IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT G. REYNOLDS, AN INDIVIDUAL; AND DIAMANTI FINE JEWELERS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellants, vs. RAFFI TUFENKJIAN, AN INDIVIDUAL; AND LUXURY HOLDINGS LV, LLC, A NEVADA LIMITED LIABILITY COMPANY, Respondents.	Case No.: 78187 Appeal from the Eighth Judicial District Court, The Honorable Mark Denton Presiding.

RESPONDENTS' ANSWERING BRIEF

Marquis Aurbach Coffing
Terry A. Moore, Esq.
Nevada Bar No. 7831
Christian T. Balducci, Esq.
Nevada Bar No. 12688
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
tmoore@maclaw.com
cbalducci@maclaw.com
Attorneys for Respondents

MAC:14229-003 4043720_3

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Respondent Raffi Tufenkjian is an individual.

2. Respondent Luxury Holdings LV, LLC is not a publicly-traded company, nor is more than 10% of its stock owned by a publicly-traded company.

Dated this 13th day of July, 2020.

MARQUIS AURBACH COFFING

By /s/ Christian T. Balducci
Terry A. Moore, Esq.
Nevada Bar No. 7831
Christian T. Balducci, Esq.
Nevada Bar No. 12688
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

RULES

STATUTES

I. JURISDICTIONAL STATEMENT

A. THIS COURT HAS JURISDICTION TO REVIEW THE ORDER GRANTING SUMMARY JUDGMENT AS TO THE CLAIMS FOR FRAUD AND ELDER ABUSE

This Court has jurisdiction to consider the appeal from the underlying summary judgment order because Appellants Robert Reynolds ("**Reynolds**") and Diamanti Fine Jewelers, LLC ("**Diamanti**") timely appealed the Court's order granting in part, denying in part, Reynolds and Diamanti's motion to amend the underlying summary judgment order. *See* NRAP 3A(b)(2); *and see* 4 Appellants' Appendix ("**AA**") 833 – 834 (notice of entry granting in part, denying in part, motion to amend); *see also* 4 AA 835 – 836 (notice of appeal). This Court's jurisdiction is limited to the underlying claims for fraud[1] and elder abuse.

[1] The rescission portion of the fraud claim is dubious and can be ignored. As part of their fraud claim, Reynolds and Diamanti requested rescission of a lease and a personal guaranty with their landlord, Great Wash Park, LLC aka Tivoli Village. 1 AA 22 ¶¶38 – 39. Great Wash Park, LLC did not participate in the proceedings below. 1 Respondents' Appendix 24 – 30 (docket). Once this Court identified this jurisdictional defect (that there was no order resolving the claims with Great Wash Park, LLC, and therefore no final order), Reynolds and Diamanti entered into a stipulation that dismissed Great Wash Park, LLC, *with prejudice*. 1 RA 21 – 23. Since that dismissal was with prejudice, there is no circumstance where this Court can remand this matter and Reynolds and Diamanti can pursue rescission of their lease and guaranty with Great Wash Park, LLC.

B. THE BREACH OF CONTRACT AND NEGLIGENT MISREPRESENTATION CLAIMS ARE DISMISSED

This Court dismissed the breach of contract and negligent misrepresentation claims. *See Reynolds v. Tufenkjian,* 126 Nev. Adv. Op. 19, 461 P.3d 147 (2020). Therefore, those claims are not subject to this Court's review.

C. THIS COURT DOES NOT HAVE JURISDICTION TO REVIEW THE ORDER GRANTING ATTORNEY FEES AND COSTS

While not squarely addressed in the Opening Brief ("**OB**"), Reynolds and Diamanti have made comments to this Court in other pleadings that "If the judgment against Appellants is reversed, the attorney's fees will also be reversed …." *See* Response to Motion to Dismiss and Substitute as Real Parties in Interest at pg. 3, on file with this Court. It is for this reason that Raffi and Luxury Holdings provide this jurisdictional statement concerning the fee and cost order entered by the district court.

This Court lacks jurisdiction to entertain any challenge to the attorney fee and cost order entered in favor of Respondents Raffi Tufenkjian ("**Raffi**") and Luxury Holdings LV, LLC ("**Luxury Holdings**") because:

(1) Neither Reynolds nor Diamanti filed a notice of appeal from the attorney fee and cost award in the District Court, and it has been more than thirty (30) days from the date of notice of entry of the same. *See Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); 1 Respondents' Appendix

("**RA**") 15 (order granting fees and costs). Due to the lack of a timely notice of appeal from the order granting attorney fees and costs, this Court lacks jurisdiction to address that order. *Rust*, 103 Nev. at 688; 747 P.2d at 1382.

(2) The fee award is based upon a fee provision in the underlying contract. 1 RA 18 ¶¶ 3, 4. The breach of contract claim was executed upon post-judgment, and the appeal thereof was dismissed by order of this Court. *See Reynolds,* 126 Nev. Adv. Op. 19, 461 P.3d 147. Consequently, the appeal regarding the breach of contract claim is no longer before this Court. Thus, there is no circumstance where the summary judgment order on the breach of contract claim can be reversed or the fee and cost award can be overturned.

II. ROUTING STATEMENT

Raffi and Luxury Holdings defer to the Court's judgment as to routing, though the case is presumptively assigned to the Supreme Court of Nevada because this matter originated in a Business Court. *See* NRAP 17(a)(9); *see also* 1 RA 1 – 2 (Business Court Request); 1 RA 3 (notice of department reassignment and designation of business court case number).

As it relates to Reynolds and Diamanti's contention that retention of this matter by the Supreme Court is appropriate under the "issue of first impression" exception, Raffi and Luxury Holdings respectfully submit that Reynolds and

Diamanti did not identity "citations to the record where the issue was raised and resolved…." *See* NRAP 28(a)(5).

III. ISSUES ON APPEAL

(1) Reynolds and Diamanti did not challenge or argue against the enforceability of the non-reliance and independent investigation clauses in the underlying contracts during the summary judgment proceeding below. A point not argued before the district court is deemed waived on appeal. Thus, did Reynolds and Diamanti waive any challenge to the non-reliance and independent investigation provisions of the underlying contracts when they failed to present such a challenge to the district court in the first instance?

(2) In this case, the contracts in question contained non-reliance clauses and independent investigation provisions, under which the parties disclaimed any reliance upon the statements of the opposing party and instead agreed that they relied exclusively upon their own independent investigation. Reynolds testified that he acknowledged and understood the non-reliance clauses. Consequently, can a party that acknowledges and agrees to non-reliance and independent investigation clauses later claim they do not apply and present evidence of justifiable reliance on appeal?

(3) The admissible evidence during the summary judgment proceedings demonstrated that Reynolds/Diamanti performed extensive due diligence, noticed there were issues were the financial figures, yet closed anyway. Likewise, neither Reynolds nor Diamanti presented admissible evidence that any of the purported misrepresentations induced them to close the transaction. Therefore, can a party that fails to present evidence that a purported misrepresentation induced them proceed past summary judgment?

4. Reynolds assigned the entire transaction from himself to Diamanti at closing in the Closing Agreement. The Closing Agreement's provision is clear that all benefits, burdens, etc., including the deposit, are assigned and that the Offer Agreement Reynolds signed was ratified to identify Diamanti as the proper party. Thus, can Reynolds assert personal claims arising from a transaction when he assigned all of his rights to Diamanti?

IV. STATEMENT OF THE CASE

This is a classic case of buyer's remorse. In March of 2015, Plaintiff Diamanti Fine Jewelers, LLC ("**Diamanti**") purchased the Diamanti jewelry store located in Tivoli Village ("**the Jewelry Store**") from Luxury Holdings LV, LLC ("**Luxury Holdings**"). After operating the business for more than two years, Diamanti and its member/manager Plaintiff Robert Reynolds ("**Reynolds**") determined that they regretted the purchase and filed this lawsuit against Luxury

Holdings and its manager, Raffi Tufenkjian ("**Raffi**"), in an effort to unwind the years-old transaction based upon claims of fraud.

Discovery revealed that the facts underlying their allegations were nothing more than a delusional reality concocted solely to form the basis of their frivolous lawsuit. The fabricated nature of Reynolds' story became clear during his deposition. During his deposition, Reynolds admitted that he took no issue with the cost of the inventory acquired (even though that was one of his core claims), readily admitted that he contractually agreed that he relied on his own due diligence investigation (thus eliminating the element of reliance required for his fraud claim), and then admitted he contractually agreed that he did not rely on representations from anyone. 1 AA 106, 113, 157. As his case fell apart more and more with each question, Reynolds resorted to *ad hominem* attacks against Raffi and even counsel. Specifically, Reynolds said that the examiner's questions were "BS" and "bullshit," and then unilaterally concluded that Raffi was a "natural-born liar." 1 AA 96 – 98.

At the conclusion of discovery, Raffi and Luxury Holdings filed for summary judgment. Raffi and Luxury Holdings summary judgment motion almost entirely relied upon (1) Reynolds deposition testimony and (2) uncontroverted documents and contracts. Once presented with Reynolds own words, the district court made two correct conclusions that formed the foundation of the summary

judgment order: first, that the express non-reliance provision eliminated the element of reliance, and second, that "[w]hile [Appellants] asserted that there are material misrepresentations that formed the foundation of [Appellants'] claims, [Appellants] failed to reference any particular records which evidence such misrepresentations." 3 AA 224. In other words, the district court found that the Appellants agreed that they did not rely on any representations, and found that Appellants did not cite any actionable misrepresentations or provide admissible evidence during the summary judgment motion practice. *Id.*

Nothing has changed since the district court entered its order granting summary judgment. The contracts still say that all parties agree they did not rely upon any representation, and the record itself remains devoid of any supported material misrepresentation which can be considered for the first time on appeal. No amount of argument by counsel can change this. This Court should affirm.

V. STANDARDS OF REVIEW

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT ORDERS

This Court "review[s] an appeal from an order granting a motion for summary judgment de novo. *Sustainable Growth Initiative Comm. v. Jumpers, LLC,* 122 Nev. 53, 61, 128 P.3d 452, 458 (2006). "On appeal, this court is required to determine whether any genuine issues of material fact were created by

the pleadings and proof offered below." *Bulbman, Inc. v. Nevada Bell,* 108 Nev. 105, 110, 825 P.2d 588, 591 (1992). To prevent summary judgment, the non-moving party must set forth specific, admissible facts demonstrating the existence of a genuine issue of material fact for trial. *Id.* "A genuine issue of material fact exists where the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Id.* In certain circumstances, this Court "must determine whether the law has been correctly perceived and applied by the district court." *Sandoval v. Board of Regents of University*, 119 Nev. 148, 153, 67 P.3d 902, 905 (2003).

Because the matter below was set for a bench trial, and not a jury trial, the question is whether the district court could return judgment for the non-moving party at the conclusion of trial. 1 RA 13 – 14 (order setting non-jury trial). The district court already concluded that the application of the undisputed facts required judgment as a matter of law. 3 AA 715 – 723.

VI. FACTUAL AND PROCEDURAL HISTORY

A. PERTINENT FACTS

The opening brief's two-page "statement of facts" does not provide this Court with a recitation necessary for *de novo* review. Presumably, this is because Reynolds and Diamanti want this Court to believe that the only bases for summary judgment were the express non-reliance clauses in the underlying contracts, and

(assuming there were misrepresentations) that that falsity of the information provided by Luxury Holdings was not apparent until after Diamanti owned the Jewelry Store in question. *See* Opening Brief ("**OB**") at pgs. 4 – 7. That is an inaccurate portrayal of the undisputed facts relied upon by the district court, as well as an incorrect portrayal of the district court's ruling.

Consequently, Raffi and Luxury Holdings hereby provide the Court with the facts considered by the district court. These facts primarily rely upon the testimony of Reynolds and documents which were not disputed.

1. The Parties

The essence of the underlying lawsuit is that Reynolds and/or Diamanti was/were defrauded and duped into buying the subject business.

a. Plaintiff Robert Reynolds

For much of his career, Robert Reynolds managed multi-million dollar construction projects, the largest of which had a $300 – $400 million per month budget. *See* 1 AA 81 at pgs. 12 – 13. Upon retiring from construction, Reynolds entered the hotel industry by purchasing a hotel in South Africa. *See* 1 AA 82 at pgs. 14 – 15. Reynolds purchased that hotel in 1995 for $3 million, and then he sold it in 2008 for $18 million. *Id.* On another occasion, Reynolds built a theater connected to a shopping mall. 1 AA 84 at pg. 23 – 1 AA 85 at pg. 25. Reynolds sold that theater for $3 million. 1 AA 86 at pg. 30, ll. 15 – 19. At the time of his

deposition, Reynolds was one of the largest stakeholders in a shopping mall in South Africa, for which he paid $4 million. 1 AA 85 at pg. 28.

In all of the above transactions, Reynolds engaged in extensive due diligence to determine the viability and profitability of each transaction. "Due Diligence" is a concept Reynolds is intimately familiar with.[2]

Reynolds admitted that he is very familiar with contracts. 1 AA 83 at pg. 21. Reynolds is also familiar with corporate formation, and the concept that a company is separate and distinct from its individual owners/shareholders. Reynolds repeatedly acknowledged his understanding of the difference between a person and an entity in his deposition:

> Mr. Balducci: Just trying to understand. Some people don't realize that an LLC is different than them, but it seems to me you're familiar with the concept that you are not a corporation. Would that be a fair statement?
>
> Mr. Reynolds: Yes. Yes.

1 AA 86 at pg. 32, ll. 24 – pg. 33, ll. 3.

[2] For example, he hired an independent bookkeeper to review the financial records of the hotel, and physically moved to the jurisdiction where the hotel was located to get a sense of its customers and operations. 1 AA 82 at pg. 16 – 1 AA 83 at pg. 18.

b. Diamanti

Diamanti is an entity Reynolds acknowledged he formed for the purpose of acquiring the Jewelry Store in question. 1 AA 87 at pg. 37, ll. 17 – 1 AA 88 at pg. 38, ll. 20.

c. Luxury Holdings LV, LLC

Luxury Holdings is the entity that sold the Jewelry Store in question. 1 AA 156 ¶¶2 – 7.

Sunbelt Business Brokers served as Luxury Holdings' business broker for the Jewelry Store. *Id.* ¶7.

d. Raffi

Raffi is the manager of Luxury Holdings. 1 AA 156 ¶5.

2. The Underlying Transaction and Its History

a. Reynolds Looks to Buy a Business

Toward the latter portion of 2014, Reynolds desired to purchase a business here in Las Vegas, Nevada, and specifically was looking to buy a business that was located in Tivoli Village (in Summerlin area). One such business was the Diamanti Jewelers ("**the Jewelry Store**"). After sending an inquiry, Reynolds received an email from Diamanti's business broker (Sunbelt Business Brokers) on January 5, 2015. 2 AA 278 – 280. This email included a business summary

marketing brochure. *Id.* The business summary marketing brochure received by Reynolds included the following disclaimers:

- "During the due diligence process, it is the responsibility of the Buyer, with the aid of an accountant and/or attorney, if necessary, to independently verify all representations which have been made by the Seller, particularly as they relate to the adjustments made to the profit and loss statements[,]" 1 AA 227, 264
- "Readers of this report should understand that statements are not guarantees of value or results[,]" *id.*;
- "Sunbelt Business Brokers cautions readers not to place undue reliance on any forward-looking statements or projects that may have been used in the analysis of value[,]" *id.*;
- "It is the responsibility of the Buyer to verify all representations and to make a final purchase decision based on their own independent investigation[,]" *id.*;
- "The books are kept in house using a sophisticated register point of sale software[,]" *id.* 1 AA 244;
- "Projection for the Year Ended December 2014[,]" 1 AA 246;

- "The Seller's profit/loss statement ***projected*** out for 2014 was used in the computation[,]" 1 AA 249 (emphasis added);

Essentially, the brochure is very clear that any buyer must perform their own independent investigation into the business to determine if they wanted to purchase it, if it made financial sense to do so, and, is very clear that any financial numbers were not to be relied upon by the buyer.[3]

3. Reynolds Offers to Purchase the Jewelry Store

Reynolds made an offer to buy the Jewelry Store on January 12, 2015. 1 AA 162 – 167. This was approximately one week after he received the marketing brochure.

The offer was extended to the Jewelry Store's owner, Luxury Holdings. The offer was made on behalf of "Robert G. Reynoldsor (*sic*) entity to be formed by purchaser...." 1 AA 162. Acknowledging the preliminary nature of the offer, the offer documentation stated that "Except for express warranties made in this Contract, the Closing of this transaction shall **supersede** this Contract." 1 AA 165 ¶20 (emphasis added).

[3] Reynolds acknowledged these disclaimers in his deposition.

4. A Contract is Formed

Luxury Holdings' manager, Raffi, submitted a counter-offer that did not materially change the offer's terms, and executed the offer on January 13, 2015, thus forming a valid and binding agreement ("**the Offer Agreement**"). 1 AA 167. This was a true arms-length transaction. 1 AA 159 ¶34. Raffi did not know Reynolds, and Reynolds did not know Raffi. *Id.*

Luxury Holdings was obligated to pay a 10% commission on the sale of the Jewelry Store to its business broker, Sunbelt Business Brokers. 1 AA 156 ¶7. This also included a 10% commission on any finished retail jewelry owned by Luxury Holdings LV, LLC that Reynolds opted to purchase in addition to the business itself. *Id.*

5. Reynolds Forms and Confirms that Diamanti is the Purchaser of the Jewelry Store

In furtherance of the acquisition of the Jewelry Store, Reynolds formed a limited liability company named Diamanti Fine Jewelers, LLC. 1 AA 171 – 172. Reynolds was, and still is, the manager of Diamanti. *Id.* As part of the purchase transaction, Diamanti executed a certificate of limited liability company status and authority. 1 AA 174 – 175. This document confirmed that Diamanti – and no one else – was purchasing the Jewelry Store, and that Reynolds had authority to

execute documents on behalf of the LLC. *Id*. In the Certificate of Authority, Reynolds confirmed that he was also the 100% owner of Diamanti. *Id.*

Notably, in executing that document, Reynolds admitted that Diamanti – and only Diamanti – was the buyer in the transaction:

> Mr. Balducci: All right, we will go on to the next one. This is the Certificate of Limited Liability Company Status and Authority of Diamanti Fine Jewelers, LLC. Is that a correct statement?
>
> Mr. Reynolds: Yes.
>
> Mr. Balducci: And you'll see on the second page this is signed by you as the member of that LLC?
>
> Mr. Reynolds: Yes.
>
> Mr. Balducci: And this document, you're verifying that you are acting on behalf of the company, and everything in relation to this transaction is for the company Diamanti Fine Jewelers, LLC?
>
> Mr. Reynolds: Yes.

1 AA 113 at pg. 139, ll. 20 – pg. 140, ll. 7.

6. <u>Due Diligence</u>

During discovery, and particularly during Reynolds' deposition, Raffi and Luxury Holdings attempted to learn what sort of due diligence (if any) Reynolds/Diamanti engaged in and whether there were any conversations between Reynolds and any of the Defendants that formed a part of his due diligence or his decision to purchase the Jewelry Store. For the most part, Reynolds' answers were less than illuminating and consisted of *ad homimem* attacks on Raffi:

Mr. Balducci: Prior to submitting this offer, how many conversations had you had with Raffi?

Mr. Reynolds: If I had one, it was too damn many. I don't know.

1 AA 111 at pg. 131, ll. 9 – 11.

Although Reynolds had ample opportunity to do whatever due diligence he wanted, he refused to ever specifically identify any due diligence that he did prior to closing the transaction. Instead, he just kept saying that Raffi "is a natural-born liar" without ever pin-pointing anything specific that Raffi ever did or failed to do. 1 AA 96 at pg. 73, ll. 9 – 17. When asked about specific conversations he may have had with Raffi or Luxury Holdings, Reynolds obfuscated by arguing "anything your client [Raffi and/or Luxury Holdings] did was false." 1 AA 98 at pg. 81, ll. 1. When asked about the current revenues of the business to determine whether the company was making a profit or sustaining a loss, Reynolds said "Well that was - - that's where you get into this bunch of BS from - - wait a minute." *Id.* at pg. 79, ll. 18 – 24.

This pattern of refusing to answer even rudimentary questions while resorting to expletives was the norm for Reynolds. For example, a number of emails produced in this case from the due diligence period included Reynolds' son on the cc line. Reynolds' son was an attorney here in Las Vegas. Reynolds claimed that the emails (which his son was cc'ed on) were "false" and that the line

of questioning was "bullshit." 1 AA 97 at pg. 76, ll. 14 – 1 AA 98 at pg. 78, ll. 6. Specifically, he said "I get worried about where you're coming from with that bullshit, I really do." 1 AA 97 at pg. 77, ll. 4 – 19.

It was not just an issue of evading questions, it was also an issue of changing his story multiple times. For example, when first asked about his son's involvement, Reynolds testified that his lawyer son did not write up any of the transactional documents and did not assist him during due diligence:

> Mr. Balducci: Did your son assist you, the lawyer son in this transaction, in any way, shape, or form?
>
> Mr. Reynolds: No.
>
> Mr. Balducci: He didn't write up any of the documents or review them previously?
>
> Mr. Reynolds: No.

Id. at pg. 75, ll. 19 – 24.

When presented with the Bill of Sale later in his deposition, Reynolds then testified to the exact opposite:

> Mr. Balducci: So tell me about this document [the Bill of Sale]. It's an inventory. Who wrote it up?
>
> Mr. Reynolds: My son.
>
> Mr. Balducci: The lawyer?
>
> Mr. Reynolds: Yes.

1 AA 117 at pg. 157, ll. 14 – 20.

After putting Reynolds indiscernible testimony aside, the undisputed fact is that Reynolds had access to ***everything*** he could have ever wanted prior to electing

to consummate his purchase of the business. Whenever he went to the Jewelry Store, Reynolds was provided access to the Jewelry Store's computer, which stored all of the financials ***specific*** to the Jewelry Store on its point-of-sale system. 1 AA 157 ¶¶12 – 17. Reynolds was allowed limitless amounts of time with the computer and the information stored on it. *Id.* ¶ 7. He also had full and complete access to all physical sales receipts. *Id.* ¶13. Reynolds was provided with unfettered access to this information as part of his due diligence. 1 AA 180 – 182.

More importantly, Reynolds testified that he had a full opportunity to review the financials of the Jewelry Store and, in fact, that he did review the financials of the Jewelry Store and even compared them to the general sales and use tax forms. 1 AA 106 at pg. 112 – 113. In his review, he realized that the general sales and use tax forms reported different figures than the computer:

Mr. Balducci:	And did you do anything to independently verify the information on the sales and use reports?
Mr. Reynolds:	Yeah, I tried. I tried to cross-reference them with the point of sales.
Mr. Balducci:	Was this during due diligence that you're doing this or after?
Mr. Reynolds:	All during. All during. Before, after, still.
Mr. Balducci:	What did you learn when you reviewed these during the due diligence by comparing the sales and use to the point of sale?
Mr. Reynolds:	That the numbers are everywhere.

Mr. Balducci:	So during the due diligence period, you understood that the numbers were everywhere?
Mr. Reynolds:	Yes.
Mr. Balducci:	And did that raise an alarm?
Mr. Reynolds:	Yes.
Mr. Balducci:	But you decided to proceed forward and close the transaction anyway?
Mr. Reynolds:	Yes. Because the - -
Mr. Balducci:	Why don't we proceed to DEFTS-815 in that particular business summary.

1 AA 106 at pg. 113, ll. 1 – 21.

This was completely true. The computer had financial information ***specific*** to the Jewelry Store, whereas the sales and use forms included any and all sales run under Luxury Holdings, regardless of whether they were made at the Jewelry Store or at a different location elsewhere. Regardless, Reynolds did not rely on the sales and use general forms at all and was fully aware of the differences in the joint forms and the Jewelry Store's sales and revenues. At the end of the day, Reynolds was ultimately comfortable and satisfied enough with the results of his due diligence that he proceeded to close the transaction.[4]

[4] Though not germane to the substance of this appeal and answering brief, there was one 30-day extension of escrow. The additional time was needed because Reynolds was wiring money from out of the country.

7. The Transaction Closes on March 24, 2015

The transaction for the Jewelry Store closed. It is undisputed that the only parties to the escrow and closing contract ("**the Closing Agreement**") were Diamanti and Luxury Holdings. 1 AA 184 – 189. Reynolds signed as manager of Diamanti, and Raffi signed as manager of Luxury Holdings. 1 AA 184. Reynolds testified that he was satisfied with everything and ultimately chose to close the transaction (while at the same time still resorting to *ad hominem* attacks):

> Mr. Balducci: That's fine. So you owned a hotel; you've got an ownership interest in a shopping mall; you owned a theater; you sold the hotel for $18 million. You understand this stuff.
>
> If you were dissatisfied with what you saw, isn't it true that you could have cancelled the transaction at any time prior to February 24th and got your $10,000 deposit back?
>
> Mr. Reynolds: Yes.
>
> Mr. Balducci: You were satisfied with what you had seen, and you entered the amendment allowing the $10,000 to be released in exchange for a 30-day extension on escrow?
>
> Mr. Reynolds: Yes.
>
> Mr. Balducci: And if you were dissatisfied with anything that you had seen and asked for and didn't get it prior to closing, you could have cancelled. You just would have lost your $10,000?
>
> Mr. Reynolds: At that time.
>
> Mr. Balducci: So on the day of closing, you were completely satisfied with everything you had seen and heard?
>
> Mr. Reynolds: At that time.
>
> Mr. Balducci: So now the only time you're not happy about

	it is after the fact when the company is not making money?
Mr. Chasey:	Objection, misstates his testimony.
Mr. Reynolds:	I don't understand that, no. The - - what I'm objecting to is that your client is a natural-born liar.

1 AA 96 at pg. 72, ll. 13 – pg. 73, ll. 14.

a. The Contract's Assignment Provision

Section 14 of the Closing Agreement takes into account the fact that Diamanti was not formed at the time of the offer. To account for this, ¶14 is a ratification and assignment provision, which states:

> This transaction is subject to the Purchase Agreement dated January 13, 2015 including all amendments, attachments, exhibits, and addendums respectively, attached hereto and made a part hereof. Purchase Agreement is hereby ratified to indicate Diamanti Jewelers LLC a Nevada Limited Liability Company, as Buyer, with all rights, privileges, responsibilities and duties, including but not limited to any deposited funds, all of which are hereby assigned and such assignment all of which are hereby accepted by Buyer.

1 AA 186 ¶14.

To further confirm the assignment to Diamanti, Reynolds executed the Closing Agreement on a signature block which confirmed it was done "As to Section 14, Assignment." 1 AA 189. In his deposition, Reynolds admitted to the assignment and agreed that he did not have a personal right to any of the proceeds held in escrow:

Mr. Balducci: And so what this is - - just trying to get - - you would agree with me that you did not have a right personally to any of that once you signed this agreement with this paragraph 14?

Mr. Reynolds: Yes.

1 AA 113 at pg. 139 ll. 22 – pg. 140 ll. 1; *see also id.* at pg. 138, ll. 18 – pg. 139, ll. 6.

b. The Inventory

Diamanti purchased all of Luxury Holdings' inventory outside of escrow. 1 AA 157 ¶18. In his deposition, Reynolds admitted that he takes no issue with the "$134,253.44 paid for the jewelry products, rings, watches, diamonds, and other fine jewelry products." 1 AA 118 at pg. 159 ll. 15 – 23. In his words, "We counted it, I paid for it. End of story." *Id.* at pg. 159, ll. 2 – 4; 1 AA 191 (Bill of Sale). The Bill of Sale identifies how the inventory sales price was calculated as between goods actually owned by Luxury Holdings and goods actually owned by vendors that provided the product on consignment (which Diamanti chose to buy outright). 1 AA 191.

c. The Contractual Non-Reliance Provisions

In two separate contractual documents, the purchaser of the Jewelry Store – first Reynolds and then Diamanti – agreed that they would solely rely upon their own investigation in proceeding forward with the purchase and closing of the Jewelry Store.

(1) Non-Reliance Provisions in the Offer to Purchase

First, in the initial offer to purchase: "… PURCHASER has relied solely upon their personal examination of the business in making this Offer …." 1 AA 164 ¶12. Paragraph 15 of that Offer further states it "supersedes and replaces any and all prior negotiations, ***representations***, warranties, understandings or contracts between the parties." *Id.* ¶15 (emphasis added).

(2) Non-Reliance Provisions in the Closing Contract

The Contract at Closing also included a very specific non-reliance, no-representation provision:

> The parties hereto agree that no representations have been made by either party, or agent/broker if any, other than those specifically set forth in this agreement and the sale agreement(s). **It is further understood and agreed that Buyer has made his own independent investigation of the subject business and has satisfied himself with his ability to conduct the same, and is now purchasing the said business with the clear and distinct understanding and agreement that all profits are future, to be arrived at from his own resources and labors.**

1 AA 189 (emphasis added).

(3) Reynolds' Admission

Reynolds admitted that he relied solely on his own investigation, and nothing else:

> Mr. Balducci: Thank you.
> Turn to DEFTS 226. All right. There is - -

one of the final paragraphs right above the bold one says, "The parties hereto agree that no representations have been made by either party, or agent/broker if any, other than those specifically set forth in this agreement and the same agreements."

Do you agree with me that's what that first sentence says in that particular paragraph.

Mr. Reynolds: Yes.

Mr. Balducci: And you signed and agreed to that in this contract?

Mr. Reynolds: Yes.

Mr. Balducci: And then the same would hold true with the next sentence in that paragraph?

Mr. Reynolds: Yes.

1 AA 113 at pg. 140, ll. 2 – 17.

Other documents were signed at closing. On each and every document, Diamanti signed as the Buyer. 1 AA 193 – 202.

d. The Lease Assignment and the Landlord's Acknowledgment of the Assignment of the Furniture, Fixtures, and Equipment

As part of closing, the lease with Tivoli Village was assigned from Luxury Holdings to Diamanti. 1 AA 204 – 206. As part of that assignment, Raffi held a contingent liability under a personal guaranty for one additional year, and Reynolds became an assignee guarantor. *Id.* Moreover, the assignment confirmed the transfer all of the furniture, fixtures, and equipment in the leased premises from Luxury Holdings to Diamanti. 1 AA 204 ¶5. The landlord executed this assignment, thus confirming the accuracy of the statements contained within ¶5. 1

AA 205. While Reynolds makes general claims about the FF&E, in his deposition he talked about a number of emails showing that he raised the issue many times. After being prodded as to whether he could produce them (which met resistance), the following exchange occurred:

> Mr. Balducci: Sure. What I had asked is, would you be able to go and print those emails out?
>
> Mr. Reynolds: No, that's what you asked but - -
>
> . . .
>
> Mr. Balducci: Would it be fair to say if you don't produce them, they don't exist and perhaps - -
>
> Mr. Reynolds: No. Hell, no. I wouldn't say that.

1 AA 93 at pg. 63 ll. 19 – pg. 64 ll. 5.

e. Raffi Does Not Compete

After selling the Jewelry Store, Raffi got out of the jewelry business entirely. 1 AA 158 ¶26.

f. The Customer List is Provided

During its time operating the Jewelry Store, Luxury Holdings maintained a customer list, which included contact information for each person that had purchased a good, expressed interest in jewelry, or left a business card or contact information. 1 AA 159 ¶¶32 – 33. The Customer List was maintained on the Computer, which Diamanti owned after Closing.

VII. RELEVANT PROCEDURAL HISTORY

A. BEFORE THE DISTRICT COURT

1. The Operative Complaint and its Pertinent Claims

The operative complaint was the third amended complaint. 1 AA 15 – 27. It asserted the following claims:

- Fraud by Reynolds and Diamanti against Raffi and Luxury Holdings, in which Reynolds and Diamanti sought rescission of the transaction as well as monetary damages, 1 AA 22 ¶¶37 – 39;
- Negligent misrepresentation by Reynolds and Diamanti against Raffi and Luxury Holdings for rescission and for monetary damages, 1 AA 22 – 23;
- Breach of contract, 1 AA 23;
- And elder abuse/exploitation by Reynolds against Raffi and Luxury Holdings, 1 AA 24 – 26.

2. The Summary Judgment Proceedings

Raffi and Luxury Holdings agree with Reynolds and Diamanti's summary of the summary judgment proceedings below with one caveat: they point out that Reynolds and Diamanti have collectively defined themselves as Reynolds and have collective defined Raffi and Luxury Holdings as Tufenkjian. Raffi and Luxury

Holdings present this one point of clarification because it is germane as it relates to the elder abuse claim that is partially the subject of the instant appeal.

3. The Dismissal of Great Wash Park, LLC

As noted above, Reynolds and Diamanti sought rescission of the transaction, and sought rescission of the lease and personal guaranty of the lease with landlord Great Wash Park, LLC. 1 AA 22 ¶¶37 – 39. This obviously caused Great Wash Park, LLC to be a necessary and indispensable party; although, they never asserted any claims against Great Wash Park, LLC. *See* 1 AA 15 – 27. But, Reynolds and Diamanti caused their request for rescission to become a virtual impossibility when they dismissed their claims/request for relief against Great Wash Park, LLC, with prejudice, in response to this Court's order to show cause. 1 RA 21 – 23.

B. BEFORE THIS COURT

1. The Order to Show Cause

On April 25, 2019, this Court issued an order to show cause concerning Great Wash Park, LLC. Specifically, whether or not it was served such that it became a party to the case (and if it had been served, the summary judgment order was not final). In response, Reynolds, Diamanti, and Great Wash Park, LLC stipulated and agreed that the claims and request for relief against Great Wash Park, LLC were dismissed. 1 RA 21 – 23. That stipulation was entered as an order by the district court, with notice being served on May 13, 2019. *Id.*

2. The Dismissal Order

In response to motion practice before this Court, whereby Raffi and Luxury Holdings sought to substitute themselves as the appellants and dismiss the appeal, this Court entered an order substituting Raffi and Luxury Holdings in place of Reynolds and Diamanti as it relates to the negligent misrepresentation and breach of contract claims and dismissing those two claims. *Reynolds v. Tufenkjian,* 136 Nev. Adv. Op. 19, 461 P.3d 147 (2020). This Court reinstated briefing solely as to summary judgment on Reynolds and Diamanti's claims for fraud and elder exploitation. *Id.*

VIII. SUMMARY OF THE ARGUMENT

The district court's order should be affirmed because:

- Neither Reynolds nor Diamanti challenged the non-reliance and independent investigation provisions they now argue against before the district court;

- Reynold and Diamanti acknowledged, understood, and agreed to the non-reliance and independent investigation provisions; and in fact, found out during due diligence that the financial numbers were "everywhere" yet chose to close the transaction anyway;

- There was no evidence of actionable misrepresentations causing inducement, and all of the evidence militated against Reynolds and Diamanti's baseless arguments;

- Reynolds assigned all rights, benefits, and burdens of this transaction, including the initial deposit, to Diamanti prior to closing and agreed that the Offer Agreement was ratified to identify Diamanti – not Reynolds – as the Buyer.

IX. LEGAL ARGUMENT

A. REYNOLDS AND DIAMANTI CANNOT ARGUE ISSUES THEY DID NOT PRESERVE BELOW

It is well established that "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This Court has said that it "will not consider issues raised for the first time on appeal." *State v. Wade,* 105 Nev. 206, 209, 772 P.2d 1291, 1293 (1989).

The substance of Reynolds and Diamanti's brief is that the non-reliance and due independent investigation provisions of the Offer Agreement and Closing Agreement cannot eliminate the element of reliance from a fraud claim. However, that issue was ***never*** raised by Reynolds or Diamanti before the district court. Those arguments are waived and cannot be argued here. Consequently, the district

court's finding that the element of justifiable reliance was non-existent as a matter of contract is unassailable and this Court should affirm.

1. Neither Reynolds nor Diamanti ever Challenged the Enforceability of the Non-Reliance and Independent Investigation Clauses

The bulk of the Opening Brief is spent arguing that contractual disclaimers cannot eliminate misrepresentation claims. In the district court, however, Reynolds and Diamanti never argued that the non-reliance and independent investigation clauses within the Closing Agreement or Purchase Agreement were unenforceable. *See, e.g.,* 2 AA 297 – 307. Nor did they challenge the contractual obligation to perform, and rely upon, their own independent investigation (and nothing else). Indeed, at no point anywhere in their opposition filed before the district court did they address, much less acknowledge, the non-reliance provisions in the Closing Agreement or the Offer Agreement (both of which were subsequent to the business summary marketing brochure). *See, e.g.,* 2 AA 287 – 307. They simply never addressed them at all.

Rather than argue against the non-reliance and independent investigation clauses, they focused on the marketing materials prepared by business broker, and argued that the primary question was if "Reynolds had unreasonably relied on the Business Summary …." 2 AA 303 ll. 7 – 13. They also spent a significant amount of time arguing (without presenting evidence) that the only way to verify the

information in the business summary marketing brochure was to ask Raffi (even though Reynolds could not articulate with any level of specificity what such conversations were other than saying "If I had one [conversation with Raffi], it was too damn many[,]" 1 AA 111 at pg. 131, ll. 9 – 11). *See* 2 AA 302.

In short, Reynolds and Diamanti never raised the enforceability of the contractual provisions. Instead, Reynolds and Diamanti tried to bootstrap their claims by talking about a marketing pamphlet that was provided before the Offer Agreement was ever presented to the seller of the Jewelry Store.

Only now in this appeal, for the first time, do Reynolds and Diamanti challenge the enforceability of the non-reliance and independent investigation clauses contained within the Closing Agreement and the Purchase Agreement. Notably, these are the very same provisions Reynolds testified that he agreed too:

> Mr. Balducci: Thank you.
>
> Turn to DEFTS 226. All right. There is - - one of the final paragraphs right above the bold one says, "The parties hereto agree that no representations have been made by either party, or agent/broker if any, other than those specifically set forth in this agreement and the same agreements."
>
> Do you agree with me that's what that first sentence says in that particular paragraph.
>
> Mr. Reynolds: Yes.
>
> Mr. Balducci: And you signed and agreed to that in this contract?
>
> Mr. Reynolds: Yes.

Mr. Balducci: And then the same would hold true with the next sentence in that paragraph?

Mr. Reynolds: Yes.

See 1 AA 113 at pg. 140, ll. 2 – 17.

In fact, in the district court Reynolds and Diamanti raised and argued only two issues:

> In the case before this [district court], the following questions of fact remains (*sic*) remains unresolved:
>
> - Did Reynolds reasonably rely on Raffi's misrepresentations of business revenue, title to the FF&E, customers, and cost of inventory during due diligence?
>
> - Is Reynolds entitled to the protection of NRS 41.1395, even though Reynolds' (*sic*) lost his money through a transaction consummated through Reynolds 100% owned Limited Liability Company?

2 AA 289 ll. 4 – 9.

2. The Non-Reliance and Independent Investigation Provisions of the Operative Contracts were just one of Several Independent Reasons for the Entry of Summary Judgment

These contractual agreements and their provisions formed one of several independent bases for summary judgment:

> Here, while Plaintiffs may have had a right to rely upon the accuracy of facts presented by other parties during Plaintiffs' due diligence period, Plaintiffs' argument that they relied upon representations regarding revenue, custom base, costs, etc. is contrary to the parties' express written agreement which included disclaimers, quoted *supra*, that the Plaintiffs acknowledged they were not relying on the

> representations of any other party, and instead were responsible for investigating the business themselves.

3 AA 722 ¶4. In reaching that conclusion, the district court considered and included in its factual findings the applicable provisions of the Offer Agreement (referred to as the "Offer" in the district court's summary judgment order) and the Closing Agreement. *See* 3 AA 719 ¶6 – 3 AA 720 ¶13. The fact that these provisions went unchallenged was undisputed: Raffi and Luxury Holdings pointed out the lack of challenge in their reply brief below. 3 AA 700 ll. 14 – 16.

In summation, the notion that the various independent investigation and non-reliance provisions in the operative contracts are unenforceable is a brand-new argument never raised before the district court. Since those issues were not raised below, they are waived. And, because those provisions formed an independent basis for the district court's summary judgment order, the other arguments raised in the Opening Brief matter not. This Court should affirm.

B. THE DISTRICT COURT CORRECTLY CONCLUDED THAT NON-RELIANCE AND INDEPENDENT INVESTIGATION PROVISIONS ELIMINATE THE ELEMENT OF JUSTIFIABLE RELIANCE[5]

Reynolds and Diamanti's fraud claim was for fraudulent inducement. 1 AA 21 ¶¶34 – 35. A claim of fraudulent inducement requires a party to prove by clear and convincing evidence that (1) a false representation was made by the defendant, (2) the defendant knew or believed that the representation was false, (3) the defendant intended to induce the plaintiff to act in reliance upon the misrepresentation, (4) the plaintiff justifiably relied upon the misrepresentation, and (5) damages. *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 111, 825 P.2d 588, 591 – 92 (1992).

1. At Issue Here are Not Integration or Waiver Clauses. Instead, we are dealing with Non-Reliance and Independent Investigation Clauses.

As a threshold matter, it is important to consider the contractual clauses in question. They are not waiver clauses, and they are not integration clauses. Instead, we are dealing with specific non-reliance and independent investigation clauses.

[5] Because Reynolds and Diamanti never challenged the non-reliance and independent investigations provisions below, Raffi and Luxury Holdings must do so here. For that reason, this section is fairly lengthy. Raffi and Luxury Holdings apologize to the Court in advance.

a. The Contractual Non-Reliance Provisions

In two separate contractual documents, the purchaser of the Jewelry Store – first Reynolds and then Diamanti – agreed that they would solely rely upon their own investigation in proceeding forward with the purchase and closing of the Jewelry Store.

(1) Non-Reliance and Due Diligence Provisions in the Offer Agreement

First, in the initial offer to purchase: "… PURCHASER has relied solely upon their personal examination of the business in making this Offer …." 1 AA 164 ¶12. Paragraph 15 of that Offer further states it "supersedes and replaces any and all prior negotiations, ***representations***, warranties, understandings or contracts between the parties." *Id.* ¶15 (emphasis added).

¶ 7 proceeds further. It specifically places a condition, which is automatically removed as a matter of contract, that relates to the financial condition of the Jewelry Store:

> **DUE DILIGENCE CONTINGENCY**: Purchaser's offer **is contingent** upon Seller proving to Purchaser's satisfaction the financial condition of the business and/or after review of all the information requested with regards to the subject business summary … **Contingency shall be automatically removed 14 days** after execution of this agreement by both parties unless extended in writing.

1 AA 163 ¶7 (emphasis in original); 3 AA 71 (district court's decision).

The Offer Agreement also made it clear that it would be superseded by the closing documents: "Except for express warranties made in this Contract, the Closing of this transaction shall supersede this Contract." 1 AA 165 ¶20.

(2) Non-Reliance Provisions in the Closing Agreement

The Contract at Closing also included a very specific non-reliance, no-representation provision:

> The parties hereto agree that no representations have been made by either party, or agent/broker if any, other than those specifically set forth in this agreement and the sale agreement(s). **It is further understood and agreed that Buyer has made his own independent investigation of the subject business and has satisfied himself with his ability to conduct the same, and is now purchasing the said business with the clear and distinct understanding and agreement that all profits are future, to be arrived at from his own resources and labors.**

1 AA 189 (emphasis added).

2. *Blanchard* does not say what Reynolds and Diamanti say it says

The crux of the Opening Brief is that *Blanchard* does not allow contractual disclaimers to bar misrepresentation claims. *See, e.g., Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992). That's not what *Blanchard* says. *Blanchard* essentially accomplishes two ends: (1) it repeats the general rule that integration and waiver clauses do not bar misrepresentation claims, and (2) it analyzes a contractual provision that states one party has represented that all assets have been

disclosed (which turned out to be false), and that the other party *has* relied upon that representation in a divorce proceeding between a husband and wife with unequal knowledge and bargaining power.

a. Integration Clauses and Waiver Clauses are not at issue here

It is true that integration and waiver clauses do not bar misrepresentation claims. *See, e.g., Blanchard*, 108 Nev. at 912, 839 P.2d at 1322 – 1323. An integration clause is "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract." *See* BLACK'S LAW DICTIONARY: DEFINITION OF INTEGRATION CLAUSE (11th ed. 2019). A waiver is "[t]he voluntary relinquish or abandonment – express or implied – of a legal right or advantage[.]" *See* BLACK'S LAW DICTIONARY: DEFINITION OF WAIVER (11th ed. 2019).

Neither a waiver nor integration clause is at issue here.

Instead, the non-reliance clause and independent investigation clauses are contractual promises, in which it was "agree[d] that no representations have been made by either party … other than those specifically set forth in this agreement[,] 1 AA 189, "that Buyer has made his own independent investigation … and has satisfied himself with his ability to conduct the same[,]" *id.*, that "PURCHASER

has relied solely upon their personal examination of the business in making this Offer[,]" 1 AA 164 ¶12, and if there were questions about the agreements that they would "seek competent legal and financial advice[,] 1 AA 189.

These are contractual promises, not a relinquishment of rights or statements that a contract is the entire agreement. Put another way, these are affirmative representations made by the parties to this commercial arm's length transaction. *Blanchard* does not address such affirmative contractual promises.

b. *Blanchard* addresses an opposite situation

Unlike this case, where Reynolds and Diamanti agreed that they relied upon their own investigation, the contractual provision in *Blanchard* encompassed a situation where one party in a divorce contractually promised that all of the assets were disclosed, and the other party contractually promised that they relied, in fact, upon that representation. *Blanchard*, 108 Nev. at 912 n.1, 839 P.2d at 1322 n.1. Specifically at issue in *Blanchard* are the following provisions:

> 2. Financial Statement. Attached hereto and incorporated herein by this reference is a copy of the most recent financial statement (balance sheet) prepared by Don Pitchford, CPA, on behalf of [Rene]. [Rene] represents that this statement contains a complete description of the parties' assets, community and separate, and acknowledges that it forms the basis for this agreement. *The value attached to each asset, as contained in the financial statement, has not been relied upon by the parties, but [Rene's] representation that all of the assets have been disclosed has been relied upon by [Lee].*
>
> …

> 12. Disclosure: Each of the parties expressly certifies that each of them has entered into this agreement upon mature consideration and upon the advice of separate counsel; that no representations of fact have been made by either party to the other except as herein expressly set forth; and that this agreement is fair and reasonable.

Id. (emphasis in original).

Different than in *Blanchard*, Reynolds (in the Offer Agreement) and Diamanti (in the Closing Agreement) contractually promised and agreed that they relied upon their own investigation, and did **not** rely upon the representations of anyone. Thus, as a matter of contract, they agreed they did not rely upon anyone other than themselves. Reliance, therefore, does not exist, and this Court should affirm.

3. A Host of Jurisdictions agree that Non-Reliance Provisions Eliminate the Element of Justifiable Reliance

While this Court has not yet had an opportunity to squarely address non-reliance and independent investigation provisions, a handful of jurisdictions have. These jurisdictions unanimously hold that non-reliance and independent investigation provisions eliminate the element of justifiable reliance as a matter of law.

Extra-contractual claims for fraud are barred when a contract includes a non-reliance clause. "[P]arties to contracts who do want to head off the possibility of a fraud suit will sometimes insert a 'no-reliance' clause into their contract, stating

that neither party has relied on any representations made by the other." *FMC Technologies, Inc. v. Edwards*, 2007 WL 1725098 at *4 (9th Cir. June 12, 2007) (*quoting Vigortone AG Prods., Inc. v. PM AG Prods., Inc.*, 316 F.3d 641, 644 (7th Cir. 2003)). This rule is consistently reaffirmed in the 9th Circuit. *See Bank of the West v. Valley Nat'l Bank of Ariz.*, 41 F.3d 471, 477 – 78 (9th Cir. 1994); *see also Paracor Finance, Inc. v. General Capital Corp.*, 96 F.3d 1151, 1155, 1159 – 60 (9th Cir. 1996).

In case after case, courts have also held that a sophisticated buyer who enters into an agreement containing a clause that includes a specific disclaimer of prior representations cannot base a claim of fraud on such representations. For example, in *Consolidated Edison v. Northeast Utilities,* 249 F. Supp. 2d 387, 408 (S.D.N.Y. 2003), the court granted summary judgment as the parties' agreement contained a clause that barred reliance on any representations or information not specifically covered by the representations, warranties and covenants in the contract. In granting summary judgment with respect to the plaintiff's fraudulent inducement claim, the court explained that "the sophistication of the parties, the arms-length nature of the transaction, and the inclusion of numerous representations and warranties covering other aspects of the merger all support this conclusion." *Id.*

The Third Circuit reached a similar conclusion in *MBIA v. Royal Indemnity,* 426 F.3d 204 (3rd Cir. 2005), holding that when sophisticated parties have

included clear anti-reliance language in their negotiated agreement, and when the language, though broad, unambiguously covers representations allegedly made, such an agreement bars claims for fraud. *Id.* at 218. As the Third Circuit observed, the danger of not enforcing the clause is that not binding the party to his written representation will, in itself, sanction a fraud. The Third Circuit concluded that "given the potential for misrepresentation from each side of the agreement, the safer route is to leave parties that can protect themselves to their own devices, enforcing the agreement they actually fashion." *Id.* at 218.

Non-reliance clauses must be enforced. If they are not, then it would "excuse a lie made by one contracting party in writing." *Abry Partners V, L.P. v. F & W Acq. LLC*, 891 A.2d 1032, 1058-59 (Del. Ch. 2006). Even broad non-reliance claims are enforced. *See In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14, 32 (Del. Ch. 2001) (applying New York law). When the contract contains clear and explicit language, the contractual obligation that Buyer will make its own independent assessment prevents justifiable reliance. *See Bank of the West v. Valley Nat. Bank of Arizona*, 41 F.3d 471, 477 (9th Cir. 1994) ("In this case, the clear and explicit language of the contract prevented justifiable reliance.").

It is also notable that Reynolds and Diamanti's criticism of these cases is limited to the fact that each applies the law of other jurisdictions. They have not, however, provided this Court with citation to a Nevada case that states non-

reliance and independent investigation provisions are unenforceable or explained why the reasoning of these other cases is not sound and applicable here. Again, it is true this Court has not had prior occasion to opine on non-reliance and independent investigation provisions as applied to the element of justifiable reliance in a fraud claim. The lack of case law here is likely reflective of the truth that the plain language of such provisions is so abundantly clear that no district court has ever needed guidance to determine whether they mean what they say. Reynolds and Diamanti all but admit this in their Opening Brief as they misstate the holding of *Blanchard* without any analysis of their incorrect rule of law.

4. Nevada law is in favor of allowing parties to freely contract

Caselaw in Nevada is clear that, "[p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009). The underlying transaction here was between sophisticated parties for the sale of a business. The parties here negotiated freely and entered into a contract which included contractual provisions eliminating reliance upon any representations of another and required an independent investigation. Thus, the ability to freely enter contract further supports the district court's decision enforcing the parties' agreements.

Similarly, at no point before the district court or this Court has Reynolds or Diamanti raised issues of unconscionability, illegality, or public policy. "Because the Nevada Rules of Appellate Procedure do not allow litigations to raise new issues for the first time in a reply brief," such issues cannot be considered if raised in reply. *LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014) (citing NRAP 28(c)).

5. ***Blanchard*** **Helps Raffi and Luxury Holdings, and Hurts Reynolds and Diamanti**

As explained, *Blanchard* does not stand for the proposition urged by Reynolds and Diamanti. In reality, *Blanchard* helps Raffi and Luxury Holdings, and hurts Reynolds and Diamanti.

a. ***Blanchard*** **did not have the benefit of discovery, whereas here Reynolds understood and agreed to the relevant contractual provisions**

Procedure matters. The *Blanchard* decision stemmed from a motion to dismiss. *Blanchard*, 108 Nev. at 910, 839 P.2d at 1321 ("On September 17, 1991, respondent filed a NRCP 12(b)(5) motion to dismiss. Following a hearing on November 19, 1991, the motion was granted."). Unlike *Blanchard*, where the Court must defer to the allegations of the complaint as being true, the district court in this case had the benefit of more than a year of discovery that included

Reynolds' own testimony and documents where he signed and agreed to the provisions in question:

> Mr. Balducci: Thank you.
>
> Turn to DEFTS 226. All right. There is - - one of the final paragraphs right above the bold one says, "The parties hereto agree that no representations have been made by either party, or agent/broker if any, other than those specifically set forth in this agreement and the same agreements."
>
> Do you agree with me that's what that first sentence says in that particular paragraph.
>
> Mr. Reynolds: Yes.
>
> Mr. Balducci: And you signed and agreed to that in this contract?
>
> Mr. Reynolds: Yes.
>
> Mr. Balducci: And then the same would hold true with the next sentence in that paragraph?
>
> Mr. Reynolds: Yes.

See 1 AA 113 at pg. 140, ll. 2 – 17. Thus, contrary to *Blanchard* (where the complaint's allegations were taken as true), Reynolds testified that he signed and agreed to the provisions in question.

b. Unlike *Blanchard*, the underlying transaction clearly involved sophisticated parties

The *Blanchard* court noted that "it is not at all clear whether appellant was competent to judge the facts without the assistance of experts." *Blanchard,* 108 Nev. at 913, 839 P.2d at 1323. That is far different than here, where Reynolds has managed multi-million dollar construction projects, 1 AA 81 at pgs. 12 – 13,

purchased a hotel for $3 million in 1995 (and sold it for $18 million in 2008), 1 AA 92 pgs. 14 – 14, built and sold a theater for $3 million, 1 AA 84 – 85, and owns a portion of a shopping mall for which he paid $4 million, 1 AA 85. Reynolds also admitted that he is very familiar with contracts. 1 AA 83 at pg. 21.

To be clear, Reynolds is not *Blanchard*.

c. Reynolds became aware of issues that caused alarm

Furthermore, whereas the party in *Blanchard* was unable to determine there were discrepancies in the marital settlement agreement until after the fact, Reynolds admitted he became aware of what he perceived as inconsistent figures during due diligence, yet decided he would close the transaction anyway:

Mr. Balducci:	And did you do anything to independently verify the information on the sales and use reports?
Mr. Reynolds:	Yeah, I tried. I tried to cross-reference them with the point of sales.
Mr. Balducci:	Was this during due diligence that you're doing this or after?
Mr. Reynolds:	All during. All during. Before, after, still.
Mr. Balducci:	What did you learn when you reviewed these during the due diligence by comparing the sales and use to the point of sale?
Mr. Reynolds:	That the numbers are everywhere.
Mr. Balducci:	So during the due diligence period, you understood that the numbers were everywhere?
Mr. Reynolds:	Yes.
Mr. Balducci:	And did that raise an alarm?

Mr. Reynolds: Yes.

Mr. Balducci: But you decided to proceed forward and close the transaction anyway?

Mr. Reynolds: Yes. Because the - -

See 1 AA 106 at pg. 113, ll. 1 – 21.

6. The Purported "Inducement" Cannot be something that Conflicts with a Contract's Express Terms

The district court found it significant that Reynolds and Diamanti's argument that "they relied upon various representations regarding revenue, customer base, costs, FF&E, etc. is contrary to their express agreement that they were not so relying, and no such items are 'specifically set forth in this agreement…'" 2 AA 712 ll. 18 – 26 (citing to the Closing Agreement). And, "[t]o say that they are material representations and to then proceed without reference to them eliminates any genuine issue going to inducement by representations, particularly in a commercial transaction of this magnitude." 1 AA 713 ll. 1 – 6. In other words, the district court found it significant that Reynolds and Diamanti pointed to misrepresentations that contradicted their own contractual promise that no representations had been made to them. This Court has already addressed whether inducement can be by something that conflicts with a contract's express terms:

> As explained by this court in *Tallman,* the purported inducement cannot be something that conflicts with the Subcontract's express terms, as the terms of the contract are the embodiment of *all* oral

> negotiations and stipulations. 66 Nev. at 257, 208 P.2d at 306. " 'When the plaintiff pleads that the writing ... does not express the intentions of the parties to it at the time, he pleads something which the law will not permit him to prove.' " *Id.* (quoting *Natrona Power Co. v. Clark*, 31 Wyo. 284, 225 P. 586, 589 (1924)); *see also Green v. Del–Camp Investment, Inc.*, 193 Cal.App.2d 479, 14 Cal.Rptr. 420, 422 (1961) (stating that where "the claim[e]d fraud consists of a false promise with respect to a matter covered by the agreement itself, the oral evidence would contradict the terms of the agreement, in direct contravention of the rules. Such proof is not permitted."); *Sherrodd, Inc. v. Morrison–Knudsen Co.*, 249 Mont. 282, 815 P.2d 1135, 1137 (1991) (providing that the exception made to the parol evidence rule when fraud is alleged "only applies when the alleged fraud does not relate directly to the subject of the contract. Where an alleged oral promise directly contradicts the terms of an express written contract, the parol evidence rule applies.").

Rd. & Highway Builders v. N. Nev. Rebar, 128 Nev. 384, 390, 284 P.3d 377, 381 (2012).

Reynolds and Diamanti simply cannot contradict their promise that no representations were made to them. This Court should affirm.

7. The district court would have been the finder of fact at trial

Though it deserves bare lip service, the Opening Brief states on a multitude of occasions that "[i]t is for a jury to decide…." There is a major flaw with this: this case was set for the bench trial. Indeed, after more than a year of discovery by all parties, the finder of fact at such bench trial (The Honorable Mark Denton) read the motion, opposition, reply, the exhibits, heard oral argument, and then entered summary judgment.

Judge Denton got the case right. This Court should affirm.

C. NO MISREPRESENTATIONS WERE MADE, BUT EVEN IF THERE WERE, NEITHER REYNOLDS NOR DIAMANTI JUSTIFIABLY RELIED UPON THEM

The district court correctly concluded that Reynolds and Diamanti did not present evidence of justifiable reliance to support their misrepresentation claims. In *Blanchard v. Blanchard*, this Court defined the element of justifiable reliance:

> In order to establish justifiable reliance, the plaintiff is required to show the following: the false representation must have played a material and substantial part in leading the plaintiff to adopt his particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.

Blanchard, 108 Nev. at 911, 839 P.2d at 1322 (quoting *Lubbe v. Barba*, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975)).

A plaintiff that undergoes an independent investigation is charged with knowledge of facts which reasonable diligence would have disclosed. *Blanchard*, 108 Nev. at 912, 839 P.3d at 1323. "Such a plaintiff is deemed to have relied on his own judgment and not on the defendant's representations." *Id.* Courts have also held that a sophisticated party, such as Reynolds, is never entitled to rely on a representation when that party can protect itself by conducting its own investigation. As the court explained in *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 165 F. Supp. 2d 615, 623 (S.D.N.Y. 2001):

> In evaluating justifiable reliance, the plaintiffs sophistication and expertise is a principal consideration. Moreover, the sophisticated investor such an Emergent must show that he or she has made an independent inquiry into all available information. As the Second Circuit has noted on this point: put another way, if the plaintiff "has the means of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations."

Id. at 623.

1. Reliance Must Actually Be Justifiable

The Nevada Supreme Court case of *Collins v. Burns,* 103 Nev. 394, 741 P.2d 819 (1987), is illustrative on this point. In that case, this Court held that the lack of justifiable reliance bars recovery in an action for damages for the tort of fraud and deceit. However, this principle does not impose a duty to investigate upon the plaintiff absent any facts to alert the defrauded party that his reliance is unreasonable. As pointed out, the test is whether the recipient has information which would serve as a "red light" to any normal person of his intelligence and experience. "It has long been the rule in this jurisdiction that the maxim of caveat emptor only applies when the defect is patent and obvious, and when the buyer and seller have equal opportunities of knowledge." *Collins v. Burns,* 103 Nev. 394, 397, 741 P.2d 819, 821 (1987).

These collective principles are important in light of the fact that Reynolds and Diamanti claim that there were misrepresentations concerning the following:

- The Jewelry Store's revenues did not match the business summary marketing brochure;
- Ownership of the furniture fixtures, and equipment;
- The cost of the inventory;
- A customer list;
- The non-compete provision in the operative transactional documents.

2. *Lazard* has no application

Reynolds and Diamanti rely upon the Second Circuit's decision in *Lazard* to support the proposition that a plaintiff has no obligation to perform due diligence when the information is peculiarly within the defendant's knowledge. *See* Opening Brief at pgs. 10 – 11. *Lazard* is inapplicable for three easily distinguishable reasons. First, the party in *Lazard* did not review any written materials (despite having received them) and instead exclusively relied upon a specific oral representation as to a discount on a debt acquisition:

> Okada did not immediately commit to buying the debt. Instead, he consulted with his boss, James Dondero, who was with him at the conference in Disney World. Dondero allegedly gave Okada the go-ahead to make the purchase, so long as he received oral representation from Lazard that "the 20 cents of the 41 cents we were paying [was] escrowed, bullet-proof, coming to us in March." Okada called Murphy back, and—according to Protective—orally agreed to purchase the bank debt at 41 1/2 cents on the dollar.

Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1534 (1997). Once the parties in *Lazard* reviewed the written materials and noticed the discrepancy between the written materials and oral representations, they backed out and were sued for backing out. *Id.* at 1534 – 1535. In contrast to *Lazard*, Reynolds reviewed the written materials, noticed that "the numbers are everywhere[,]" and yet decided to proceed forward and close the transaction anyway. 1 AA 106 at pg. 113, ll. 1 – 21.

Second, and entirely unlike here, the proposition Reynolds and Diamanti rely upon from *Lazard* was entirely predicated upon the fact that the due diligence material "was not in [the buying party's] possession at the time that it committed to the deal. [The buying party] did not, therefore, have access to the relevant information." *Lazard*, 108 F.3d at 1542. This is completely implausible here as Reynolds and Diamanti had access to all of the documents and the computer when Diamanti closed the escrow

Third, Nevada has its own law on this topic:

> We have previously held that a plaintiff who makes an independent investigation will be charged with knowledge of facts which reasonable diligence would have disclosed. Such a plaintiff is deemed to have relied on his own judgment and not on the defendant's representations. Nevertheless, an independent investigation will not preclude reliance where the falsity of the defendant's statements is not apparent from the inspection, where the plaintiff is not competent to judge the facts without expert assistance, or where the defendant has superior knowledge about the matter in issue.

Epperson v. Roloff, 102 Nev. 206, 211–12, 719 P.2d 799, 803 (1986) (internal citations omitted). Thus, under *Epperson*, the fact that due diligence is undertaken matters not as it relates to the element of justifiable reliance if, and only if, (a) the false nature of the representations are not apparent from the inspection, (b) the plaintiff is not sophisticated enough to judge facts without an expert, and (c) the defendant has superior knowledge about the matter in issue.

a. Reynolds and Diamanti became aware of what they perceived as discrepancies during due diligence yet closed anyway

The first exception under *Epperson* is entirely inapplicable. According to Reynolds, "the numbers are everywhere[,]" yet he knowingly decided to proceed forward and close the transaction anyway. 1 AA 106 at pg. 113, ll. 1 – 21.

b. Reynolds is sophisticated

As demonstrated by his millions of dollars in prior transaction, Reynolds is a sophisticated party. He also had accountants and lawyers at his disposal. Yet, even without using an accountant to review the information, he formed the opinion that "the numbers are everywhere." 1 AA 106 at pg. 113, ll. 1 – 21. When asked at his deposition, he said he didn't "have a problem" with the cost he paid for the inventory. 1 AA 117, pg. 157 – 1 AA 118, pg. 161. This exception, therefore, does not apply.

c. Raffi did not have superior knowledge

At the end of the day, Diamanti bought a business. Its principal, Reynolds, performed all of the due diligence he felt was necessary. He had a lawyer son at his disposal. He met with an accountant to set up the proper corporate form.

Moreover, Reynolds and Diamanti admitted they knew "Raffi did not have full year revenue figures and so the 2014 revenue was initially presented as a projection" in the business summary marketing brochure. 2 AA 292 ll. 14 – 17. In addition, during due diligence, Reynolds was given full access to everything, including the computer where all of the information was stored and saved. 1 AA 156 – 157. While Reynolds complains about what he was allegedly told (even though he testified that if he only had one conversation with Raffi, it would have been "too damn many," 1 AA 111 at pg. 131, ll. 9 –11), he conveniently ignores that he had complete, unfettered access to the computer with all of the information in native form, and ignores that he spent as much time as he wanted reviewing all of the information on the computer. 1 AA 156 – 157; 1 AA 181 – 182.

Last but not least, neither Reynolds nor Diamanti submitted any evidence in the district court below to allow them to invoke this exception.

3. <u>There were no misrepresentations, and there is no justifiable reliance.</u>

a. There is no justifiable reliance on the alleged incorrect revenues

The main thrust of Reynolds and Diamanti's appeal is that the business marketing summary contains false and misleading information. Reliance upon this document is not justifiable. Aside from the panoply of disclaimers contained within the brochure, as part of the due diligence, Reynolds received the sales and use reports from Luxury Holdings and reviewed the computer information, which specifically identified sales made by Luxury Holdings at the Jewelry Store and elsewhere which were reported to the State of Nevada for tax purposes. Reynolds then reviewed the point of sale system's sales numbers and realized there was a discrepancy between the figures as the Jewelry Store's sales were lower than Luxury Holdings' total sales. Additionally, Reynolds was aware that the figures in the contractually disclaimed business summary marketing brochure did not align with the sales and use reports. Reynolds, nevertheless, elected to proceed forward to close the transaction anyway despite his knowledge of these discrepancies.

Due to his knowledge, justifiable reliance does not existent pursuant to *Blanchard*:

> In order to establish justifiable reliance, the plaintiff is required to show the following: the false representation must have played a material and substantial part in leading the plaintiff to adopt his

> particular course; and when he was unaware of it at the time that he acted, or it is clear that he was not in any way influenced by it, and would have done the same thing without it for other reasons, his loss is not attributed to the defendant.

Blanchard, 108 Nev. at 911 – 912, 839 P.2d at 1322.

Here, Reynolds' awareness of the very thing he subsequently complains about bars the element of justifiable reliance.

b. There was no justifiable reliance with respect to the furniture, fixtures, and equipment and no misrepresentations regarding the FF&E

Reynolds and Diamanti's claim that Luxury Holdings misrepresented the ownership of certain furniture, fixtures, and equipment conveyed to Diamanti at closing is, and has always been, baseless. When asked about the document his lawyers relied on for the proposition that Diamanti didn't obtain title to the FF&E, Reynolds said "I don't even know what Exhibit I is." 1 AA 93 at pg. 60 ll. 1 – 10. Reynolds then admitted he had nothing in writing from Tivoli supporting his baseless position. *Id.*

The issue with this claim is that there is a complete lack of evidence. Indeed, Reynolds and Diamanti's unfounded position is at odds with the lease itself, and with the Assignment and Assumption of the retail lease in which the landlord signed off on the assignment of all of Luxury Holdings' "right, title and interest to any furniture, figures and equipment in the leased premises as of the

date of this Assumption [] to Assignee [Diamanti] ...." 1 AA 204 at Recital ¶5. When presented with the copy of the Lease Assignment and Assumption that he had signed, Reynolds refused to acknowledge the signature of the landlord despite paying rent to that landlord for years because by that point he realized the document hurt his case. 1 AA 117 at pg. 154. He also claimed that someone named "Fickenstein" told him that "he feels Tivoli did own them [the FF&E]." 1 AA 94 at pg. 64 – 65. However, Reynolds then retreated and said "And he didn't go any further, he didn't look, and I didn't pursue it either." *Id.*

In summation, the undisputed documentary evidence submitted to the district court established that there was no justifiable reliance on any alleged misrepresentation concerning the furniture, fixtures, and equipment. More important, there was no admissible evidence creating a genuine issue of fact in dispute that any statements about the furniture, fixtures, and equipment were false.

c. No justifiable reliance with respect to the cost of inventory and no misrepresentations

(1) <u>Reynolds admitted he took no issue with the cost paid for inventory</u>

It is baffling that Reynolds and Diamanti continue to complain about inventory cost on appeal. In his deposition, Reynolds admitted that he did not take issue with what he paid:

Mr. Reynolds: I don't know, but why are you asking me that? I'm not arguing about this. We counted it; I paid for it. End of story.

. . .

Mr. Balducci: Yes. You just told me you don't have a problem with that, so I just want you to agree with what you already said. You'd agree with me you don't take any issue with the $134,253.44 paid for the jewelry products, rings, watches, diamonds, and other fine jewelry products?

Mr. Chasey: I'm going to object that it's vague. I'm not sure what - - what are you fine with? I mean - -

Mr. Reynolds: I don't have a problem with it.

1 AA 118 at pg. 158, ll. 16 – pg. 159, ll. 23

In addition to not having "a problem" with the price paid for inventory, Reynolds also readily admitted he had a full and fair opportunity to inspect all of the inventory of the business, and in fact did so with the assistance of a third party. 1 AA 117 – 1 AA 118. The individual that went to inspect the inventory with Reynolds was his lawyer son:

Mr. Balducci: All right. Did he - - when did he [lawyer son] write this [Bill of Sale] up? Was it in front of you? Was it at the store? Was it in his law office?

Mr. Reynolds: Yes.

Mr. Balducci: At the store?

Mr. Reynolds: Yes.

Mr. Balducci: The day you and Raffi met to go over the inventory?

Mr. Reynolds: Yes.

Mr. Balducci: He was there?

Mr. Reynolds: Yes.

Mr. Balducci: And he had an opportunity to inspect the various items [the inventory] that are delineated in this document [the inventory bill of sale]?

Mr. Reynolds: Yes.

Mr. Balducci: And so did you?

Mr. Reynolds: Yes.

1 AA 117 at pg. 157, ll. 25 – 1 AA 118 pg. 157, ll. 15.

(2) <u>The Inventory was Sold Below Cost</u>

Certain items that were subject to Sunbelt's 10% commission had a 10% mark-up to make up for the commission cost. 1 AA 157 ¶18 – 1 AA 158 ¶24. This ultimately resulted in a loss to Luxury Holding because Sunbelt took 10% off the adjusted price, which ultimately resulted in an 11% reduction. *Id.*

Regardless, the Closing Agreement specifically requires adjustment for cost: "If inventory is purchased, it will be at cost and the price adjusted accordingly. Inventory to be counted, priced and extended by Purchaser and Seller unless otherwise agreed." 1 AA 185 ¶5. That is precisely what happened – the parties went over the inventory, Reynolds had his attorney son present to draw up the Bill of Sale, and the parties agreed on the price after Reynolds had a full and fair opportunity to review everything.

d. The Customer List Argument is Non-Sensical

Another assertion is that some of the individuals identified on a Customer List had not actually purchased jewelry at the store.

The Jewelry Store has always maintained a list of customers that included actual and prospective customers. 1 AA 159 ¶32. The Customer List included individuals that had purchased, individuals that were interested, and individuals that had attended events at the Jewelry Store. *Id.* At no point during this transaction was it ever represented to Plaintiffs that the customer list was solely comprised of customers that had bought jewelry.

No admissible ever submitted in support of this theory. During his deposition, Reynolds admitted that he had no personal knowledge of this, and that the sole basis for this allegation is that he simply heard from "someone else" that some of the individuals listed on the customer list were not familiar with the Jewelry Store. 1 AA 98 at pg. 81 – 1 AA 99 at pg. 81. This court should affirm.

e. The Non-Compete Argument Makes Even Less Sense

The final basis for the misrepresentation claim relates to an alleged non-compete provision. Specifically, Reynolds contends that Raffi defrauded him by violating the non-compete provision. This is ludicrous.

After selling the Jewelry Store, Luxury Holdings LV, LLC opened a semi-custom cabinet showroom that sold cabinets from an Italian cabinet designer. 1

AA 158 ¶27 – 1 AA 159 ¶30. That venture was unprofitable, short-lived, and basically was sold for a loss. *Id.* According to Reynolds, the non-compete said Raffi "would not directly or indirectly operate a business. That didn't say what kind of business." 1 AA 90 at pg. 49, ll. 20 – 24.

Reynolds did not produce, and certainly during the summary judgment proceedings did not present, any evidence that Raffi had any involvement whatsoever in a jewelry store after closing the transaction. Thus, the district court properly rejected this claim below.

4. Reynolds and Diamanti did not show they were induced by any purported misrepresentations

Neither Reynolds nor Diamanti ever presented evidence tending to show that if they knew the purported representations were false, that they would not have closed the transaction. Quite the contrary, Reynolds testified he knew the numbers were off, knew they were "everywhere," knew he could have cancelled at any time, but went ahead and closed the transaction anyway.

There was no evidence that the financials reviewed by Reynolds were fabricated. Reynolds knew they didn't match up. There was no evidence that Raffi competed other than whimsy and speculation. There was no admissible evidence that Raffi told Reynolds, "this is a list of all of our buying customers."

There was no evidence that Diamanti didn't own the FF&E. There is no evidence that Raffi "fabricated" revenue numbers to drive up the value of the business. There is not even evidence showing the revenue numbers had much of anything to do with the contract price. At the end of the day a business is worth what someone is willing to pay, and after going through everything, Reynolds and Diamanti were satisfied with what they saw and closed the deal.

Indeed, once the district court was presented with the foregoing information and testimony of Reynolds, it correctly concluded that "While Plaintiffs asserted that there are material misrepresentations that formed the foundation of Plaintiffs' claims, Plaintiffs failed to reference any particular records which evidence such misrepresentations. Plaintiffs therefore did not show any genuine issue as to inducement by representations, particularly in a commercial transaction of this magnitude." 3 AA 722 ¶5. Further, the district court noted "The lack of actionable misrepresentations inducing Plaintiffs to enter the contract is fatal to each of Plaintiffs' claims[.]"

D. REYNOLDS DID NOT HAVE ANY ACTIONABLE INDIVIDUAL CLAIMS

1. Reynolds did not present evidence of any actionable misrepresentations

Reynolds did not produce any evidence showing that any of the purported misrepresentations caused him to purchase and close the transaction for the

Jewelry Store. Instead, what was presented to the district court was ample documentation and evidence that a sophisticated businessman performed all of the due diligence he felt was necessary and appropriate before deciding to buy a jewelry business. That businessman formed an LLC to limit his liability which then operated that jewelry business for 25 months before concocting this hybrid, delusional version of reality to try and claim he was somehow duped, regardless of all of the numerous contractual provisions he signed to the contrary.

Telling is Reynolds' own declaration. Nowhere does it say, "if it knew this was false, I wouldn't have done this." Reynolds did not present any evidence of an actionable misrepresentation causing inducement. This Court should affirm.

2. Reynolds Lacks Standing

Reynolds never had standing to bring personal claims because he assigned the entire transaction, including all benefits (including the deposit) to Diamanti.

"Every action shall be prosecuted in the name of the real party in interest." NRCP 17(a). A real party in interest "is one who possesses the right to enforce the claim and has a significant interest in the litigation." *Szilagyi v. Testa,* 99 Nev. 834, 838, 673 P.2d 495, 498 (1983). Determining whether the plaintiff is a real party in interest requires courts to focus on the party seeking adjudication. *Id.*

Determining who has standing in the context of transactions involving LLC's in Nevada is easy: "A member of a limited-liability company is not a proper

party to proceedings by or against the company...." NRS 86.381. An LLC may "[s]ue and be sued, complain and defend, in its name." NRS 86.281(1). An LLC may also "[p]urchase, take, receive, lease or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property, or an interest in it, wherever situated." NRS 86.281(2).

It was undisputed that Reynolds assigned all right, title, and interest in the transaction to Diamanti in paragraph 14 of the Closing Contract:

> This transaction is subject to the Purchase Agreement dated January 13, 2015 including all amendments, attachments, exhibits, and addendums respectively, attached hereto and made a part hereof. Purchase Agreement is hereby ratified to indicate Diamanti Jewelers LLC a Nevada Limited Liability Company, as Buyer, with all rights privileges, responsibilities and duties, including but not limited to any deposited funds, all of which hereby assigned and such assignment all of which are hereby accepted by Buyer.

1 AA 186 ¶14.

When confronted with this provision, Reynolds said:

> Mr. Balducci: And so what this is - - just trying to get - - you would agree with me that you did not have a right personally to any of that once you signed this agreement with this paragraph 14?
>
> Mr. Reynolds: Yes.

1 AA 113 at pg. 139 ll. 22 – pg. 140 ll. 1.

The undisputed documents in this case demonstrate that any interest Reynolds had was expressly assigned to Diamanti, which Reynolds acknowledged in writing in the Closing Agreement, and which undisputedly superseded all prior

documents. Reynolds also did not pay anything as the Closing Agreement clearly states that "The Transferee (Buyer), Diamanti Fine Jewelers LLC, will hand you funds and/or documents set forth below ... $395,000.00." 1 AA 184. Reynolds is the manager and sole member of Diamanti. Any interest in the claims is held solely by Diamanti, not its manager or member. Nevada's statutes are absolutely clear on this point. Telling is that Reynolds did not cite any cases in support of the proposition that a senior citizen can bring a personal claim for a wrong committed against their company. If there were, certainly Warren Buffett would have taken advantage of such a law. Such law simply doesn't exist. This Court should affirm.

3. The Elder Abuse Statute is a Red Herring with No Application

Nevada's elder abuse statute is limited to the following circumstances:

- If an older person or a vulnerable person suffers a personal injury or death caused by abuse or neglect (not applicable here);
- If an older person or vulnerable person suffers a loss of money or property caused by exploitation.

See NRS 41.1395(1). In Nevada, an older person is defined as anyone over 60 years of age. NRS 41.1395(4)(d).

Arguably the only portion of the elder abuse statute that might apply (although it does not) is if an older person suffers a loss of money or property caused by exploitation.

a. There was no exploitation.

Nevada's elder abuse statute defines "exploitation" as "any act taken by a person who has the trust and confidence of an older person or a vulnerable person ... to ..." either (1) obtain control over money through deception, intimidation or undue influence, or (2) convert money, assets, or property of the older person with the intention of permanently depriving them of such asset. NRS 41.1395(4)(b).

Reynolds never presented evidence of trust. Reynolds never presented evidence of confidence. In his Opening Brief, Reynolds did not bother to even address these fatal points.

This was an arms-length transaction between two companies – Diamanti and Luxury Holdings. Prior to the transaction, Raffi and Reynolds had never met one another, and they had no pre-existing relationship. As such, there was no "trust and confidence" as required by the elder abuse statute. Undisputedly, none of the Defendants had any fiduciary duty to Reynolds.

In the simplest of terms, the elder abuse statute has zero application to this arm's length commercial transaction. This Court should affirm.

X. CONCLUSION

For the foregoing reasons, the Court should affirm.

Dated this 13th day of July, 2020.

MARQUIS AURBACH COFFING

By /s/ Christian T. Balducci
Terry A. Moore, Esq.
Nevada Bar No. 7831
Christian T. Balducci, Esq.
Nevada Bar No. 12688
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondents

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 13,884 words; or

☐ does not exceed _____ pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of May, 2020.

MARQUIS AURBACH COFFING

By /s/ Christian T. Balducci
Terry A. Moore, Esq.
Nevada Bar No. 7831
Christian T. Balducci, Esq.
Nevada Bar No. 12688
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONDENTS' ANSWERING BRIEF** was filed electronically with the Nevada Supreme Court on the 13th day of July, 2020. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Bradley M. Marx, Esq.
brad@marxfirm.com
Attorneys for Plaintiffs

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing