless, or substantially vexatious.”

58. Diamond McCarthy appealed the order granting summary judgment and represented Prospect in the appeal.

59. By decision issued February 25, 2021, the Court of Appeals affirmed Judge Patrick’s summary judgment, agreeing that Prospect’s claims against H&K accrued more than three years before Prospect entered into the tolling agreement with H&K on January 26, 2015. The Court of Appeals explained, “[w]e reach this conclusion for two significant reasons: (1) Prospect settled with the Seymours on October 7, 2010; and (2) Prospect’s attorneys, Diamond McCarthy LLP, knew of the alleged malpractice in 2010, and this knowledge is imputed to Prospect.” *Opinion*, ¶13. The Court of Appeals noted that:

Prospect hired the Diamond McCarthy law firm as its litigation counsel in early 2010 once the Seymours and other lot owners began expressing concerns about what they perceived to be misleading disclosures in the property reports. When Prospect incurred legal fees from Diamond McCarthy to help remedy the perceived errors in the property reports, Prospect suffered injury for the purposes of the accrual of a legal claim against H&K. *See Jacobson*, 859 P.2d at 913.

Opinion, ¶ 21.

60. Even though the Court of Appeals agreed with the trial court that Prospect’s malpractice claims accrued in 2010, it concluded that other events occurring throughout 2011 would also have triggered the accrual of claims – thus further establishing that Prospect’s claims were time-barred before the January 26, 2015 tolling agreement. More specifically, the Court of Appeals cited:

- a. Diamond McCarthy’s February 2011 letter to H&K providing it “notice of circumstances which may reasonably be expected to give rise to a claim against [Prospect], Triple Peaks, Inc. . . . , and potentially H&K, among others.”
- b. H&K’s May 2011 termination of its relationship with Prospect.
- c. The August 2011 43-page letter from the Lot Owners’ lawyer accusing H&K of legal malpractice.

- d. The November 2011 mediation at which Prospect offered \$2 million to settle the Lot Owners' claims.

61. The Court of Appeals stated: [a]t a minimum, these events put Prospect on notice that it was facing a claim for damages caused by negligent or wrongful acts of H&K." *Opinion*, ¶ 25.

62. The Court of Appeals issued its mandate on April 23, 2021.

The Trial Court Awards Attorneys' Fees and Costs to H&K

63. On October 9, 2019, H&K filed its Motion for Attorneys' Fees and Costs. The trial court permitted H&K to conduct discovery related to H&K's fees, and it conducted an evidentiary hearing. In its January 23, 2020 Order Re: Defendant's Motion for Attorney Fees, the trial court found that "there is no rational argument to support Prospect's claim against H&K" because "Prospect knew the essential facts supporting its malpractice claim no later than February 2011 when Prospect's litigation counsel [Diamond McCarthy] provided written notice to H&K of Prospect's potential claim against the firm." *Order Re: Defendant's Motion for Attorney Fees, Jan. 23, 2020, p. 1*. Further, Judge Patrick explained that "[e]ven before February 2011," Prospect had settled the Seymours' claim and that "[f]rom that point forward, Prospect's officers knew that H&K had improperly drafted the HUD reports." *Id. at p. 2*.

64. H&K's expert witness who testified in support of the firm's fee request stated in his expert report:

[T]his is a lawsuit that should never have been brought. The action was obviously time barred and the information establishing the time bar was known to the Plaintiff and the law firm that represented the Plaintiff. There was neither legal nor factual support for any argument that the lawsuit **was not** time barred making this action hornbook frivolous and groundless.

Report of Jeffrey S. Pagliuca, Esq., p. 18.

65. The trial court entered judgment in the amount of \$570,144.81 in favor of H&K and against Prospect on June 2, 2020.

66. Following the Court of Appeals' decision affirming the trial court's summary judgment ruling, H&K filed another motion for attorneys' fees – this time seeking fees for defending Prospect's appeal of the summary judgment motion. In light of the trial court's previous rulings and the expense involved in objecting to H&K's motion, Prospect did not oppose H&K's request. On July 30, 2021, the trial court entered judgment against Prospect and for H&K in the amount of \$65,696.50.

***Prospect Lost the Opportunity to Recover its Damages from H&K Because of
Diamond McCarthy's Errors and Omissions***

67. As a proximate cause of Defendants' conduct, Prospect's claims against H&K are now barred and rendered worthless.

68. Prospect's claims against H&K were meritorious. But for Defendants' conduct, Prospect would have prevailed on the merits in the prosecution of such claims and would have obtained and collected a judgment against or settlement from H&K of several million dollars.

69. As a further proximate result of Defendants' conduct, two judgments for attorneys' fees and costs have been entered against Prospect, and Prospect has incurred and will incur additional attorneys' fees.

**CLAIM FOR RELIEF:
PROFESSIONAL NEGLIGENCE**

70. Prospect incorporates the foregoing paragraphs as if fully set forth herein.

71. Defendants had a lawyer-client relationship with Prospect.

72. As the employer of Taylor and Loden, Diamond McCarthy is responsible for the acts and omissions of Taylor and Loden and all of its other attorneys and paraprofessionals.

73. As the lawyers advising Prospect and acting on its behalf, each Defendant owed Prospect a duty to exercise that degree of care and skill that would be exercised by a reasonably competent attorney providing the same or similar services and advice under the same or similar circumstances.

74. Each of the Defendants breached their duty of care owed to Prospect through their acts, errors, and/or omissions during the course of providing professional services and advice to Prospect in that, among other things, each Defendant:

- a. Failed to identify the time of accrual of Prospect's claims for professional negligence and breach of fiduciary duty against H&K;
- b. Failed to accurately advise Prospect as to when the limitations periods applicable to Prospect's claims against H&K began to run;
- c. Negligently informed Prospect that the limitations periods applicable to Prospect's claims against H&K began to run later than what Colorado law provides for the accrual of such claims;
- d. Failed to obtain a tolling agreement with H&K before the statute of limitations expired; and

- e. Failed to commence a lawsuit against H&K within the time required to preserve Prospect's causes of action for breach of fiduciary duty and professional negligence and prevent those claims from being dismissed as time-barred.

75. As a direct and proximate result of Defendants' breach of the standard of care, including any one or more of the negligent acts and omissions referenced above, Prospect suffered damages, including the loss of its claims against H&K and the entry of judgments against Prospect.

Limitations

76. Prospect's cause of action against Defendants was tolled under *Hughes v. Mahoney & Higgins*, 821 S.W.2d 154 (Tex. 1991) because Defendants' negligence occurred in the prosecution of a claim that resulted in litigation. Additionally, Prospect and Defendants entered into a tolling agreement.

Reservation of Right to Amend Petition

77. Prospect reserves the right to amend this Petition to assert additional damages suffered by it as a result of the Defendants' acts and omissions.

PRAYER FOR RELIEF

Prospect requests that this Court enter judgment in its favor and against Defendants for the following relief:

- a. Actual damages;
- b. Pre-judgment interest;
- c. Post-judgment interest;
- d. Attorneys' fees and court costs incurred in this case; and
- e. All other relief available under law and/or equity.

JURY DEMAND

Prospect demands a jury trial and tenders the appropriate fee with this Petition.

Respectfully submitted this 22d day of October, 2021.

OGBORN MIHM LLP

/s/ Susan H. Jacks

Susan H. Jacks

Texas State Bar No. 08957600

1700 Lincoln, Suite 2700

Denver, Colorado 80203

Phone Number: (303) 592-5900

Fax Number: (303) 592-5910

susie.jacks@OMTrial.com

Attorneys for Plaintiff

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

eLawServices EFM on behalf of Susan Jacks
Bar No. 8957600
melissa@elawservices.com
Envelope ID: 58465359
Status as of 10/22/2021 3:56 PM CST

Associated Case Party: PROSPECT DEVELOPMENT COMPANY INC

Name	BarNumber	Email	TimestampSubmitted	Status
Susan H.Jacks		susie.jacks@omtrial.com	10/22/2021 3:43:37 PM	SENT