

IN THE SUPREME COURT STATE OF NEVADA

Electronically Filed  
Mar 12 2021 02:38 p.m.

<p>JOSEPH FOLINO, an individual and NICOLE FOLINO, an individual,</p> <p>Appellant,</p> <p>v.</p> <p>TODD SWANSON, an individual; TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin; LYONS DEVELOPMENT, LLC, a Nevada limited liability company; DOES I through X; and ROES I through X,</p> <p>Respondent.</p>	<p>Case No. 81252</p>	<p>Elizabeth A. Brown Clerk of Supreme Court</p>
<p>JOSEPH FOLINO, an individual and NICOLE FOLINO, an individual,</p> <p>Appellant,</p> <p>v.</p> <p>TODD SWANSON, an individual; TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin; LYONS DEVELOPMENT, LLC, a Nevada limited liability company; DOES I through X; and ROES I through X,</p> <p>Respondent.</p>	<p>Case No. 81831</p>	

**APPEAL  
FROM THE EIGHTH JUDICIAL DISTRICT COURT  
THE HONORABLE JIM CROCKETT CASE NO. A-18-782494-C**

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**JOINT  
APPENDIX ON APPEAL  
VOLUME XI OF XIX  
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### **CERTIFICATE OF SERVICE**

*When All Case Participants are Registered for the Appellate CM/ECF System*

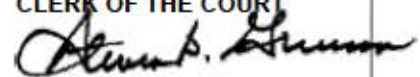
I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on March 9<sup>th</sup>, 2021.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 9th day of March 2021.

**BLACK & WADHAMS**

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11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JOSEPH FOLINO, an individual and NICOLE  
14 FOLINO, an individual,

15 Plaintiff,

16 v.

17 TODD SWANSON, an individual; TODD  
18 SWANSON, Trustee of the SHIRAZ TRUST;  
19 SHIRAZ TRUST, a Trust of unknown origin;  
20 LYONS DEVELOPMENT, LLC, a Nevada  
21 limited liability company; DOES I through X;  
22 and ROES I through X,

23 Defendants.

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

**OPPOSITION TO DEFENDANTS'  
MOTION FOR ATTORNEY'S FEES AND  
COSTS**

24 COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through  
25 their attorney of record Rusty Graf, Esq., of Black & LoBello, hereby submit their Opposition  
26 to Defendants' Motion for Attorney Fees and Costs.

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This Opposition is based upon the pleadings and papers on file in this action, the Points and Authorities set forth herein, and argument to be made by counsel at the time of the hearing.

DATED this 11 day of May 2020.

**BLACK & LOBELLO**

#15271 

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**POINTS AND AUTHORITIES**

**I.**

**PERTINENT PROCEDURAL BACKGROUND**

On October 19, 2018, Plaintiffs filed their initial Complaint against Defendants. On February 4, 2019 Defendants filed their first Motion to Dismiss, which was denied, and the Court granted Plaintiffs leave to amend. On April 18, 2019, Plaintiffs filed their First Amended Complaint. On May 20, 2019, Defendants filed their Motion to Dismiss Plaintiffs' First Amended Complaint. On July 18, 2019, the Court dismissed several of Plaintiffs' claims, but denied Defendants' Motion to Dismiss for two remaining causes of action. On September 4, 2019 Plaintiffs filed their Second Amended Complaint with the surviving causes of actions: (1) Fraud/Intentional Misrepresentation; and (2) violation of NRS 113.100 et seq.

On September 24, 2019, Defendants filed a Motion to Dismiss the Second Amended Complaint. The Court held a hearing on Defendants' Motion to Dismiss the Second Amended Complaint on November 7, 2019, and the matter was ordered continued to permit the parties time to file a supplemental brief and production of documents. On December 11, 2019,



1 Defendants served Plaintiffs with an Offer to have Judgment entered against them in the amount  
2 of One Hundred and Fifty Thousand Dollars (\$150,000.00) inclusive of costs, fees and interest.  
3 *See Defendants' Motion for Attorney's Fees and Costs, Exhibit F.* The hearing on Defendants'  
4 Motion to Dismiss the Second Amended Complaint was held on April 7, 2020, and the Court  
5 granted the Motion. Thereafter, on April 23, 2020, Defendants filed the instant Motion for  
6 Attorney's Fees and Costs.  
7

## 8 II.

### 9 LEGAL ARGUMENT

#### 10 A. INTRODUCTION

11 The foundational points of Plaintiffs' instant Opposition are (1) that Defendants cannot  
12 meet the statutory requirements for an award of attorney's fees and costs; and (2) that even if  
13 Defendants did meet those requirements, it was objectively reasonable in the given  
14 circumstances for Plaintiffs to bring the lawsuit. Plaintiffs' claims were not frivolous or based  
15 upon spite. Defendants argue to the contrary, and state that they are entitled to their accrued  
16 attorney's fees and costs, by attempting to misconstrue the background of this dispute and paint  
17 Plaintiffs' Complaint as having no factual or legal basis. This is incorrect. Defendants' flawed  
18 assertions do not support an award for fees. The Defendants assert in their motion the following  
19 arguments: (1) evidence of repairs of specific leaks removed any legal uncertainty as to whether  
20 there was a duty to disclose those leaks on the Seller's Real Property Disclosure ("SRPD"); (2)  
21 that evidence of repairs of leaks asserted in the complaint removed any factual uncertainty as to  
22 the existence of additional leaks, and whether the leaks asserted in the complaint had been  
23 repaired (or should have been disclosed); (3) that the factual basis of this dispute was similar  
24 enough to that in *Nelson v. Heer*, such that there was no reasonable legal basis for Plaintiffs to  
25 believe Defendants must disclose the leaks; and (4) that because the Court ultimately granted  
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1 Defendants' Motion to Dismiss, it was implicitly agreeing that it was unreasonable for Plaintiffs'  
2 to have brought their claims in the first place. *See Defendants' Motion for Attorney's Fees and*  
3 *Costs, Pg. 4-16.* Defendants' use these four assertions in an attempt to support their argument  
4 that "Plaintiffs pursued this action out of "pure spite" and thus validate their request for fees and  
5 costs. *Id. at Pg. 4.*

6  
7 The fundamental problem with Defendants' overall argument and characterization of  
8 Plaintiffs' suit as based on "pure spite" and completely unreasonable, is the procedural history.  
9 More importantly, discovery uncovered numerous leaks, some of which were not repaired. The  
10 Plaintiff asserted that there were no conditions of moisture EVER at this home, and that if there  
11 were conditions of moisture, then they were repaired. This was found to be false. Further, the  
12 Plaintiff asserted that there was never any mold that existed at this residence. This is also false,  
13 as the condition existed at the time of the closing.

14  
15 Further, though Plaintiffs' cannot dispute that the Court did grant the Motion to Dismiss,  
16 it is incorrect for Defendants to argue that Plaintiffs' suit was only based upon a leak, about  
17 which they were fully informed. There were multiple leaks in the house, at least one of which the  
18 Plaintiffs have presented the evidence of the Defendant's own testimony and exhibits was never  
19 repaired or disclosed in violation of the SRPD. The lawsuit was not just about a single leak even  
20 if, arguendo, Defendants did make a full and proper disclosure in that regard. The litigation was  
21 the failure of the Plaintiff to make a full and knowing disclosure of the conditions of moisture or  
22 mold in the residence that existed during the time he owned the residence. The mere fact that  
23 Defendants are forced to characterize the "early November" leak, rather than simply the leak, is  
24 illustrative of this point. There were at least six different leaks presented to the Court. These  
25 multiple leaks in the house over a long period of time were proof of the knowledge of the  
26 Defendant. Dr. Todd Swanson's knowledge of each of those leaks, actions taken by him and  
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28



1 vendors at his direction for each of those leaks, and the failure to make subsequent disclosures  
2 were all at issue. Finally, Plaintiffs' have reasonably asserted that the facts of this dispute allow it  
3 to be distinguished from Nelson v. Heer. This is not such a firmly settled and established area of  
4 that Plaintiffs are unreasonable for believing and arguing that, unlike Nelson v. Heer,  
5 Defendants' did have a duty to disclose. More so, the instant facts reveal the existence of mold  
6 never disclosed and another leak in a detailed report with color photos, a report to which the  
7 Defendant annotated and confirmed that the condition was never repaired.

9 Plaintiffs' were not acting out of spite. Spite being an act to deliberately hurt, annoy or  
10 offend someone. These Plaintiffs brought a lawsuit after suffering massive losses due to  
11 systemic flaws in the plumbing system of their brand-new home. The only person in this  
12 transaction that knew of all of the leaks and the failure to repair all of the leaks, was the  
13 Defendant. Plaintiffs are not mind readers. They could not have known of the numerous leaks  
14 Dr. Swanson was aware of, and when he became aware of those leaks. Just because Plaintiffs  
15 had a Motion to Dismiss granted against them, does not mean they acted with the intent to spite  
16 Dr. Swanson. Quite the opposite, had the Defendant notified them of all of the at least six leaks  
17 in the residence, then and only then could the Plaintiffs have made a rational decision as to  
18 whether to close or not.

20 The Court has intimated that the Plaintiffs waived their rights to assert the failures of the  
21 Defendant to provide notice of the prior conditions of moisture and mold by closing. The SRPD  
22 does not have a limit on the time the owner has the knowledge to look back in his mind.  
23 Moreover, the leaks in question was known to the Defendant in August 2015, less than three  
24 years prior to the October 2017 signing of the SRPD. Further, the Defendant produced the May  
25 21, 2015 Criterium report that put Dr. Swanson on notice of the 2015 leaks as opposed to the  
26 2017 leaks upon which the Court based its waiver ruling.  
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**B. DEFENDANTS' CANNOT BE AWARDED THEIR ATTORNEY'S FEES AND COSTS UNDER ANY OF THE STATUTES THEY CITE**

Plaintiffs' decision to bring a lawsuit against Defendants has a demonstrably reasonable basis, yet Defendants still assert that they are entitled to recover their attorney's fees and costs and cite three different statutes under which they claim they may receive such an award. These include (1) NRCP 68 (under which Defendants' state they are entitled to the fees and costs accrued since December 11, 2019); (2) NRS 18.010(2)(b) (under which Defendants' state they are entitled to the fees and costs accrued since the inception of the suit); and (3) NRS 18.020 (under which Defendants' state they are entitled to the costs accrued since the inception of the suit). Defendants are not entitled to an award of attorney's fees under any of these three statutes, and Plaintiffs will address each in more detail below.<sup>1</sup>

**i. Defendants' Are Not Entitled to Fees and Costs Pursuant to NRCP 68**

Pursuant to NRCP 68, if an offeree rejects an offer and fails to obtain a more favorable judgment, they must pay the reasonable attorney's costs and fees incurred by the offeror post-offer. *See NRCP 68(f)(1)*. However, an award of attorney's fees pursuant to NRCP 68 is discretionary with the court. *Bidart v. American Title Ins. Co.*, 103 Nev. 175, 734 P.2d 732 (1987). Further, the Nevada Supreme Court has stated that "while the purpose of NRCP 68 is to encourage settlement, it is not to force plaintiffs unfairly to forego legitimate claims." *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983).

Based on these considerations, the Court engages in a two-part analysis when determining the award of fees and costs. First, it is determined whether it is reasonable to award a party fees and costs by weighing the following Beattie factors: (1) whether the plaintiff's claim

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<sup>1</sup> The propriety of the award of costs has been addressed by a separate Motion to Retax Costs, set to be heard on the same date as the hearing of this Motion for Fees and Costs. This Opposition incorporates by reference any and all argument made in the Motion to Retax Costs.

1 was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in  
2 good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer  
3 and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by  
4 the offeror are reasonable and justified in amount. *Id. at 588-89*. When it is determined that the  
5 first three Beattie factors weigh in favor of the party who rejected the offer of judgment, the  
6 reasonableness of the requested fees becomes irrelevant as the reasonableness of the fees alone  
7 cannot support an attorney fees award. *Frazier v. Drake*, 131 Nev. 632, 641-42, 357 P.3d 365,  
8 372 (Ct. App. 2015).

10 If the Court determines that it is reasonable to make an award of attorney's fees and  
11 costs, it then engages in the second part of the analysis by using the Brunzell Factors to  
12 determine what amount of fees and costs is reasonable to award. The Brunzell Factors include:  
13 (1) the qualities of the advocate: his ability, training, education, experience, professional standing  
14 and skill; (2) the character of the work to be done: its difficulty, intricacy, importance, the time  
15 and skill required, the responsibility imposed and the prominence and character of the parties  
16 when they affect the importance of the litigation; (3) the work actually performed by the lawyer:  
17 the skill, time and attention given to the work; and (4) the result: whether the attorney was  
18 successful and what benefits were derived. *Schouweiler v. Yancy Co.*, 101 Nev. 827, 712 P.2d  
19 786 (1985) (citing *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 455 P.2d 31 (1969)).

22 ii. Analysis under Beattie and Brunzell Demonstrate Defendants' are not  
23 entitled to an award of fees and costs under NRCP 68.

24 Defendants' served an Offer of Judgment on Plaintiffs on December 11, 2019 which was  
25 ultimately rejected and they now assert that, pursuant to NRCP 68, they are thus entitled to  
26 recover Forty-Three Thousand Six Hundred and Twelve Dollars and Twenty-Six cents  
27 (\$43,612.26) in attorney's fees and costs they subsequently incurred. *See Defendants' Motion for*  
28



1 *Attorney's Fees and Costs*, Pg. 5. The following analysis of the Beattie Factors indicates that an  
2 award of such fees and costs is not reasonable and thus should not be awarded.

3 a. **Whether the Plaintiffs' claims were brought in good faith**

4 In arguing against Plaintiffs' claims being brought in good faith, Defendants' argument  
5 focuses on three key assertions: (1) that the legal standard for the duty to disclose a repaired leak  
6 is clear from *Nelson v. Heer* and thus there should have been no legal controversy regarding the  
7 failure of Todd Swanson to Disclose the leaks on the SRDP; (2) that Plaintiffs' knowledge of the  
8 receipt evidencing the repair of the February leak and the affidavit of the owner of the plumbing  
9 company stating the repairs had taken place demonstrates bad faith in bringing the claim (in light  
10 of the holding of *Nelson v. Heer*); and (3) that Plaintiffs' Motion for Sanctions against  
11 Defendants' Counsel evidenced Bad Faith. *Id.* at 7-8. Defendants conclude that the good faith of  
12 Plaintiffs is in doubt because "Not only had they filed multiple complaints with seemingly zero  
13 factual basis, but had also filed a completely "inappropriate" motion for sanctions ascribing  
14 multiple nefarious acts to defense counsel without basis." *Id.* at 8.

15 First, Plaintiffs would emphasize that Defendants are mistaken in their belief that the  
16 Motion for Sanctions that they repeatedly deem "inappropriate" has any relevance to analysis of  
17 the first Beattie Factor. Again, the first factor is "whether the plaintiff's **claims were brought** in  
18 good faith". (Emphasis added) *Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983).  
19 The plain language of the Court's holding in *Beattie v. Thomas* makes it clear that this analysis is  
20 not meant to investigate the motive behind every motion filed throughout the litigation process,  
21 only the reasonableness of bringing the claims. *Id.* The complaint was brought in good faith and  
22 the facts presented prove the claims as made.

23 Next, as to Defendants' assertion that Plaintiffs' demonstrated bad faith because they  
24 "filed multiple complaints with seemingly zero factual basis", this is inaccurate to the point "zero  
25  
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28

1 factual basis". See *Defendants' Motion for Attorney's Fees and Costs*, Pg. 8. Plaintiffs' Initial  
2 Complaint, First Amended Complaint, and Second Amended Complaint were all factually well  
3 based, and the parties agree on the majority of the facts alleged. Defendants' do not dispute that  
4 there were multiple leaks that occurred on the property,<sup>2</sup> they do not dispute that Dr. Swanson  
5 indicated the existence of no leaks on the SRPD,<sup>3</sup> and Defendant Dr. Swanson's own notes  
6 regarding the repairs to leaks in the house demonstrate it was a systemic problem.<sup>4</sup> The  
7 Defendants only dispute the duty to disclose those leaks, and the knowledge of Dr. Swanson as  
8 to the systemic nature of the problem. This is not a matter of Plaintiffs' bringing Complaints that  
9 had no facts or incorrect facts, it's a dispute involving (1) the legal interpretation of the duty to  
10 disclose repaired leaks; and (2) the extent of Dr. Swanson's knowledge of the leaks; and, (3)  
11 whether all of the leaks to which he was aware, were fully repaired.  
12

13 Finally, as to Defendants' argument that the legal standard from *Nelson v. Heer*  
14 combined with Plaintiffs' knowledge of the February and November repairs evidences bad faith  
15 (as they claim this makes it clear any duty to disclose the leaks was negated), this is a blatant  
16 misinterpretation of the history of all of the leaks at this residence and the arguments made by  
17 Plaintiffs up to this point. Plaintiffs did not merely ignore relevant case law in bringing their  
18 claims, they clearly argued that the instant matter could be distinguished from the situation in  
19 *Nelson v. Heer*. See attached Exhibit 2, *Plaintiffs' Opposition to Defendants' Motion to Dismiss*  
20 *the Second Amended Complaint*, Pg. 5-6. Plaintiffs' addressed the holding of *Nelson v. Heer* in  
21 their Opposition to Defendants' Motion to Dismiss the Second Amended Complaint, stating:  
22  
23

24  
25 <sup>2</sup> See Defendants' Motion for Attorney's Fees and Costs, Pg. 4 (referencing the February 2017 leak); Pg.  
26 10 (referencing the November leak); and see also attached Exhibit 1 (Repair notes of Todd Swanson,  
demonstrating knowledge of multiple leaks in the house).

27 <sup>3</sup> See Defendants' Motion for Attorney's Fees and Costs, Pg. 7.

28 <sup>4</sup> See attached Exhibit 1, Repair notes of Todd Swanson.



1 “Defendants argue that under *Nelson v. Heer* and NRS 113.140, they did not  
2 commit concealment because they were not “aware of the defect after they believed it had  
3 been repaired. Defendants then go into an extensive analysis of the Court’s holding in  
4 *Nelson*, and also the word “aware”, and what means to be aware and have knowledge of  
5 something, but this discussion is totally irrelevant. Moreover, this is nonsense!  
6 Defendants are correct that in *Nelson* the Court found it was not concealment for a seller  
7 not to disclose past water damage they believed to have been repaired. *Nelson v. Heer*,  
8 123 Nev. 217, 163 P.3d 420 (2007). However, Defendants ignore a key difference  
9 between the holding in *Nelson* and the current situation. Namely that, unlike in *Nelson*,  
10 Defendants explicitly lied on the SRPD, and this is true regardless of what they were told  
11 about the repairs by Rakeman.

8 At least 10 days before residential property is conveyed to a purchaser the seller  
9 “shall complete a disclosure form regarding the residential property.” See NRS  
10 113.130(1)(a). Here, the SRPD for the sale asked if Defendants were aware of any  
11 “previous or current moisture conditions and/or water damage”. (emphasis added) See  
12 attached Exhibit 1, Seller’s Real Property Disclosure Form. This is explicitly clear. It  
13 does not matter whether Defendants believe that the repair removed their awareness of  
14 the issue, because the question did not only ask about the current issues. It specifically  
15 asked if there were any “previous” moisture conditions or water damage. A repair does  
16 not remove one’s awareness of previous occurrences. Despite this, on the SRPD  
17 Defendants indicated no, that they were not aware of any previous moisture conditions or  
18 water damage. This is concealment, and the Rakeman affidavit has no relevance.

15 It’s not like *Nelson*, where it is unclear what the SRPD form actually asked. The  
16 Court merely held that the seller had no affirmative duty to disclose something they did  
17 not know materially and adversely affected the value of the property. *Nelson v. Heer*, 123  
18 Nev. 217, 163 P.3d 420 (2007). Here the seller was asked an explicit question about past  
19 occurrences, not just whether an issue still existed, and they gave a demonstrably false  
20 and misleading answer.” (footnotes omitted)

19 See attached Exhibit 2 at Pg. 5-7. This demonstrates that there was an actual legal controversy  
20 and Plaintiffs were not acting unreasonably and simply defying the holding of *Nelson v. Heer* out  
21 of spite. The facts of this case are not the same as *Nelson v. Heer*. More importantly, there are  
22 leaks and conditions of moisture to which repairs were not made. In addition, the Plaintiffs  
23 argued that the affidavit of Aaron Hawley was hearsay and should not be considered by the  
24 Court. *Id.* at Pg. 4-5.

26 Therefore, Defendants’ arguments regarding (1) the relevance of the Countermotion for  
27 Sanctions; (2) the factual basis for the Complaints; and (3) the existence of a clear legal standard  
28 from *Nelson v. Heer* which would apply to this dispute. Each and every one of those arguments

are all false, and as such they do not demonstrate bad faith on the part of Plaintiffs. To the contrary, examination of these issues actually reveals the reasonable basis for Plaintiffs' claims. Just because Plaintiffs' lost does not mean they were unreasonable in their pursuit of these claims, and it certainly does not mean they acted in bad faith. Thus, this factor should be weighed in favor of Plaintiffs', as they made a reasonable argument for the Court to distinguish *Nelson v. Heer* and Defendants' cannot demonstrate the existence of bad faith.

b. **Whether Defendants' offer of judgment was brought in good faith in both its timing and amount.**

Defendants' brought their Offer of Judgment, in the amount of One Hundred and Fifty Thousand Dollars (\$150,000.00) inclusive of costs, fees and interest, on December 11, 2019. *See Defendants' Motion for Attorney's Fees and Costs, Exhibit F.* Defendants argue that this was "generous" and therefore objectively reasonable because they claim "Plaintiffs have never asserted that they had suffered any measurable special damages", that "all repairs to the plumbing system were handled under warranty by either Rakeman Plumbing or the manufacturer, Uponor" and that Plaintiffs had already been advised of the Court's "inclination to grant Defendants' motion to summarily dispose of the case". *Id., at Pg. 8-9.* Defendants' claim to have made this offer due to the "unpredictable nature of litigation and the potential to accrue substantial costs and fees in a relatively short period of time" but this is inaccurate. *Id., at Pg. 8.* Defendants' Offer, both in timing and amount, was not brought in good faith, and was instead an attempt to avoid the revelation of information and evidence harmful to their position through the subsequent depositions and discovery.

Defendants' claim that "Plaintiff's had essentially zero special damages" is incorrect, irrelevant, and fails to provide the proper financial context for the situation. As Defendants' themselves note, Plaintiffs' alleged Fraud damages of approximately Three Hundred Thousand



1 Dollars (\$300,000.00) and Bad Faith damages of One Hundred Thousand Dollars (\$100,000.00).  
2 *Id.*, at Pg. 9. These damages were calculated as the result of both (1) the need to complete a re-  
3 pipe of the entire residence due to the systemic issues with the plumbing system; (2) the likely  
4 affect to the value of the home due to the multiple water leaks that will be required to be reported  
5 going forward; and (3) the additional expenses Plaintiffs incurred for additional living expenses  
6 due to their home remaining non-functional for such a significant period of time. Further, as of  
7 November of 2019, Plaintiffs had already incurred attorney's fees and expenses in excess of  
8 Thirty-Two Thousand Dollars (\$32,000.00). *See attached Exhibit 3, Bills Evidencing Plaintiffs'*  
9 *Fees and Costs through October 31, 2019.* This was all in addition to Plaintiffs' alleged Breach  
10 of Contract damages in an amount to be determined.  
11

12 After deducting attorney's fees and costs, Defendants' were ultimately offering a  
13 settlement which would allow Plaintiffs' to recoup less than a third of their alleged damages.  
14 This weighs against considering the offer to be in good faith as to the amount offered. The timing  
15 of the offer also weighs against any finding of reasonableness, as it was offered prior to any  
16 discovery in the litigation process, and immediately after the filing of the third motion to dismiss  
17 the case without ever producing a single document and without even answering.  
18

19 The offer was grossly unreasonable. After spending more than a year of time and effort  
20 bringing the case to this point and immediately before conducting discovery believed to be  
21 essential to Plaintiffs' claims, the Plaintiffs received the instant Offer. Within Weeks of the Offer  
22 expiring, the Plaintiffs received the May 21, 2015 Criterium report from the Plaintiff. *See*  
23 *attached Exhibit 4, Defendants' First Supplemental Production of Documents, dated January 23,*  
24 *2020.* Only after one session of Dr. Swanson's deposition, did the Plaintiffs receive the rest of  
25 the Defendants' documents referencing the tracking of the prior leaks and the lack of repair of  
26  
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28

1 the same. *See attached Exhibit 5, Defendants' Second Supplemental Production of Documents,*  
2 *dated January 31, 2020.*

3 Therefore, it was not grossly unreasonable of Plaintiffs to reject an offer that was (1) only  
4 for a fraction of the amount of losses suffered; and (2) immediately before additional key  
5 discovery would be produced. In fact, the evidence above makes it clear that it was reasonable to  
6 reject the Defendants' Offer. Therefore, this factor too must be weighed in favor of Plaintiffs.  
7

8 c. **Plaintiffs' decision to reject the offer and proceed to trial was not**  
9 **grossly unreasonable or in bad faith.**

10 Defendants next argue that Plaintiffs' decision to reject the offer was "grossly  
11 unreasonable" for three reasons: (1) because "the Court had already indicated its inclination to  
12 dismiss the case"; (2) because "Plaintiff's had essentially zero special damages"; and (3) because  
13 "established case law clearly eviscerated Plaintiff's claims". *See Defendants' Motion for*  
14 *Attorney's Fees and Costs, Pg. 10.* Close consideration of these three issues demonstrates that  
15 Defendants are blatantly incorrect and that it was not either grossly unreasonable or in bad faith  
16 for Plaintiffs' to reject the offer.  
17

18 First, Defendants' argument that it was grossly unreasonable to reject the offer, because  
19 the Court had already indicated its inclination to dismiss the case offers is baseless and should be  
20 completely discounted. The Court was unaware of the facts of the 2015 leaks and the failure to  
21 repair the same. Only the Defendants were aware of those facts. If, as the Defendants imply, the  
22 Court had already determined how it would rule on this matter it would have been ridiculous to  
23 order the matter continued for 90 days for further discovery. Therefore, it must be concluded that  
24 the Court believed that it was still possible at that point for additional evidence to demonstrate  
25 the validity of Plaintiffs' claims. Additional evidence that could only come through discovery.  
26 Further, Plaintiffs' did uncover key evidence after this fact (through depositions and the  
27  
28



1 additional subpoena of documents) that supported their claims. This is evidenced by the  
2 voluminous production which accompanied Plaintiffs' Supplemental Brief.

3       Next, as discussed in depth above, it is inaccurate of Defendants to attempt to portray  
4 their Offer as generous to the point that it was unreasonable for Plaintiffs' not to accept.  
5 Plaintiffs had suffered losses and accrued fees and expenses far in excess of what was being  
6 offered, and a risk-reward analysis suggested to Plaintiffs that the wisest decision would be to  
7 continue through litigation. Finally, as is also discussed in more detail above, it is a gross  
8 exaggeration for Defendants to claim that "established case law clearly eviscerated Plaintiff's  
9 claims". Even though the Court ultimately agreed with Defendants' interpretation of the duty to  
10 disclose, Plaintiffs had a reasonable and well supported argument in favor of distinguishing this  
11 situation from Nelson v. Heer.  
12

13       Specifically, Nelson v. Heer was unclear whether the seller of a property had actually  
14 been asked whether any leaks had ever occurred. The Supreme Court's holding in that case  
15 merely established that the seller had no affirmative duty to disclose something they did not  
16 know materially and adversely affected the value of the property. *See attached Exhibit 2,*  
17 *Plaintiffs' Opposition to Defendants' Motion to Dismiss the Second Amended Complaint, Pg. 7.*  
18 Here, Plaintiffs argued that the Defendant was required pursuant to the SRPD and NRS 113 et  
19 seq. to provide any information about prior or current conditions of moisture or mold. Not just  
20 whether such an issue still existed. The Defendants gave a false and misleading answer. *Id.*  
21 There was no case law which "eviscerated" this position. More importantly, the Defendants  
22 have yet to address the condition of moisture in the basement bathroom.  
23  
24

25       Therefore, the three arguments that Defendants offering in support of Plaintiffs being  
26 "grossly unreasonable" in rejecting the offer can all be refuted. The Court's "inclination" was not  
27 an actual decision, and the Order granting a continuance demonstrates that the matter was not  
28

effectively determined. Plaintiffs did suffer substantial damages, well in excess of the Offer. Finally, the assertion that case law “eviscerated” Plaintiffs’ position is an attempt by Defendants to rewrite history. As Defendants’ offer no other arguments in support of Plaintiffs being “grossly unreasonable” in rejecting the offer, this factor too should weigh in favor of Plaintiffs.

d. **Brunzell factor analysis: whether the fees sought by the offeror are reasonable and justified in amount**

As stated above, when it is determined that the first three Beattie factors weigh in favor of the party who rejected the offer of judgment, the reasonableness of the requested fees becomes irrelevant as the reasonableness of the fees alone cannot support an attorney fees award. *Frazier v. Drake*, 131 Nev. 632, 641-42, 357 P.3d 365, 372 (Ct. App. 2015). Here, the first three Beattie factors all do weigh in favor of Plaintiffs’ and thus an award of fees and costs to Defendants is not reasonable. If the Court does find an award of fees and costs is reasonable, then there would still need to be a second analysis conducted using the Brunzell Factors to determine what amount of fees and costs is reasonable to award. Analysis of these factors indicates that the amount of fees and costs requested by Defendants is not reasonable and should be greatly reduced. In particular, Brunzell factors 2 and 3 weigh heavily in favor of reducing any requested attorneys’ fees award to Defendants.

i. **Brunzell Factor 2: the character of the work to be done: its difficulty, intricacy, importance, the time and skill required**

Defendants’ argue that “The character of the work to be done was difficult. The range of claims initially brought by the Plaintiffs combined with the statute heavy nature of these types of cases required close attention to detail and mastery of a litany of important facts.” *Defendants’ Motion for Attorney’s Fees and Costs*, Pg. 12-13. However, this argument clearly contradicts how Defendants characterize this case throughout the rest of the Motion. Defendants directly



1 state the opposite. The Defendants relied upon this argument throughout the proceedings and  
2 within the instant Motion. This was a simple case that was easily analyzed and argued.

3 Plaintiffs disagree that Nelson v. Heer controlled in this situation. However, the holding  
4 ,which they themselves state had only one “reasonable reading” and ultimately prevailed clearly  
5 undermines Defendants’ arguments as to the difficulty of their work in this matter. Because the  
6 matter was not difficult to handle, this factor should weigh heavily in favor of Plaintiffs in  
7 determining any award of fees.  
8

9 ii. **Brunzell Factor 3: the work actually performed by the lawyer:**  
10 **the skill, time and attention given to the work**

11 After outlining the work Defendants’ attorneys did on this case, they conclude “None of  
12 this unnecessary work changed the facts which had already been established: the February 2017  
13 leak had been repaired by a professional, licensed plumbing contractor and the November 2017  
14 leak was disclosed during escrow via Addendum 4A.” *Id. at 13*. Again, this demonstrates that  
15 much of Defendants’ work was simply resting on the case law and facts already established and  
16 arguing against Plaintiffs’ attempts to distinguish the instant matter from Nelson v. Heer.  
17 Ultimately, Defendants unnecessarily engaged two separate law firms to conduct their defense,  
18 Christopher M. Young, PC., and Galliher Legal PC.  
19

20 As would be expected, the use of two different law firms in conjunction resulted in  
21 numerous duplicative efforts and needlessly increased expenses. For example: (1) on September  
22 19 and September 20, 2019, both firms billed for working on the affidavit of Aaron Hawley; (2)  
23 on October 4 and October 28, 2019, both firms billed for reviewing the same Opposition of  
24 Plaintiff; (3) on November 6 and November 7, 2019, both firms billed for preparation and  
25 appearance at the same hearing; (4) on December 23, 2019, both firms billed for work on the  
26 same discovery responses; and (5) on March 3, 2020, both firms billed for attending the same  
27  
28

1 hearing. *Defendants' Motion for Attorney's Fees and Costs, Exhibit C & Exhibit D.* These are  
2 just some examples of the pattern of duplicative work that was unnecessary and could have been  
3 completely avoided by engaging a single law firm instead of having different offices collaborate  
4 on the defense. Therefore, this factor should be weighed heavily in favor of Plaintiffs,  
5 particularly when Defendants admit that the work they conducted was "unnecessary" and  
6 ultimately did not lead to them change any substantive parts of their defense.

7  
8 The invoices further dispel the myth of the necessity of two law firms. First and  
9 foremost, the claim for fees and costs prior to the filing of the complaint are not recoverable  
10 pursuant to any of the Statutes cited by the Defendants. That amount is \$13,058.00 and should  
11 be deducted from the purported total of \$82,021.50 in attorney's fees and \$6,939.85 in costs.  
12 Secondly, Mr. Hopkins cannot possibly work for both Nevada law firms at the same time and be  
13 deemed to have done so reasonably in terms of time and amount. See Affidavit of Jeff Galliher,  
14 para. 5.

15  
16 **iii. Defendants' Are Not Entitled to Fees and Costs Pursuant to NRS**

17 **18.010(2)(b)**

18 Defendants next argue for an award of fees and costs accrued since the inception of the  
19 suit under NRS 18.010(2)(b). NRS 18.010(2)(b) states that the Court "may make an allowance of  
20 attorney's fees to a prevailing party" but only when it finds that "the claim, counterclaim,  
21 cross-claim or third-party complaint or defense of the opposing party was brought or  
22 maintained without reasonable ground or to harass the prevailing party." (Emphasis added)  
23 See NRS 18.010(2)(b). Defendants' incorrectly argue that, under this statute, they are entitled to  
24 the award of "\$82,021.50 in attorney's fees and \$6,939.85 in costs" allegedly incurred since the  
25 inception of the suit. See *Defendants' Motion for Attorney's Fees and Costs, Pg. 14.*  
26 Preliminarily, Plaintiffs would emphasize that NRS 18.010(2)(b) only address attorney's fees, it  
27  
28



1 does not address costs and the costs Defendants assert are not recoverable under this statute. *See*  
2 *NRS 18.010(2)(b)*.

3 Further, Defendants may not recover their attorney's fees under this statute because they  
4 are not the "prevailing party" as required by the statute. In *Singer v. Chase Manhattan Bank*, the  
5 Nevada Supreme Court addressed this very issue. In that case, cardholders filed a complaint  
6 against a credit card issuer which was ultimately dismissed, and the trial court subsequently  
7 awarded attorney fees and costs to credit card issuer pursuant to NRS 18.010. *Singer v. Chase*  
8 *Manhattan Bank*, 111 Nev. 289, 293, 890 P.2d 1305, 1307 (1995). The Court noted that, while it  
9 had previously been possible for a defendant to receive an award of attorney's fees and costs  
10 without having recovered a money judgment, a 1985 amendment of NRS 18.010 "**extended to**  
11 **prevailing defendants the requirement of a money judgment for recovery of attorney's**  
12 **fees**". (Emphasis added) *Id. at 1307-08*.

13 The concurrence of Chief Justice Steffen made this point even more blatantly clear when  
14 he stated that by putting in place the requirement for a money judgment, "we have effectively  
15 written prevailing defendants out of the statute." *Id.* Here, Defendants' did not receive a money  
16 judgment and the Court has directly addressed this issue and noted that Defendants' in this  
17 position are written out of the statute. Therefore, the Court should deny Defendants' Motion as to  
18 the award of any fees and costs pursuant to NRS 18.010(2)(b).

19 Arguendo, even if the Court determined that it wished to extend the definition of  
20 "prevailing party" to encompass Defendants, Defendants still cannot demonstrate that Plaintiffs'  
21 claims were "brought or maintained without reasonable ground" as required by the statute.  
22 Defendants' argue that Plaintiffs brought the lawsuit "upon wholly frivolous grounds" because  
23 (1) the determination that the November leak was caused by a manufacturing defects was "never  
24 disclosed by Uponor or Rakeman Plumbing to Defendants prior to the sale to the Plaintiffs and  
25  
26  
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28

1 the Plaintiffs had no evidence that it ever had been disclosed to Defendants when they initiated  
2 this suit"; and (2) the February leak "was fully repaired as indicated by documentation the  
3 Plaintiff actually attached to their Second Amended Complaint." *Id.*, at Pg. 15. Both of these  
4 arguments ignore the fact that the evidence uncovered that Dr. Swanson was aware of prior  
5 conditions of moisture and mold, and that he failed to identify them on the SRPD. In support of  
6 these misplaced arguments, Defendants again rely entirely upon their assertion that the holding  
7 of Nelson v. Heer made the lawsuit frivolous because:

9 These facts, alleged within the Second Amended Complaint itself, firmly establish that  
10 Defendants had no liability under Nevada law because they show that 1) the February leak  
11 had been repaired, and 2) Plaintiffs were aware of the November leak prior to closing.  
12 These facts, alleged by Plaintiffs themselves, defeat their claims **when applied to clearly  
established precedent in the form of the Nelson decision.**

13 (*Emphasis added*) *Id.*

14 The problem with this assertion is the same problem with every argument Defendant  
15 makes as to the holding of Nelson v. Heer. It does not in and of itself demonstrate any bad faith  
16 or lack of reasonableness by Plaintiffs'. Namely, Plaintiffs argued for a reasonable way of  
17 distinguishing the instant matter from the holding of that case, and Plaintiffs are not required to  
18 presume that the Court would agree with Defendants.

19 In order to be deemed a "prevailing party" for the purposes of obtaining an award of  
20 attorneys' fees under NRS 18.010, must have first obtained a money judgment against Plaintiffs.<sup>5</sup>

21  
22 <sup>5</sup> NRS 18.010 provides as follows:

23 1. The compensation of an attorney and counselor for his or her services is governed by  
24 agreement, express or implied, which is not restrained by law.

25 2. In addition to the cases where an allowance is authorized by specific statute, the court  
26 may make an allowance of attorney's fees to a prevailing party:

27 (a) When the prevailing party has not recovered more than \$20,000; or

28 (b) Without regard to the recovery sought, when the court finds that the claim, counterclaim,  
crossclaim or third-party complaint or defense of the opposing party was brought or maintained  
without reasonable ground or to harass the prevailing party. The court shall liberally construe the  
provisions of this paragraph in favor of awarding attorney's fees in all appropriate situations. It is



1 Dr. Swanson did not do this as evidenced by the Court granting the motion to dismiss. Nevada  
2 case law is clear that such an absence of damages precludes an award of attorneys' fees under  
3 this statute. As such, this Court cannot use its ruling as a basis for a finding, that the Complaint  
4 or the Amended Complaints was frivolous and thus grounds to award Defendants their attorney's  
5 fees.

6  
7 More importantly, the Defendants would have the Court believe just because they  
8 prevailed upon a motion to dismiss, they are entitled to the fees. The Nevada Supreme Court has  
9 held for years, and recently reaffirmed its thinking in *In re 12067 Oakland Hills, Las Vegas,*  
10 *Nevada 89141*, 134 Nev. 799, 807-808, 435 P.3d 672, 679 (2018), as follows:

11 Not every unsuccessful defense [claim] is ipso facto "unreasonable," "frivolous," or  
12 "vexatious." Merely losing a motion on the merits does not mean that the losing defense  
13 [claim] was utterly "without reasonable ground" for purposes of awarding attorney  
14 fees. NRS18.010(2)(b) does not create an automatic "loser pays" system, of the kind found  
15 in England, in which the unsuccessful party always pays fees to the winning  
16 party. See *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2, 103 S.Ct. 1933, 76 L.Ed.2d 40  
17 (1983) (Brennan, J., concurring in part and dissenting in part) (noting that the "English Rule"  
18 is one "under which the losing party, whether plaintiff or defendant, pays the winner's fees").

19 Id.

20 To reiterate, in *Nelson v. Heer* it was held that a seller did not have a duty to disclose a  
21 repair. In *Nelson*, it was unclear whether the seller of a property had actually been asked  
22 whether any leaks had ever occurred. *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).

23 the intent of the Legislature that the court award attorney's fees pursuant to this paragraph and  
24 impose sanctions pursuant to Rule 11 of the Nevada Rules of Civil Procedure in all appropriate  
25 situations to punish for and deter frivolous or vexatious claims and defenses because such claims  
26 and defenses overburden limited judicial resources, hinder the timely resolution of meritorious  
27 claims and increase the costs of engaging in business and providing professional services to the  
28 public.

3. In awarding attorney's fees, the court may pronounce its decision on the fees at the  
conclusion of the trial or special proceeding without written motion and with or without  
presentation of additional evidence.

4. Subsections 2 and 3 do not apply to any action arising out of a written instrument or  
agreement which entitles the prevailing party to an award of reasonable attorney's fees.

1 Plaintiffs argued that the holding in Nelson could be distinguished from this situation where the  
2 seller was asked an explicit question about past occurrences and chose not to disclose those  
3 occurrences due to repair. *See attached Exhibit 2, Plaintiffs' Opposition to Defendants' Motion*  
4 *to Dismiss the Second Amended Complaint, Pg. 7.* This does not address the unrepaired items,  
5 the hearsay nature of the affidavit and the failure to even mention the mold being tested. This  
6 makes it clear that, despite the Court's ultimate determination on this issue, there was not a  
7 "clearly established precedent in the form of the Nelson decision" as Defendants argue.

8  
9 Defendants' next state that "even if the Plaintiffs could establish a prima facie case, they  
10 could still not establish that they had suffered any recoverable damages" but this too is incorrect  
11 and offers no support for the instant Motion. *See Defendants' Motion for Attorney's Fees and*  
12 *Costs, Pg. 15.* Plaintiffs' provided the estimates of damages cited by Defendants in their initial  
13 NRCP 16.1 disclosures. As stated above, Plaintiffs' alleged Fraud damages of approximately  
14 Three Hundred Thousand Dollars (\$300,000.00), Bad Faith damages of One Hundred Thousand  
15 Dollars (\$100,000.00), and Breach of Contract damages in an amount to be determined. At the  
16 point in the litigation process where the case was dismissed, Plaintiffs still were not required to  
17 provide any further substantiation or evidence of their alleged damages. Defendants have no  
18 basis for claiming that Plaintiffs could not establish that they had suffered any recoverable  
19 damages. Further, they provide not evidence themselves or cite to anything in support of this  
20 assertion. Therefore, this part of Defendants' argument should be completely discounted.

21  
22  
23 Defendants conclude that they are entitled to an award of fees and costs under NRS  
24 18.010(2)(b) by reiterating their position on the holding of *Nelson v. Heer* as follows:

25 Any reasonable reading of Nelson must lead to the conclusion that the conduct of the  
26 Defendants alleged in this case are not actionable. Likewise, Plaintiffs **made no real**  
27 **effort to distinguish this case** from Nelson **nor did they argue that Nelson should not**  
28 **otherwise apply.** Instead, in pursuing this case **Plaintiffs essentially ignored Nelson** and  
the clear example it set for actionable conduct. "A claim is groundless if "the allegations



1 in the complaint . . . are not supported by any credible evidence at trial." [citation  
2 omitted] Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 996 (Nev. 1993).

3 (*Emphasis added*) *Id.*, at 16.

4 As discussed in depth above, it is clearly incorrect and blatantly misleading for  
5 Defendants' to argue that Plaintiffs made no real effort to distinguish this case, did not even  
6 argue that *Nelson v. Heer* should not otherwise apply, and essentially ignored the holding from  
7 that case. All of these assertions are demonstrably false. Throughout the proceedings, Plaintiffs  
8 devoted considerable time and energy specifically to arguing that *Nelson v. Heer* did not control  
9 in this situation, did not establish clear case law as to affirmative statements that property issues  
10 did not ever exist (because repairs had been conducted), and thus could be distinguished. Further,  
11 even using the definition of a groundless claim provided by Defendants (a claim is groundless if  
12 "not supported by any credible evidence at trial") indicates that Plaintiffs' Claims were not  
13 groundless. It clearly says that the claim is groundless, if the allegations are not supported by  
14 "any credible evidence", not substantial credible evidence, not a preponderance of credible  
15 evidence, just "any credible evidence". The Plaintiffs still put to this Court the fact that there  
16 was a leak in the basement bathroom of the residence in 2015, and the Defendants have provided  
17 not a single piece of evidence showing it was repaired.  
18

19  
20 Plaintiffs met "any credible evidence" standard and provided more than credible evidence  
21 in support of their allegations. At the time Plaintiffs brought their claims, *Nelson v. Heer*  
22 provides that a seller is asked about the existence of any prior conditions of moisture that may  
23 have been repaired (rather than just choosing not to disclose past repaired issues not specifically  
24 inquired about). Therefore, it was reasonable for the Plaintiffs to believe that the SRPD itself was  
25 substantial and credible evidence which would prevent their claims from being considered  
26 "groundless". In addition to that evidence, the Plaintiffs controverted the affidavit of Aaron  
27 Hawley and was able to garner deposition testimony as to the hearsay nature of the averments  
28

1 within the affidavit. Finally, Plaintiffs also provided the admissible and credible evidence of the  
2 Defendants own statements of the May 21, 2015 Criterium Report, with color photographs  
3 depicting the leak and the annotations from the Defendant himself confirming that the leaks were  
4 never “located” let alone repaired.

5 Arguendo, even if the Court determines that the lack of clarity as to the applicability of  
6 Nelson v. Heer was not sufficient to make the SRPD credible evidence, there is still substantial  
7 additional evidence which could have supported Plaintiffs position. Specifically, the statements  
8 of Todd Swanson in his deposition regarding his knowledge of the leaks and understanding of  
9 when disclosure was necessary and the Criterium Home Inspection Report which identified a  
10 leak in the home which Todd Swanson could provide no repair documentation for. Even though  
11 the Court did not find this sufficient to overcome the Motion to Dismiss, it still meets the bar of  
12 “any credible evidence” and thus Plaintiffs’ claims were not “groundless”. Because the claims  
13 were not “brought or maintained without reasonable grounds or to harass the prevailing party”,  
14 as required by NRS 18.010(2)(b), Defendants cannot recover their fees and costs under this  
15 statute. *See NRS 18.010(2)(b)*.

16  
17  
18 **iv. Defendants’ are not a “prevailing party” and thus cannot receive an award**  
19 **of fees and costs under NRS 18.020.**

20 Finally, Defendants argue that pursuant to NRS 18.020, they are entitled to their costs  
21 accrued since the inception of the suit in the amount of \$6,427.26. *See Defendants’ Motion for*  
22 *Attorney’s Fees and Costs, Pg. 16*. While Defendants are correct that NRS 18.020 allows for the  
23 recovery of costs in an action for the recovery of money or damages when a plaintiff seeks to  
24 recover more than Two Thousand Five Hundred Dollars (\$2,500.00), they are incorrect in  
25 asserting that this statute applies to them. *Id.* Specifically, NRS 18.020 states that costs must be  
26 allowed “to the prevailing party against any adverse party against whom judgment is  
27  
28



1 rendered". (*Emphasis added*) See NRS 18.020. For the purposes of NRS 18.020, the prevailing  
2 party is determined by examining the amounts awarded to each party for each claim or  
3 counterclaim they have brought, offsetting those amounts, then determining which party received  
4 the higher "net verdict". *Parodi v. Budetti*, 115 Nev. 236, 241–42, 984 P.2d 172, 175 (1999); see  
5 also *N. Nevada Homes, LLC v. GL Constr., Inc.*, 134 Nev. 498, 501, 422 P.3d 1234, 1237 (2018).  
6 The party with the higher net verdict is the prevailing party under NRS 18.020. *Id.*

7  
8 What the plain language of the statute and case law makes clear, is that to be defined as a  
9 "prevailing party" under NRS 18.020, it is required that the party received a money judgment.  
10 Case law, specifically the holding from *Parodi v. Budetti*, supports this interpretation by  
11 providing a singular method for determining the "prevailing party" which entirely relies upon the  
12 existence of a money judgment in one party's favor. Here, neither party received a money  
13 judgment, neither party is thus considered the "prevailing party" under NRS 18.020, and,  
14 therefore, Defendants cannot recover their costs under this statute.  
15

### 16 III.

### 17 CONCLUSION

18 Based on the foregoing reasons, Defendants are not entitled to attorney's fees or costs  
19 pursuant to NRCP 68, NRS 18.010(2)(b), or NRS 18.020. Defendants' request for fees and costs  
20 under NRCP 68 should be denied because analysis of the Beattie Factors demonstrates that an  
21 award to Plaintiffs' would not be reasonable (and even it is was, a further analysis of the  
22 Brunzell Factors indicates an such award should be greatly reduced from the requested amount).  
23 Defendants' request for fees and costs under NRS 18.010(2)(b) should be denied because costs  
24 can't be awarded under this statute, Defendants are not a prevailing party as required by the  
25 statute and, even if Defendants were the prevailing party, Plaintiffs' claims were not brought  
26 without reasonable grounds or to harass. Finally, Defendants' request for costs under NRS  
27  
28

1 18.020 must also be denied because, again, Defendants' are not the prevailing party as required  
2 by the statute. Therefore, Plaintiffs respectfully request this Court deny Defendants' Motion for  
3 Attorney's Fees and Costs.

4 Dated this 11 day of May 2020.

**BLACK & LOBELLO**

#15271



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**IN THE SUPREME COURT STATE OF NEVADA**

<p>JOSEPH FOLINO, an individual and NICOLE FOLINO, an individual,</p> <p style="text-align: center;">Appellant,</p> <p>v.</p> <p>TODD SWANSON, an individual; TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin; LYONS DEVELOPMENT, LLC, a Nevada limited liability company; DOES I through X; and ROES I through X,</p> <p style="text-align: center;">Respondent.</p>	<p>Case No. 81252</p>
<p>JOSEPH FOLINO, an individual and NICOLE FOLINO, an individual,</p> <p style="text-align: center;">Appellant,</p> <p>v.</p> <p>TODD SWANSON, an individual; TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin; LYONS DEVELOPMENT, LLC, a Nevada limited liability company; DOES I through X; and ROES I through X,</p> <p style="text-align: center;">Respondent.</p>	<p>Case No. 81831</p>

**APPEAL**  
**FROM THE EIGHTH JUDICIAL DISTRICT COURT**  
**THE HONORABLE JIM CROCKETT | CASE No. A-18-782494-C**

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**JOINT**  
**APPENDIX ON APPEAL**  
**VOLUME XI OF XIX**  
**INDEX TO APPELLANTS' APPENDIX OF RECORD**

**VOLUMES**

<b>No.</b>	<b>Date of Item</b>	<b>Description</b>	<b>Vol.</b>	<b>Bates Nos.</b>
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**VOLUME I**

1.	08/05/2006	Appellant's Appendix from Nelson v. Heers Appeal No. 45571 (Part 1)	I	JA000001 JA000200
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**VOLUME II**

2.	08/05/2006	Appellant's Appendix from Nelson v. Heers Appeal No. 45571 (Part 2)	II	JA000201 JA000248
3.	10/09/2018	Complaint	II	JA000249 JA000325
4.	10/12/2018	Summons – Todd Swanson	II	JA000326 JA000327
5.	10/12/2018	Summons – Lyons Development	II	JA000328 JA000329
6.	10/12/2018	Summons – Shiraz Trust	II	JA000330 JA000331

7.	10/23/2018	Declaration of Service – Summons - Lyons Development	II	JA000332
8.	01/04/2019	Acceptance of Service on Behalf of Defendant Todd Swanson, an individual, Todd Swanson, Trustee of the Shiraz Trust, and Shiraz Trust	II	JA000333 JA000334
9.	02/04/2019	Defendant’s Initial Appearance Fee Disclosure	II	JA000335 JA000336
10.	02/04/2019	Defendant’s Motion to Dismiss and/or Motion for More Definite Statement	II	JA000337 JA000349
11.	02/07/2019	Plaintiff’s Request for Exemption from Arbitration	II	JA000350 JA000355
12.	02/13/2019	Plaintiffs’ Opposition to Defendant’s Motion to Dismiss and/or Motion for More Definite Statement; Countermotion to Amend Complaint	II	JA000356 JA000368
13.	02/13/2019	[Proposed] First Amended Complaint (Part 1)	II	JA000369 JA000407

### VOLUME III

14.	02/13/2019	[Proposed] First Amended Complaint (Part 2)	III	JA000408 JA000446
15.	03/26/2019	Notice of Re-Hearing re: Defendant’s Motion to Dismiss and/or Motion for More Definite Statement and Plaintiff’s Countermotion to Amend the Complaint	III	JA000447 JA000449

16.	04/02/2019	Defendant's Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss and/or Motion For More Definite Statement; Countermotion to Amend the Complaint	III	JA000450 JA000458
17.	04/18/2019	Notice of Entry of Order on Defendants' Motion to Dismiss and/or Motion for More Definite Statement; Countermotion to Amend the Complaint	III	JA000459 JA000461
18.	04/18/2019	Order on Defendants' Motion to Dismiss and/or Motion for More Definite Statement; Countermotion to Amend the Complaint	III	JA000462 JA000465
19.	05/20/2019	Defendant's Motion to Dismiss Plaintiff's First Amended Complaint	III	JA000466 JA000486
20.	05/21/2019	Clerk's Notice of Hearing re: Defendant's Motion to Dismiss Plaintiff's First Amended Complaint	III	JA000487 JA000488
21.	06/05/2019	Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint	III	JA000489 JA000501
22.	07/03/2019	Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint	III	JA000502 JA000507



23.	07/18/2019	Minute Order - Defendant's Motion to Dismiss Plaintiff's First Amended Complaint	III	JA000508
24.	08/14/2019	Notice of Entry of Order Defendants' Motion to Dismiss the Plaintiff's First Amended Complaint	III	JA000509 JA000511
25.	08/14/2019	Order - Defendants' Motion to Dismiss the Plaintiff's First Amended Complaint	III	JA000512 JA000525
26.	9/03/2019	Plaintiff's Second Amended Complaint	III	JA000526 JA000595
27.	09/24/2019	Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint	III	JA000596 JA000621
28.	09/25/2019	Clerk's Notice of Hearing re: Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint	III	JA000622 JA000623

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29.	10/03/2019	Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint	IV	JA000624 JA000645
30.	10/31/2019	Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint	IV	JA000646 JA000658
31.	11/20/2019	Notice of Early Case Conference	IV	JA000659 JA000661

32.	11/20/2019	Plaintiffs' Initial List of Witnesses and Production of Documents Pursuant to NRCP 16.1	IV	JA000662 JA000724
33.	11/26/2019	Notice of Association of Counsel	IV	JA000725 JA000727
34.	12/06/2019	Declaration of Service of SDT COR Rakeman Plumbing, Inc.	IV	JA000728
35.	12/09/2019	Affidavit of Service - Frontsteps	IV	JA000729 JA000730
36.	12/10/2019	Declaration of Service – Lyons Development LLV – SDT COR	IV	JA000731
37.	12/10/2019	Declaration of Service – The Summerlin Association COR	IV	JA000732
38.	12/10/2019	Declaration of Service – Ivan Sher Group – SDT COR	IV	JA000733
39.	12/19/2019	Declaration of Service – Americana LLC – SDT COR		JA000734
40.	12/19/2019	Declaration of Service – Las Vegas Homes and Fine Estates – SDT COR	IV	JA000735
41.	12/19/2019	Declaration of Service – Repipe Specialist – SDT COR	IV	JA000736
42.	12/19/2019	Declaration of Service – The Ridges Community Assoc. – SDT	IV	JA000737
43.	12/26/2019	Declaration of Service – Uponor, Inc.	IV	JA000737
44.	12/30/2019	Production of Documents - PLT000054 – PLT000064	IV	JA000739 JA000749
45.	12/30/2019	Plaintiffs' First Supplemental Lists of Witnesses and Production of Documents Pursuant to NRCP 16.1	IV	JA000750 JA000759

46.	01/02/2020	Plaintiff's Notice of Subpoena Pursuant to NRCP 45(A)(4)(A)	IV	JA000760 JA000798
47.	01/02/2020	Video Taped Deposition Subpoena – Kelly Contenta	IV	JA000799 JA000802
48.	01/02/2020	Video Taped Deposition Subpoena – Ivan Sher	IV	JA000803 JA000806
49.	01/02/2020	Video Taped Deposition Subpoena – Nicole Whitfield	IV	JA000807 JA000810
50.	01/13/2020	Declaration of Service – Galliher- Rescheduled Videotaped Depo of Swanson, PMK Shiraz and PMK Lyons	IV	JA000811
51.	01/13/2020	Declaration of Service – Young - Rescheduled Videotaped Depo of Swanson, PMK Shiraz and PMK Lyons	IV	JA000812
52.	01/14/2020	Plaintiffs' Second Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1	IV	JA000813 JA000822
53.	01/14/2020	Declaration of Service SDT – Absolute Closets & Cabinetry	IV	JA000823

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54.	01/14/2020	Document Production – PLT000065 – PLT0000156	V	JA000824 JA000915
55.	01/14/2020	Galliher – Declaration of Service Rescheduled Depositions of William Gerber and Aaron Hawley	V	JA000916
56.	01/14/2020	Misc Filing Kirby C. Gruchow Jr. (Part 1 Pgs 1-107)	V	JA000917 JA001023

### VOLUME VI

57.	01/14/2020	Misc Filing Kirby C. Gruchow Jr. (Part 2)	VI	JA001024 JA001066
58.	01/14/2020	Misc Filing Kirby C. Gruchow Jr. (Part 3)	VI	JA001067 JA001223

### VOLUME VII

59.	01/14/2020	Misc Filing Kirby C. Gruchow Jr. (Part 4)	VII	JA001224 JA001315
60.	01/14/2020	Misc Filing Kirby C. Gruchow Jr. (Part 5)	VII	JA001316 JA001423

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61.	01/14/2020	Misc Filing Kirby C. Gruchow Jr. (Part 6)	VIII	JA001424 JA001524
62.	01/14/2020	Plaintiffs' Third Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1	VIII	JA001525 JA001534
63.	01/14/2020	SDT Decl Srv Video Depo Sher Group	VIII	JA001535
64.	01/14/2020	SDT Decl Srv Video Depo Absolute	VIII	JA001536
65.	01/14/2020	Young – Decl Srv Reschedule Depo Aaron Hawley	VIII	JA001537
66.	01/15/2020	Amd Cert of Srv Plt Production of Fourth Supp List of Witnesses and Documents	VIII	JA001538 JA001540
67.	01/15/2020	Decl Srv SDT – EH Designs	VIII	JA001541
68.	01/15/2020	Decl Srv SDT – Infinity Environmental Srv.		JA001542

69.	01/15/2020	Decl Srv SDT – Kelly Cotenta	VIII	JA001543
70.	01/15/2020	Plaintiffs’ Fourth Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1	VIII	JA001544 JA001553
71.	01/23/2020	Declaration of Service re SDT and Video Depo – Nicole Whitfield	VIII	JA001554
72.	01/24/2020	Plaintiffs’ Fifth Supplemental List of Witnesses and Production of Documents Pursuant to NRCP 16.1	VIII	JA001555 JA001565
73.	02/04/2020	Notice of Continuance of (Zoom Conferencing) Deposition of Swanson	VIII	JA001566 JA001570
74.	02/05/2020	Plaintiffs’ Sixth Supplemental Lists of Witnesses and Production of Documents Pursuant to NRCP 16.1	VIII	JA001571 JA001582
75.	02/07/2020	Stipulation and Order for Sixty (60) Day Continuing Production of Plaintiffs’ Brief and Hearing Date	VIII	JA001583 JA001587
76.	02/11/2020	Notice of Entry of Stipulation and Order for Sixty (60) Day Continuing Production of Plaintiffs’ Brief and Hearing Date	VIII	JA001588 JA001594
77.	02/13/2020	Plaintiffs’ Supplemental List of Witnesses and Production of Documents	VIII	JA001595 JA001610
78.	02/13/2020	Plaintiffs’ Supplemental Brief to Opposition to Defendants’ Motion to Dismiss Plaintiffs’ Second Amended Complaint	VIII	JA001611 JA001634

### VOLUME IX

79.	02/27/2020	Defendants Todd Swanson; Todd Swanson as, Trustee of the Shiraz Trust; and Lyon Development, LLC's Supplemental Reply in Support of Motion for Summary Judgment	IX	JA001635 JA001825
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### VOLUME X

80.	02/27/2020	Defendants Todd Swanson; Todd Swanson as, Trustee of the Shiraz Trust; and Lyon Development, LLC's Supplemental Reply in Support of Motion for Summary Judgment	X	JA001826
81.	03/10/2020	Acceptance of Service – Amended – Videotaped Deposition Subpoena for Ashely Oakes-Lazosky	X	JA001827
82.	03/20/2020	Transcript of Hearing Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint	X	JA001828 JA001850
83.	04/07/2020	Transcript of Hearing Defendant's Motion To Dismiss Plaintiff's Second Amended Complaint	X	JA001851 JA001868
84.	04/22/2020	Defendants' Motion for Attorney's Fees and Costs	X	JA001869 JA001946

85.	04/22/2020	Defendants' Verified Memorandum of Costs and Disbursements	X	JA001947 JA001950
86.	04/23/2020	Notice of Hearing re: Defendants' Motion for Fees and Costs	X	JA001951
87.	04/24/2020	Plaintiffs' Motion to Retax Costs	X	JA001952 JA002042
88.	04/27/2020	Clerks Notice of Hearing re: Plaintiffs' Motion to Retax Costs	X	JA002043
89.	04/29/2020	Status Check Order re: Continue Hearing Motion to Retax and Motion for Fees and Costs	X	JA002044
90.	05/11/2020	Order Granting Dismissal of Plaintiffs' Second Amended Complaint	X	JA002045 JA002064

### VOLUME XI

91.	05/11/2020	Opposition to Defendants' Motion for Attorney's Fees and Costs	XI	JA002065 JA002206
92.	05/13/2020	Errata to Opposition to Defendants' Motion for Attorney's Fees and Costs	XI	JA002207 JA002211
93.	05/13/2020	Notice of Entry of Order Granting Motion to Dismiss Plaintiffs' Second Amended Complaint	XI	JA002212 JA002234
94.	05/26/2020	Notice of Appeal	XI	JA002235 JA002237
95.	05/26/2020	Case Appeal Statement	XI	JA002238 JA002268

96.	06/03/2020	Defendants' Reply in Support of Motion for Attorney's Fees	XI	JA002269 JA002288
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## VOLUME XII

97.	06/04/2020	Notice of Entry re: Stipulation and Order to Continue the Hearing For: 1) Plaintiffs' Motion to Retax Costs and 2) Defendants' Motion for Attorney's Fees and Costs	XII	JA002289 JA002294
98.	06/04/2020	Stipulation and Order to Continue the Hearing For: 1) Plaintiffs' Motion to Retax Costs and 2) Defendants' Motion for Attorney's Fees and Costs	XII	JA002295 JA002298
99.	06/18/2020	Errata to Case Appeal Statement	XII	JA002299 JA002310
100.	06/25/2020	Transcript of Hearing Defendants' Motion for Fees and Costs and Plaintiffs' Motion to Retax Costs	XII	JA002311 JA002325
101.	08/18/2020	Order Regarding Defendants' Motion for Attorney's Fees, Verified Memorandum of Costs and Disbursements and Plaintiffs' Motion to Retax	XII	JA002326 JA002343
102.	08/21/2020	Notice of Name Change of Law Firm	XII	JA002344 JA002346
103.	08/24/2020	Notice of Entry of Order Regarding Defendants' Motion for Attorney's Fees, Verified Memorandum of Costs and Disbursements and Plaintiffs' Motion to Retax	XII	JA002347 JA002368



104.	09/17/2020	Appellants' Case Appeal Statement	XII	JA002369 JA002380
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105.	09/17/2020	Notice of Appeal	XII	JA002381 JA002406
106.	09/17/2020	Motion for Stay of Execution of Judgment on an Order Shortening Time	XII	JA002407 JA002483

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107.	09/24/2020	Stipulation and Order to Stay Execution of Judgment	XIII	JA002484 JA002490
108.	09/25/2020	Notice of Entry of Order – Stipulation and Order to Stay Execution of Judgment	XIII	JA002491 JA002497
109.	09/30/2020	Notice of Posting Cash Bond	XIII	JA002498 JA002502
110.	10/07/2020	Notice of Compliance with Court Order		JA002503 JA002506
111.	12/08/2020	Plaintiff's Request for Transcripts of Proceedings	XIII	JA002507 JA002509
112.	01/24/2019	Swanson Deposition Transcript 1/24/2020 (Part 1)	XIII	JA002510 JA002581

### **VOLUME XIV**

113.	01/24/2019	Swanson Deposition Transcript 1/24/2020 (Part 2) w/Exhibit "1"	XIV	JA002582 JA002776
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### **VOLUME XV**

114.	01/24/2019	Swanson Deposition Transcript 1/24/2020 Exhibits 2 – 14	XV	JA002777 JA002977
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### **VOLUME XVI**

115.	01/24/2019	Swanson Deposition Transcript 1/24/2020 Exhibits 15 – 28	XVI	JA002978 JA003038
116.	01/29/2020	Nicole Whitfield Deposition Transcript 1/29/2020	XVI	JA003039 JA003194

### **VOLUME XVII**

117.	01/31/2020	Aaron Hawley Deposition Transcript 1/31/2020	XVI	JA003195 JA003296
118.	01/31/2020	William Gerber Deposition Transcript 1/31/2020	XVI	JA003297 JA003386

### **VOLUME XVIII**

119.	02/03/2020	Ivan Sher Deposition Transcript 2/3/20	XVIII	JA003387 JA003539
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### **VOLUME XIX**

120.	02/03/2020	Kelly Contenta Deposition Transcript 2/3/2020	XIX	JA003540 JA003583
121.	02/06/2020	Todd Swanson Deposition Transcript Volume II 2/6/20	XIX	JA003584 JA003701
122.	01/13/2021	Hearing Transcript of March 3, 2020 of Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint	XIX	JA003702 JA003724

123.	01/13/2021	Hearing Transcript of April 7, 2020 of Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint	XIX	JA003725 JA003742
124.	01/13/2021	Hearing Transcript of June 20, 2020 of Defendants' Motion for Fees and Costs and Plaintiffs' Motion to Retax Costs	XIX	JA003743 JA003757

### **CERTIFICATE OF SERVICE**

*When All Case Participants are Registered for the Appellate CM/ECF System*

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Nevada Supreme Court by using the appellate CM/ECF system on March 9<sup>th</sup>, 2021.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 9th day of March 2021.

**BLACK & WADHAMS**

/s/ Rusty Graf  
 Rusty Graf, ESQ  
 Nevada Bar No. 6322  
 10777 W. Twain Ave., Ste 300.  
 Las Vegas, Nevada 89135  
*Attorneys for Appellants*

1 18.020 must also be denied because, again, Defendants' are not the prevailing party as required  
2 by the statute. Therefore, Plaintiffs respectfully request this Court deny Defendants' Motion for  
3 Attorney's Fees and Costs.

4 Dated this 11 day of May 2020.

**BLACK & LOBELLO**

#15271



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**AFFIDAVIT OF PLAINTIFFS' COUNSEL IN SUPPORT OF THE OPPOSITION TO  
DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS**

STATE OF NEVADA       )  
  )       ss.  
COUNTY OF CLARK       )

I, J. RUSTY GRAF, ESQ., state under penalty of perjury that the assertions of this affidavit are true:

1. I am an attorney duly licensed to practice law in the State of Nevada. I am an attorney with the law firm of Black & LoBello.

2. This Affidavit is offered in support of Plaintiffs' Opposition to Defendants' Motion for Attorney's Fees and Costs

3. That Plaintiffs had a reasonable, good faith belief that the claims they brought and maintained in this matter were valid and actionable under relevant State statutes.

4. That Plaintiffs had a reasonable, good faith belief that their claims were distinguishable from the holding of *Nelson v. Heer*.

5. That Plaintiffs had credible evidence that they intended to introduce at trial to support the claims they asserted.

6. That Plaintiffs rejected Defendants' Offer of Judgment because they had a reasonable, good faith belief that the claims they asserted were valid and supported by evidence such that Defendants' Offer was not reasonable in amount or timing.

7. That Plaintiffs did not have any bad faith motivations in bringing or maintaining any of the claims asserted in this case and never intended to harass Defendants in any manner.

8. That Plaintiffs did not have any bad faith motivation in filing the Motion for Sanctions.

9. That analysis of the Beattie Factors indicates it would not be reasonable to award Defendants' fees or costs in this matter.

10. That analysis of the Brunzell Factors indicates that, if it is determined that an

award of fees and costs is reasonable, it would still be reasonable to reduce the amount requested by Defendants in this matter.

11. That I have reviewed the attorney's fees and costs attached to Defendants' Motion and it appears there were numerous times the two law firms engaged by Defendants engaged in needlessly duplicative work.

12. That Defendants did not receive either a money judgment or a settlement in this matter, and thus cannot be a prevailing party under NRS 18.010 or NRS 18.020.

13. That Affiant prepared the Opposition to which this Affidavit is attached, and Affiant affirms that the facts and arguments as true and accurate to best of Affiant's information and belief.

DATED this \_\_\_\_ day of May 2020.

\_\_\_\_\_  
J. RUSTY GRAF, ESQ.

SWORN and SUBSCRIBED to before me on

This \_\_\_\_ day of May 2020.

\_\_\_\_\_  
NOTARY PUBLIC in and for said  
COUNTY and STATE

BLACK & LOBELLO  
10777 W. Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
(702) 869-8801 FAX: (702) 869-2669

**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 11<sup>th</sup> day of May 2020, I caused the above and foregoing document **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.  
Nevada Bar No. 7961

Jay T. Hopkins, Esq.  
Nevada Bar No. 3223

Christopher M. Young, PC  
2640 Professional Court, #200  
Las Vegas, Nevada 89128

Jeffrey L. Galliher, Esq.  
Galliher Legal, P.C.  
Nevada Bar No. 8078  
1850 E. Sahara Ave., #107  
Las Vegas, NV 89104  
Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & LoBello

# **EXHIBIT 1**



## EXECUTIVE SUMMARY OF FINDINGS

To help provide a perspective for the work that we have recommended be complete before releasing the contractor, we offer the following list of suggested repairs. **This list should not be considered all-inclusive since there will surely be other things you will want to make part of this list.** Please use this list in conjunction with this Report and the Maintenance Plan provided at the end of this report in Appendix A.

### Items to be addressed before releasing the contractor:

- Maintain heating/air conditioning equipment

- The door at the right side air handler is damaged and does not close properly. (I had Sierra come out and try to fix it when my A/C went out--the door closes a switch that allows the FAU to power on. His first solution was to tape the switch closed with electrical tape, which is not acceptable. Now the door is bent and not right. They need to come back and fix it correctly.)

- Repair plumbing fixtures

(There are 3 water leaks inside the house that need to be fixed.)

There are leaks at both recirculation pumps.

There is a plumbing leak above the ceiling of the basement bathroom.

The drain cleanouts should have permanent screw-type caps.

- There is no air gap on the ice maker drain line. In addition, we recommend that the drain line hose be cleaned.

- The locking lug is missing from one water heater enclosure. I had Rakeman come out when I lost hot water in my master shower. They must have come out 3-4 times before it was finally fixed (I think), but they jacked up the cover of one of the enclosures in the process. (see Photo #2)

(The 2 upstairs secondary bathroom tubs have controls that have power, but not sure what they do?? Are there supposed to be jets in those tubs??)

The tubs in the second floor bathroom have controls for some unknown feature.

This should be investigated further.

The automatic solenoid valves on the pool fill circuit are noisy and create a water hammer effect throughout the house. This should be investigated further, and repaired as needed. This is causing a constant pounding noise in the house when the valve closes. I was told that they have soft

- Repair electrical system

close solnoid valves that don't make such a pounding sound.

- There is an open outlet at the lower patio.
- All outlets within six feet of a sink should be protected by GFCIs. The outlets by the master bathroom sinks were not.
- There is no power at the outlet in the master closet. The cover is also missing from this outlet.
- The outlet covers are loose at the media room wet bar cabinet.
- The door at the control box for the automated panel door can not close. The power cord is routed through the door. (up in the garage ceiling)
- The whirlpool tub is not GFCI protected.
- The screws are missing from the deadman covers at the main electrical panels.
- Review entire electrical system.



- Make interior repairs
  - The drywall is damaged at the right side mechanical closet.
  - The whirlpool tub is not supported from the floor.
  - The cover is missing from the vent fan in the media room. (Harry Davis knows this)
  - There is a loose light fixture in the master shower. (Harry also knows about this)
  - The access cover at the basement hall does not close properly. (near the bathroom)
  - There are no secondary latches on the patio sliding glass doors.
  - One burner valve at the patio grill is not functional.
  - ~~There is no hardware in the basement bedroom closet.~~
- Repair exterior
  - The handrail has been removed from a second floor window. The handrail should be properly replaced or the wall penetrations sealed. (You already know about this--due to replacement of the window)
  - The grout is missing from the tile joints on the patio stairs.
  - There is no landing at the exterior door in the kitchen. (I was told this is not compliant with code)
  - There is unfinished stucco surface at the roof feature.
  - The screens for the patio slider doors do not latch. (the screen door latches don't latch)
  - The patio slider in the basement media room does not latch. (I showed you this already)
  - The automated panel doors do not close properly. The big glass panel sliders in my family room are not closing/locking at the corner. Rand Sawbuck stopped out to look. He couldn't fix them, and the guy who can fix them is on his honeymoon. Sawbuck was going to let him know that he needs to come out and fix the doors.
- Make roof repairs
  - The primary debris guards are not sealed to the roof.
  - The debris guards should be removed from the secondary drains.
  - The cap should be removed from the plumbing vent at the left side roof.
  - The elimination of low spots that accumulate standing water.
  - The gutter downspouts should be made to discharge away from the house. Therefore, a splashblock should be placed under each downspout to direct the water away from the foundation. This on the left side of the house.
- Further investigation of fire sprinkler controls I was told there should be a shutoff valve on the sprinkler system since it does not shut off with the main water supply.
- Repair garage firewall (see photo)
- Maintain/repair the whirlpool bath
  - The jet nozzles are missing. They should be installed.
  - There is no support under the tub, appropriate support should be installed.
- Maintain/repair the swimming pool and equipment
  - The water distribution for the water wall should be adjusted to reduce splashing. Rick Pinney is coming out to re-program the pool controls after setting up the fire feature. I asked him to take a look at this while he is out. If he can't fix it, Anthony Sylvan will need to be notified.

Henry: There are also some cosmetic problems that need to be addressed, which I can go over with you (small drywall repairs, touch-up paint, etc.).

iii



DEF000144

JA002095

## EXECUTIVE SUMMARY OF FINDINGS

To help provide a perspective for the work that we have recommended be complete before releasing the contractor, we offer the following list of suggested repairs. **This list should not be considered all-inclusive since there will surely be other things you will want to make part of this list.** Please use this list in conjunction with this Report and the Maintenance Plan provided at the end of this report in Appendix A.

### Items to be addressed before releasing the contractor:

- Maintain heating/air conditioning equipment
  - The door at the right side air handler is damaged and does not close properly. Sierra fixed today.
- Repair plumbing fixtures
  - There are leaks at both recirculation pumps. Need plumber to address
  - There is a plumbing leak above the ceiling of the basement bathroom. Need plumber to address
  - The drain cleanouts should have permanent screw-type caps. Not necessary per Henry
  - There is no air gap on the ice maker drain line. In addition, we recommend that the drain line hose be cleaned. Henry will investigate with plumber
  - The locking lug is missing from one water heater enclosure. Plumber needs to fix
  - The tubs in the second floor bathroom have controls for some unknown feature. This should be investigated further. They are to heat tubs. n/a
  - The automatic solenoid valves on the pool fill circuit are noisy and create a water hammer effect throughout the house. This should be investigated further, and repaired as needed. Anthony Sylvan fixed yesterday
- Repair electrical system
  - There is an open outlet at the lower patio. Discussed with electrician
  - All outlets within six feet of a sink should be protected by GFCIs. The outlets by the master bathroom sinks were not. Discussed with electrician
  - There is no power at the outlet in the master closet. The cover is also missing from this outlet. Discussed with electrician
  - The outlet covers are loose at the media room wet bar cabinet. Discussed with electrician
  - The door at the control box for the automated panel door can not close. The power cord is routed through the door. This is for the automated doors. Henry will contact Sawbuck
  - The whirlpool tub is not GFCI protected. Discussed with electrician
  - The screws are missing from the deadman covers at the main electrical panels. Discussed with electrician
  - Review entire electrical system.

Also, the following items need to be addressed (not on this list):

1. Pot filler is not anchored well and droops. Need plumber to address
2. Steamer is not anchored to countertop. Need to address with appliance company
3. Master bathroom light fixtures on mirrors are unstable. I will discuss with electrician
4. Main sliding pocket doors in great room do not fully close and latch. Henry to discuss with Sawbuck
5. Built in wine rack in basement bar area does not hold wine bottles; may cause them to drop down inside. Henry to discuss with Absolute Closets
6. I may have the final drywall, paint, & grouting touch ups done in the next month or so. I will mark areas with blue tape.
7. All double screen doors have no "stop," allowing them to slide all the way off to the side of the double patio doors in 3 areas. Need to ask door company about this.
8. I'm still waiting for the correct stone top to be installed in the main floor powder room. I had Ashley Rogers emailed me 2/13/2015 saying she was working on it.
- 9.



DEF000168

JA002096



- Make interior repairs
  - The drywall is damaged at the right side mechanical closet. Not a problem, but Henry will discuss
  - The whirlpool tub is not supported from the floor. Henry will talk to plumber about this
  - The cover is missing from the vent fan in the media room. (Electrician knows about this)
  - There is a loose light fixture in the master shower. (Electrician also knows about this)
  - The access cover at the basement hall does not close properly. Sierra will fix. Talked to Chris today
  - There are no secondary latches on the patio sliding glass doors. Not necessary per Henry
  - One burner valve at the patio grill is not functional. n/a. Appears to be working fine.
  - ~~There is no hardware in the basement bedroom closet.~~
- Repair exterior
  - The handrail has been removed from a second floor window. The handrail should be properly replaced or the wall penetrations sealed. (You already know about this)
  - The grout is missing from the tile joints on the patio stairs. Will address with final touch ups
  - There is no landing at the exterior door in the kitchen. Not needed per Henry
  - There is unfinished stucco surface at the roof feature. Henry will discuss with Chris Myers
  - The screens for the patio slider doors do not latch. Discussed with door/window company today
  - The patio slider in the basement media room does not latch. Henry will talk to door company
  - The automated panel doors do not close properly. Henry will discuss with Sawbuck
- Make roof repairs
  - The primary debris guards are not sealed to the roof. Not sure what this is about
  - The debris guards should be removed from the secondary drains. Not sure what this is about
  - The cap should be removed from the plumbing vent at the left side roof. Henry will investigate this
  - The elimination of low spots that accumulate standing water. Already done per Henry
  - The gutter downspouts should be made to discharge away from the house. Henry will discuss with Chris Myers
  - Therefore, a splashblock should be placed under each downspout to direct the water away from the foundation. This on the left side of the house.
- Further investigation of fire sprinkler controls Called fire sprinkler company. Valve not necessary. n/a
- Repair garage firewall 5/8" drywall sufficient per Henry
- Maintain/repair the whirlpool bath
  - The jet nozzles are missing. They should be installed. Henry will call tub installer to provide
  - There is no support under the tub, appropriate support should be installed. Henry will discuss with plumber
- Maintain/repair the swimming pool and equipment
  - The water distribution for the water wall should be adjusted to reduce splashing. I talked to Anthony Sylvan yesterday. I'll try to make some adjustments in the frequency the waterfall runs to see if this resolves the problem.

## EXECUTIVE SUMMARY OF FINDINGS

To help provide a perspective for the work that we have recommended be complete before releasing the contractor, we offer the following list of suggested repairs. **This list should not be considered all-inclusive since there will surely be other things you will want to make part of this list.** Please use this list in conjunction with this Report and the Maintenance Plan provided at the end of this report in Appendix A.

### Items to be addressed before releasing the contractor:

- Maintain heating/air conditioning equipment

~~— The door at the right side air handler is damaged and does not close properly. Sierra fixed today.~~

- Repair plumbing fixtures

Fixed by plumber There are leaks at both recirculation pumps. Need plumber to address

They couldn't find it. I'll monitor There is a plumbing leak above the ceiling of the basement bathroom. Need plumber to address

~~— The drain cleanouts should have permanent screw-type caps. Not necessary per Henry~~

Plumber is addressing There is no air gap on the ice maker drain line. In addition, we recommend that the drain line hose be cleaned. Henry will investigate with plumber

Plumber is addressing The locking lug is missing from one water heater enclosure. Plumber needs to fix

~~— The tubs in the second floor bathroom have controls for some unknown feature.~~

~~This should be investigated further. They are to heat tubs. n/a~~

Fixed by Anthony Sylvan The automatic solenoid valves on the pool fill circuit are noisy and create a water hammer effect throughout the house. This should be investigated further, and repaired as needed. Anthony Sylvan fixed yesterday

Harry Davis is addressing all Repair electrical system  
of these items

- There is an open outlet at the lower patio. Discussed with electrician
- All outlets within six feet of a sink should be protected by GFCIs. The outlets by the master bathroom sinks were not. Discussed with electrician
- There is no power at the outlet in the master closet. The cover is also missing from this outlet. Discussed with electrician
- The outlet covers are loose at the media room wet bar cabinet. Discussed with electrician
- The door at the control box for the automated panel door can not close. The power cord is routed through the door. This is for the automated doors. Henry will contact Sawbuck
- The whirlpool tub is not GFCI protected. Discussed with electrician
- The screws are missing from the deadman covers at the main electrical panels. Discussed with electrician
- Review entire electrical system.

Also, the following items need to be addressed (not on this list):

1. Pot filler is not anchored well and droops. Need plumber to address Fixed by plumber
2. Steamer is not anchored to countertop. Need to address with appliance company Need someone to address
3. Master bathroom light fixtures on mirrors are unstable. I will discuss with electrician Harry Davis is addressing
4. Main sliding pocket doors in great room do not fully close and latch. Henry to discuss with Sawbuck This needs attention. The door has not been fixed so still won't close
5. Built in wine rack in basement bar area does not hold wine bottles; may cause them to drop down inside. Henry to discuss with Absolute Closets Need to find a solution with Absolute
6. I may have the final drywall, paint, & grouting touch ups done in the next month or so. I will mark areas with blue tape.
7. All double screen doors have no "stop," allowing them to slide all the way off to the side of the double patio doors in 3 areas. Need to ask door company about this. Door company needs to address this issue
8. I'm still waiting for the correct stone top to be installed in the main floor powder room. I had Ashley Rogers emailed me 2/13/2015 saying she was working on it. This has not been addressed yet
- 9.

DEF000191

JA002098



- Make interior repairs

Not a major issue The drywall is damaged at the right side mechanical closet. Not a problem, but Henry will discuss  
 Plumbers have fixed; I will check The whirlpool tub is not supported from the floor. Henry will talk to plumber about this  
 Harry Davis to address The cover is missing from the vent fan in the media room. (Electrician knows about this)  
 Harry Davis to address There is a loose light fixture in the master shower. (Electrician also knows about this)  
 Sierra knows and says will fix The access cover at the basement hall does not close properly. Sierra will fix. Talked to Chris today  
~~There are no secondary latches on the patio sliding glass doors. Not necessary per Henry~~  
~~One burner valve at the patio grill is not functional. n/a. Appears to be working fine.~~  
~~There is no hardware in the basement bedroom closet.~~

- Repair exterior

Waiting JD Stairs to replace - The handrail has been removed from a second floor window. The handrail should be properly replaced or the wall penetrations sealed. (You already know about this)  
 Will address with final touch-up The grout is missing from the tile joints on the patio stairs. Will address with final touch ups  
~~There is no landing at the exterior door in the kitchen. Not needed per Henry~~  
 Ask Chris - There is unfinished stucco surface at the roof feature. Henry will discuss with Chris Myers  
 Door company is supposed to fix The screens for the patio slider doors do not latch. Discussed with door/window company today  
 Door company needs to fix - The patio slider in the basement media room does not latch. Henry will talk to door company  
 Sawbuck needs to fix ASAP - The automated panel doors do not close properly. Henry will discuss with Sawbuck

- Make roof repairs

~~The primary debris guards are not sealed to the roof. Not sure what this is about~~  
~~The debris guards should be removed from the secondary drains. Not sure what this is about~~  
 Henry to investigate The cap should be removed from the plumbing vent at the left side roof. Henry will investigate this  
~~The elimination of low spots that accumulate standing water. Already done per Henry~~  
 Ask Chris The gutter downspouts should be made to discharge away from the house. Henry will discuss with  
 Therefore, a splashblock should be placed under each downspout to direct the Chris Myers  
 water away from the foundation. This on the left side of the house.  
~~Further investigation of fire sprinkler controls Called fire sprinkler company. Valve not necessary. n/a~~  
~~Repair garage firewall 5/8" drywall sufficient per henry~~  
~~Maintain/repair the whirlpool bath~~

Plumber to supply jets The jet nozzles are missing. They should be installed. Henry will call tub installer to provide  
 Plumber fixed; I will check There is no support under the tub, appropriate support should be installed. Henry will discuss with  
 plumber

- Maintain/repair the swimming pool and equipment

I think Anthony Sylvan adequately addressed this; I will monitor The water distribution for the water wall should be adjusted to reduce splashing. I talked to Anthony Sylvan yesterday. I'll try to make some adjustments in the frequency the waterfall runs to see if this resolves the problem.



## EXECUTIVE SUMMARY OF FINDINGS

To help provide a perspective for the work that we have recommended be complete before releasing the contractor, we offer the following list of suggested repairs. **This list should not be considered all-inclusive since there will surely be other things you will want to make part of this list.** Please use this list in conjunction with this Report and the Maintenance Plan provided at the end of this report in Appendix A.

### Items to be addressed before releasing the contractor:

- Maintain heating/air conditioning equipment

~~— The door at the right side air handler is damaged and does not close properly. Sierra fixed today.~~

- Repair plumbing fixtures

Fixed by plumber ~~— There are leaks at both recirculation pumps. Need plumber to address —~~

They couldn't find it. I'll monitor ~~— There is a plumbing leak above the ceiling of the basement bathroom. Need plumber to address~~

~~— The drain cleanouts should have permanent screw-type caps. Not necessary per Henry~~

Plumber is addressing ~~— There is no air gap on the ice maker drain line. In addition, we recommend that the drain line hose be cleaned. Henry will investigate with plumber~~

Plumber is addressing ~~— The locking lug is missing from one water heater enclosure. Plumber needs to fix~~

~~— The tubs in the second floor bathroom have controls for some unknown feature.~~

~~— This should be investigated further. They are to heat tubs. n/a~~

Fixed by Anthony Sylvan ~~— The automatic solenoid valves on the pool fill circuit are noisy and create a water-hammer effect throughout the house. This should be investigated further, and — repaired as needed. Anthony Sylvan fixed yesterday~~

Harry Davis is addressing all  
of these items

### Repair electrical system

- There is an open outlet at the lower patio. Discussed with electrician
- All outlets within six feet of a sink should be protected by GFCIs. The outlets by the master bathroom sinks were not. Discussed with electrician
- ~~— There is no power at the outlet in the master closet. The cover is also missing from this outlet. Discussed with electrician~~
- The outlet covers are loose at the media room wet bar cabinet. Discussed with electrician
- ~~— The door at the control box for the automated panel door can not close. The power cord is routed through the door. This is for the automated doors. Henry will contact Sawbuck~~
- The whirlpool tub is not GFCI protected. Discussed with electrician
- The screws are missing from the deadman covers at the main electrical panels. Discussed with electrician
- Review entire electrical system.

Also, the following items need to be addressed (not on this list):

- ~~1. Pot filler is not anchored well and droops. Need plumber to address~~ Fixed by plumber
- ~~2. Steamer is not anchored to countertop. Need to address with appliances company~~ Need someone to address
3. Master bathroom light fixtures on mirrors are unstable. I will discuss with electrician Harry Davis is addressing
4. Main sliding pocket doors in great room do not fully close and latch. Henry to discuss with Sawbuck This needs attention. The door has not been fixed so still won't close
5. Built in wine rack in basement bar area does not hold wine bottles; may cause them to drop down inside. Henry to discuss with Absolute Closets I am meeting with Jay with Absolute
6. I may have the final drywall, paint, & grouting touch ups done in the next month or so. I will mark areas with blue tape.
7. All double screen doors have no "stop," allowing them to slide all the way off to the side of the double patio doors in 3 areas. Need to ask door company about this. Door company needs to address this issue
- ~~8. I'm still waiting for the correct stone top to be installed in the main floor powder room. I had Ashley Rogers emailed me 2/13/2015 saying she was working on it. This has not been addressed yet~~
- 9.

DEF000211

JA002100

- Make interior repairs

Not a major issue ~~The dry wall is damaged at the right side mechanical closet. Not a problem, but Henry will discuss.~~  
 Plumbers have fixed; I will check ~~The whirlpool tub is not supported from the floor. Henry will talk to plumber about this~~  
 Harry Davis to address ~~The cover is missing from the vent fan in the media room. (Electrician knows about this)~~  
 Harry Davis to address ~~There is a loose light fixture in the master shower. (Electrician also knows about this)~~  
 Sierra knows and says will fix ~~The access cover at the basement hall does not close properly. Sierra will fix. Talked to Chris today~~  
~~There are no secondary latches on the patio sliding glass doors. Not necessary per Henry~~  
~~One burner valve at the patio grill is not functional. n/a. Appears to be working fine.~~  
~~There is no hardware in the basement bedroom closet.~~

- Repair exterior

Waiting JD Stairs to replace ~~The handrail has been removed from a second floor window. The handrail should be properly replaced or the wall penetrations sealed. (You already know about this)~~  
 Will address with final touch-up ~~The grout is missing from the tile joints on the patio stairs. Will address with final touch ups~~  
~~There is no landing at the exterior door in the kitchen. Not needed per Henry~~  
 Ask Chris ~~There is unfinished stucco surface at the roof feature. Henry will discuss with Chris Myers~~  
 Door company is supposed to fix ~~The screens for the patio slider doors do not latch. Discussed with door/window company today~~  
 Door company needs to fix ~~The patio slider in the basement media room does not latch. Henry will talk to door company.~~  
 Sawbuck needs to fix ASAP ~~The automated panel doors do not close properly. Henry will discuss with Sawbuck~~

- Make roof repairs

~~The primary debris guards are not sealed to the roof. Not sure what this is about~~  
~~The debris guards should be removed from the secondary drains. Not sure what this is about~~  
 Henry to investigate ~~The cap should be removed from the plumbing vent at the left side roof. Henry will investigate this~~  
~~The elimination of low spots that accumulate standing water. Already done per Henry~~  
 Ask Ghris ~~The gutter downspouts should be made to discharge away from the house. Henry will discuss with~~  
~~Therefore, a splashblock should be placed under each downspout to direct the Chris Myers~~  
~~water away from the foundation. This on the left side of the house.~~  
~~Further investigation of fire sprinkler controls Called fire sprinkler company. Valve not necessary. n/a~~  
~~Repair garage fire wall 5/8" drywall sufficient per henry~~  
~~Maintain/repair the whirlpool bath~~

Plumber to supply jets ~~The jet nozzles are missing. They should be installed. Henry will call tub installer to provide~~  
 Plumber fixed; I will check ~~There is no support under the tub, appropriate support should be installed. Henry will discuss with~~  
 plumber

- Maintain/repair the swimming pool and equipment

~~I think Anthony Sylvan adequately addressed this, I will monitor~~ ~~The water distribution for the water wall should be adjusted to reduce splashing. I talked to Anthony~~  
~~Sylvan yesterday. I'll try to make some adjustments in the frequency the waterfall runs to see if this resolves the problem.~~

## **EXHIBIT 2**



1 **OPPS**

2 Rusty Graf, Esq.

3 Nevada Bar No. 6322

4 **BLACK & LOBELLO**

5 10777 West Twain Avenue, 3<sup>rd</sup> Floor

6 Las Vegas, Nevada 89135

7 Telephone: (702) 869-8801

8 Facsimile: (702) 869-2669

9 E-mail: [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)

10 *Attorney for Plaintiff*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JOSEPH FOLINO, an individual and NICOLE  
14 FOLINO, an individual,

15 Plaintiff,

16 v.

17 TODD SWANSON, an individual; TODD  
18 SWANSON, Trustee of the SHIRAZ TRUST;  
19 SHIRAZ TRUST, a Trust of unknown origin;  
20 LYONS DEVELOPMENT, LLC, a Nevada  
21 limited liability company; DOES I through X;  
22 and ROES I through X,

23 Defendants.

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

24 **PLAINTIFFS' OPPOSITION TO  
25 DEFENDANTS' MOTION TO DISMISS  
26 PLAINTIFFS' SECOND AMENDED  
27 COMPLAINT**

28 COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through  
Rusty Graf, Esq. of Black & LoBello, their attorney of record, and hereby submit their  
Opposition to Defendant's Motion to Dismiss Plaintiffs' Second Amended Complain. This  
Opposition is made and based upon the Memorandum of Points and Authorities attached hereto,  
all exhibits attached hereto, and any oral argument as may be entertained by the Court at the time  
and place of the hearing of this matter.

///

///

///

///

I.

PROCEDURAL HISTORY

On October 19, 2018, Plaintiffs filed their initial Complaint for Defendants' failure to disclose known water leaks and issues with a plumbing system prior to the sale of real property. Defendants filed their first Motion to Dismiss on February 4, 2019, but it was not granted, and the Court instead granted Plaintiffs leave to amend. On May 20, 2019, Defendants filed their second Motion to Dismiss. On July 18, 2019, the Court dismissed several of Plaintiffs claims, but denied Defendants' motion to dismiss the claim for fraud and claim of concealment in violation of NRS 113.

Plaintiffs then filed their second amended Complaint, with the surviving claims of fraud and concealment in violation of NRS 113 on September 4, 2019. Inexplicably, Defendants have brought the instant Motion to Dismiss these same claims, which the Court refused to dismiss less than three months ago, alleging no new facts which support a different outcome than their past already decided Motions to Dismiss. This is an attempt to delay the discovery process.

II.

INTRODUCTION

As is clear from the short procedural history above, Defendants have little grasp of the requirements for a successful Motion to Dismiss. Plaintiffs assume this, as there is no other logical explanation for (1) a third motion on issues that the Court has already decided twice and (2) the strange hybrid motion that Defendants have produced which is nominally a motion to dismiss but is written as if it is a motion for summary judgment. Not a single discovery act has been taken in the case. The Court has yet to conduct the NRCP 16.1 conference. In the interest of expediency, Plaintiffs would respectfully suggest that in future motions Defendants focus on issues that have not already been clearly decided and, perhaps more importantly, determine which type of motion is appropriate for the circumstances rather than creating a hodgepodge of



1 different standards and requests that the uncharitable might call nearly indecipherable. *See*  
2 *Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint.*

3  
4 **III.**

5 **"UNDISPUTED FACTS"**

6 Defendants begin their argument by listing a series of "undisputed" facts. Again, not a  
7 single discovery act has been taken. The primary issue here is that Defendants seem to have  
8 mistaken the term "undisputed" to simply mean alleged, as many of these facts are heavily  
9 disputed. Plaintiffs do not dispute the fact that (1) there were previous water leaks at the  
10 property;<sup>1</sup> (2) that Rakeman Plumbing invoiced and submitted a warranty claim for one of these  
11 leaks; and (3) that Defendants did not disclose any leaks in their October 24, 2017 Sellers Real  
12 Property Disclosure Form ("SRPD"). However, Plaintiffs do dispute Defendants assertions that  
13 (1) the leak was completely repaired, as there have been subsequent leaks; and (2) that no  
14 information about the repair other than completion was reported to Defendants. Further, there is  
15 clearly a dispute of material facts as Plaintiffs assert that there were more than the two incidents  
16 of water leakage, that there was a systemic defect in the plumbing system that was never repaired  
17 (even if Rakeman believes they identified all of the damages), and that the Upnor fittings  
18 (referenced in the Rakeman affidavit) were all defective. However regardless of the status of  
19 these facts, as stated below, Defendants' Motion to Dismiss lacks merit.  
20

21 **IV.**

22 **ARGUMENT**

23 **A. Summary judgment is not warranted as to Plaintiffs' claim for concealment.**

24 As discussed above, though Defendants call this a Motion to Dismiss, they immediately  
25 enter into a summary judgment analysis. Defendants are correct that under NRCP 56(a) the court  
26

27 <sup>1</sup> The admission of which is a violation and in contradiction of the requirements of the NRS 113 Sellers  
28 Real Property Disclosure Form ("SRPD")

1 may grant summary judgment, if the movant shows that there is not genuine dispute of material  
2 facts and that the movant is entitled to judgment as a matter of law. *Wood v. Safeway, Inc.*, 731,  
3 121 P.3d 1026, 1031 (2005). However, this is generally done by filing a Motion for Summary  
4 judgement rather than a Motion to Dismiss that requests summary judgment. *See NRCP 56*.  
5 However, being understanding of the Defendants apparent difficulty distinguishing between the  
6 two standards, Plaintiffs will respond to the Motion for Summary Judgment within the Motion to  
7 Dismiss.  
8

9 Evidence presented in support of a motion for summary judgment must be construed in  
10 the light most favorable to the nonmoving party, and facts demonstrating the existence of a  
11 genuine issue will preclude an unfavorable summary judgment. *Sustainable Growth Initiative*  
12 *Committee v. Jumpers, LLC*, 22 Nev. 53, 61, 128 P.3d 452, 458 (2006). A factual dispute is  
13 genuine when the evidence is such that a rational jury could return a verdict in the nonmoving  
14 party's favor. *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031, 1032 (2005).  
15 When ruling on a summary judgment motion, "[a]ll of the nonmovant's statements must be  
16 accepted as true." *Jones v. First Mortgage Company of Nevada*, 112 Nev. 531, 534, 915 P.2d  
17 883, 885 (1996). See also, *Harrington v. Syufy Enterprises*, 113 Nev. 246, 248, 931 P.2d 1378,  
18 1379-80 (1997). Further, "a court should exercise great care in granting summary judgment; a  
19 litigant **has a right to trial where there is the slightest doubt as to the facts.**" (emphasis  
20 added) See *Nehls v. Leonard*, 97 Nev. 325, 328, 630 P.2d 258, 260 (1981).  
21

22  
23 Defendants argue that, under NRCP 56(c)1(A), they may establish facts as undisputed  
24 using an affidavit. *See NRCP 56(c)1(A)*. This is incorrect. The actual standard is that a party  
25 asserting that a fact is or is not genuinely disputed must cite evidence in support of that assertion  
26 and that can include affidavits. *Id.* However, simply offering an affidavit in support of a position  
27 does not establish it as an undisputed fact. *Id.* Especially, when those facts are contradicted by  
28



1 real admissible evidence and facts. Further, as stated above, all facts, statements, and evidence  
2 must be viewed in the light most favorable to Plaintiffs, as Defendants are the moving party.  
3 *Sustainable Growth Initiative Committee v. Jumpers. LLC*, 22 Nev. 53, 61, 128 P.3d 452, 458  
4 (2006).  
5

6 Defendants go on to assert that the affidavit of Rakeman has shifted the burden of proof  
7 to Plaintiffs to “present specific facts showing a material issue of fact.”<sup>2</sup> This is incorrect, not  
8 because defendants have misstated the law, but because they completely misinterpret what the  
9 Rakeman affidavit establishes. All it proves is that a repair was conducted, not that Defendants  
10 did not engage in misrepresentation, concealment, and fraud. Further, Plaintiffs assert that there  
11 were more than the two incidents of water leakage and that there was a systemic defect in the  
12 plumbing system that was never repaired by Rakeman or any other contractor. These disputes  
13 over key facts make Defendants’ Motion to Dismiss inappropriate, as the claims have been plead  
14 sufficiently and no discovery has yet taken place to further uncover the existence of admissible  
15 evidence in support of Plaintiffs’ assertions. Further, Defendants’ Motion for Summary  
16 Judgment, within their motion to Dismiss, is even less applicable to the current situation as there  
17 are key facts that remain unknown without discovery and all assumptions and inferences should  
18 be made in favor of Plaintiffs as the non-moving party.  
19  
20

21 Defendants argue that under *Nelson v. Heer* and NRS 113.140, they did not commit  
22 concealment because they were not “aware” of the defect after they believed it repaired.<sup>3</sup>  
23 Defendants then go into an extensive analysis of the Court’s holding in *Nelson*, and also of the  
24 word “aware”, and what it means to be aware and have knowledge of something, but this  
25

26  
27 <sup>2</sup> Defendants’ Motion to Dismiss, pg. 7.

28 <sup>3</sup> Id.

1 discussion is totally irrelevant. Moreover, this is nonsense! Defendants are correct that in *Nelson*  
2 the Court found it was not concealment for a seller not to disclose past water damage they  
3 believed repaired. *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007). However, Defendants  
4 ignore a key difference between the holding in *Nelson* and the current situation. Namely that,  
5 unlike in *Nelson*, Defendants explicitly lied on the SRDP, and this is true regardless of what they  
6 were told about the repairs by Rakeman. *Id.*

8 At least 10 days before residential property is conveyed to a purchaser the seller "shall  
9 complete a disclosure form regarding the residential property." See *NRS 113.130(1)(a)*. Here, the  
10 SRPD for the sale asked if Defendants were aware of any "previous or current moisture  
11 conditions and/or water damage". (emphasis added) See *attached Exhibit 1, Seller's Real*  
12 *Property Disclosure Form*. This is explicitly clear. It does not matter whether Defendants believe  
13 that the repair removed their awareness of the issue, because the question did not only ask about  
14 current issues. It specifically asked if there were any "previous" moisture conditions or water  
15 damage.<sup>4</sup> A repair does not remove one's awareness of previous occurrences. Despite this, on the  
16 SRPD Defendants indicated no, that they were not aware of any previous moisture conditions or  
17 water damage.<sup>5</sup> This is concealment, and the Rakeman affidavit has no relevance.

19  
20 It's not like *Nelson*, where it is unclear what the SRPD form actually asked. The Court  
21 merely held that the seller had no affirmative duty to disclose something they did not know  
22 materially and adversely affected the value of the property. *Nelson v. Heer*, 123 Nev. 217, 163  
23

24  
25  
26  
27 <sup>4</sup> See attached Exhibit 1, *Seller's Real Property Disclosure Form*, Pg. 2, *Question 1*.

28 <sup>5</sup> *Id.*

1 P.3d 420 (2007). Here, the seller was asked an explicit question about past occurrences, not just  
2 whether an issue still existed, and they gave a demonstrably false and misleading answer.<sup>6</sup>

3  
4 Further, though the concealment is obvious, it should be reiterated that the standard for  
5 summary judgment requires that all facts and inferences be interpreted in the light most favorable  
6 to the non-moving party (Plaintiffs). *Sustainable Growth Initiative Committee v. Jumpers, LLC*,  
7 22 Nev. 53, 61, 128 P.3d 452, 458 (2006). More importantly, Plaintiffs allege there were more  
8 than two previous water leaks. Plaintiffs also dispute the allegation that the water leak was even  
9 repaired, as there were systemic defects in the plumbing system that were never addressed by  
10 Rakeman. Therefore, viewed through the legal standard that requires all facts and inferences be  
11 interpreted in the light most favorable to the non-moving party, it is impossible to conclude that  
12 Defendants have met their burden and should be granted the Motion for Summary Judgment.

13  
14 **B. Summary judgment is not warranted as to Plaintiffs' claim for fraud.**

15 Defendants conclude their Motion by stating that if the Court grants the Motion for  
16 Summary Judgment as to the concealment claim, then the fraud claim will necessarily fail as  
17 well.<sup>7</sup> Defendants are correct that fraud requires (1) that the Defendants made a false  
18 representation or misrepresentation of fact; and (2) that the Defendants had knowledge or belief  
19 that the representation was false. *Jordan v. State ex rel. Dep't of Motor Vehicles & Pub. Safety*,  
20 121 Nev. 44, 75, 110 P.3d 30, 51 (2005). It is somewhat inexplicable that Defendants would state  
21 these requirements, then assert that "Rakeman Plumbing's completed repair eviscerates the  
22 factual allegation that the Defendants made a false representation."<sup>8</sup> Further, Plaintiffs already  
23

24  
25 \_\_\_\_\_  
26 <sup>6</sup> Id.

27 <sup>7</sup> Defendants' Motion to Dismiss, pg. 9.

28 <sup>8</sup> Id.



1 allege that there were systemic problems with the plumbing system which Rakeman did not  
2 repair, and there were more than the two water leakage incidents Defendants' claim occurred.

3  
4 Defendants themselves attached the SRDP to the instant motion.<sup>9</sup> Presumably this means  
5 they are aware of its content and the representations they made to Plaintiffs. Therefore, it is  
6 utterly illogical and offensive for them to claim that Rakeman's completed repair "eviscerates"  
7 Plaintiffs' claim of fraud, when they admit themselves that there were leaks a plumbing company  
8 was required to repair, and yet they still answered "no" to the SRPD question. The SRPD asked  
9 if the Defendants were aware of any "**previous or current** moisture conditions and/or water  
10 damage". (emphasis added) *See attached Exhibit 1, Seller's Real Property Disclosure Form.*  
11 Unambiguously, this is (1) a false representation or misrepresentation of fact by Defendants; and  
12 (2) Defendants admit they had knowledge that the representation was false. Again, the standard  
13 for determining summary judgment requires that all facts and inferences be interpreted in the  
14 light most favorable to the non-moving party (Plaintiffs) and, therefore, there is no way that  
15 Defendants can prevail. *Sustainable Growth Initiative Committee v. Jumpers, LLC*, 22 Nev. 53,  
16 61, 128 P.3d 452, 458 (2006). Going a step further, the SRPD is a due diligence form to aid a  
17 buyer of real property in determining if they want to proceed with the purchase. If it is  
18 reasonable for a buyer not to proceed with the sale after notice of a prior water leak, then the  
19 failure to make it known to the buyer is just as unreasonable.  
20  
21

22 V.

23 CONCLUSION

24 The issues presented by Defendants have already been decided by the Court multiple  
25 times.<sup>10</sup> This new Motion for Summary judgment, couched in a Motion to Dismiss, brings

26  
27 <sup>9</sup> Defendants' Motion to Dismiss, Exhibit B.

28 <sup>10</sup> Defendants' Motion to Dismiss, pg. 4-5.

1 nothing new to the table and is a blatant effort by Defendants to delay and inconvenience  
2 Plaintiffs while driving up litigation costs. Rakeman's affidavit, presented as some ground  
3 breaking evidence, is not even relevant. It does not matter whether Defendants believe the repair  
4 had taken place, they still lied on the SRDP and in doing so engaged in fraud and concealment.  
5 Further, without allowing for discovery Plaintiffs' do not have access to the documents and  
6 additional evidence necessary to demonstrate that there were more leaks than Defendants claim  
7 and that there was systemic problem with the plumbing system that was never addressed. They  
8 cannot, and should not, be allowed to continue filing motions over the same issues in an attempt  
9 prevent the discovery process and to exhaust and dissuade Plaintiffs from recovering their  
10 damages. Therefore, Defendants' Motion to Dismiss should be denied and Rule 11 sanctions  
11 should be imposed.  
12

## 13 VI.

### 14 PLAINTIFFS' COUNTERMOTION TO COMPEL DISCOVERY

15 It is essential to reiterate the fact that absolutely no discovery has occurred to this point.  
16 There is evidence that can be obtained in discovery to refute this Motion and the erroneous  
17 factual assertions contained therein. The instant Motion by Defendants is an end around the due  
18 process rights of the Plaintiffs to obtain those documents in discovery. Therefore, in addition to  
19 denying Defendant's Motion, the Court should grant Plaintiffs' Countermotion to compel  
20 discovery.  
21  
22  
23

24 The newly revised NRCPP 56 provides that when facts are unavailable to the nonmovant  
25 (here Plaintiffs), then the nonmovant may show by affidavit the specified reasons it cannot  
26 present facts essential to justify its opposition, and the Court may then allow time to take  
27 discovery. *See NRCPP 56(d)*. Here, as has been specified in the below declaration of Plaintiffs'  
28

1 counsel Rusty Graf, Esq., there are essential facts to Plaintiffs' opposition which cannot be  
2 demonstrated because no discovery has been conducted. It is ridiculous for Defendants to  
3 suggest that Plaintiffs' claims should be dismissed or summary judgment entered against  
4 Plaintiffs, all on the basis of a disputed affidavit of a plumbing company, when Plaintiffs have  
5 not even been able to engage in discovery to access to the information necessary to fully refute  
6 that affidavit. Therefore, Plaintiffs respectfully request that the Court order that the discovery  
7 process continue for this case.  
8

9  
10 VII.

11 PLAINTIFFS' COUNTERMOTION FOR RULE 11 SANCTIONS

12 COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through  
13 Rusty Graf, Esq. of Black & LoBello, their attorney of record, and hereby submit their Motion  
14 For Sanctions Pursuant To NRCP Rule 11 And For Attorneys' Fees And Costs seeking the  
15 following relief:

- 16 1. An Order issuing Rule 11 Sanctions against Defendants;
- 17 2. An Order for reasonable Attorney's Fees and Costs for having to oppose this  
18 duplicative and baseless motion; and
- 19 3. For such further relief as the Court deems appropriate, including limiting the  
20 manner and type of future procedural motions to the Court.  
21

22 This Motion is made and based upon the following Points and Authorities, the attached  
23 Exhibits and evidence, the papers and pleadings on file herein, and any oral argument or  
24 evidence as may be adduced at the hearing of this matter, including but not limited to the  
25 following Exhibits cited in the Motion:  
26

27 ///



1 **A. Declaration of counsel in support of motion for rule 11 sanctions and to conduct**  
2 **discovery.**

3 I, Rusty Graf, Esq., declare as follows:

4  
5 1. That I am an attorney duly licensed to practice law in the State of Nevada. I have  
6 personal knowledge of the matters stated herein and am competent to testify thereto. I am  
7 counsel for the Plaintiffs, JOSEPH FOLINO and NICOLE FOLINO in this matter, and I am  
8 making this Affidavit in support of their Motion for Sanctions Pursuant to Nevada Rule of Civil  
9 Procedure 11 and for Attorneys' Fees and Costs for previous motions and hearings.

10  
11 2. On September 24, 2019, counsel for Defendants, Christopher M. Young, Esq.,  
12 filed the instant motion seeking dismissal of Plaintiffs' Second Amended Complaint.

13  
14 3. That this Motion to Dismiss Plaintiffs' Second Amended Complaint involves  
15 issues that have already been decided by this Court.

16  
17 4. Defendants offer no new evidence in support of their position other than an  
18 affidavit by the plumbing company which has no relevance to the situation.

19  
20 5. At a minimum, Declarant is aware that the Uponor fittings and the potential  
21 defective nature of those fittings has been litigated. The affidavit of Rakeman only states that the  
22 one fitting and the damage it caused were repaired.

23  
24 6. Based on the pleadings and evidence available, that this Motion was filed for the  
25 purpose of delaying, harassing, and increasing litigation costs for Plaintiffs.

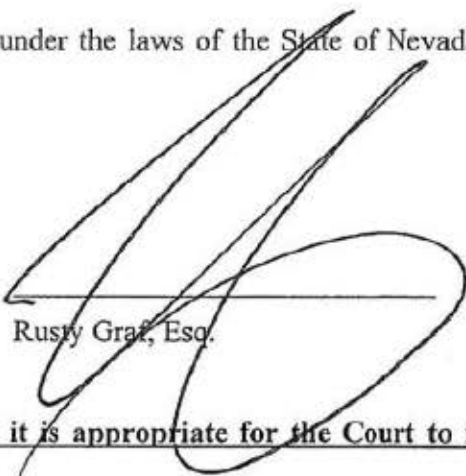
26  
27 7. No discovery has yet been conducted in this case and it is my belief, based on the  
28 pleadings and evidence available, that evidence can be obtained through discovery that will  
refute Defendants' Motion to Dismiss and will be relevant to Plaintiffs' case at trial.

1 8. As of this date, Defendants have not withdrawn this Motion.

2 9. The estimated fees and costs Plaintiffs have incurred due to Defendants' efforts to  
3 delay, harass, and increase litigation costs is \$2,417.26.  
4

5 10. I declare under penalty of perjury under the laws of the State of Nevada (NRS  
6 53.045) that the foregoing is true and correct.

7 Executed this 16<sup>th</sup> day of October, 2019.  
8 

9  
10 Rusty Graf, Esq. 

11 **B. Defendants have violated NRCP 11 and it is appropriate for the Court to impose**  
12 **sanctions.**

13 Rule 11 "provides for the imposition of sanctions when a motion is frivolous, legally  
14 unreasonable, or brought for an improper purpose." (emphasis added) *FED. R. CIV. P. 11(b)*; *Conn*  
15 *v. Borjorquez*, 967 F.2d 1418, 1420 (9th Cir. 1992); *McMahon v. Best*, 2000 WL 1071828, \*6  
16 (N.D. Cal. 2000). Rule 11 sanctions may be imposed upon litigants and counsel who file baseless  
17 papers without first conducting a reasonable and competent inquiry. *Schutts v. Bentley Nevada*  
18 *Corp.*, 966 F. Supp. 1549 (D. Nev. 1997). The test for determining whether a Rule 11 violation has  
19 occurred is one of objective reasonableness. *Operating Engineers Pension Trust v. G.C. Wallace,*  
20 *Inc.*, 159 F.R.D. 536, 539 (D. Nev. 1994).

21 Rule 11 provides in pertinent part:

22 (b) Representations to Court. By presenting to the court (whether by signing, filing,  
23 submitting, or later advocating) a pleading, written motion, or other paper, an  
24 attorney or unrepresented party is certifying that to the best of the person's  
25 knowledge, information, and belief, formed after an inquiry reasonable under the  
26 circumstances,—

27 (1) it is not being presented for any improper purpose, such as to harass or to  
28 cause unnecessary delay or needless increase in the cost of litigation;



(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;  
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and  
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. (Emphasis added).

Here, Defendants have clearly violated Rule 11 by introducing a motion for the purpose of harassment, delay, and to increase litigation costs. As outlined above, Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint is the third time that Defendants have asked the Court to rule on the same issues. This Court has found that the Plaintiffs' claims of concealment and fraud are valid and should not be dismissed. When Defendants continue to file motions seeking the dismissal of the same claims, the only reasonable conclusion is that they have an improper purpose. The Defendants have previously made the arguments in the current motion.

At this point they cannot legitimately believe they have a legal basis to stand upon. Rather, they are simply seeking to dissuade Plaintiffs from attempting to recover by (1) causing unnecessary delay; (2) increasing costs; and (3) harassing Plaintiffs. These are all of the improper purposes specifically enumerated in Rule 11(b)(1). Therefore, if Defendants are unable to offer an explanation for their continued motions on the same issues (other than their ridiculous claim that the Rakeman affidavit is sufficient for summary judgment, despite having no relevance to the misrepresentations made on the SRDP) then Rule 11 sanctions should be imposed.

**C. Plaintiffs Should Be Awarded Attorneys' Fees and Costs for the Necessity of Filing this Motion.**

Defendants have flagrantly violated NRCP Rule 11. As such, Plaintiffs are requesting an award of reasonable attorneys' fees for the necessity of filing this Motion. NRS 113.150(4) provides in pertinent part:

1 "if a seller conveys residential property to a purchaser without complying with the  
2 requirements of NRS 113.130 or otherwise providing the purchaser or the purchaser's  
3 agent with written notice of all defects in the property of which the seller is aware, and  
4 there is a defect in the property of which the seller was aware before the property was  
5 conveyed to the purchaser and of which the cost of repair or replacement was not limited  
6 by provisions in the agreement to purchase the property, the purchaser is entitled to  
7 recover from the seller treble the amount necessary to repair or replace the defective part  
8 of the property, together with court costs and reasonable attorney's fees." *See NRS*  
9 *113.150.*

10 Further, NRS 18.010(2)(b) provides that the court may award attorneys' fees "when the  
11 court finds that the claim, counterclaim, cross-claim or third-party complaint or defense of the  
12 opposing party was brought or maintained without reasonable ground or to harass the prevailing  
13 party." *See NRS 18.010(2)(b).* Additionally, the statute goes on to read that "The court shall  
14 liberally construe the provisions of this paragraph in favor of awarding attorney's fees in all  
15 appropriate situations." *Id.*

16 As demonstrated above, Defendants have clearly violated NRCP Rule 11 by seeking to  
17 relitigate decided issues in perpetuity or until they receive the desired outcome. Defendants'  
18 Motions have been brought without reasonable grounds and for either the purpose of harassment,  
19 delay, or increasing litigation costs. Therefore, pursuant to NRS 18.010 (and NRS 113), the  
20 Court should liberally construe the provisions of NRS 18.010 "in favor of awarding attorney's  
21 fees in all appropriate situations." *Id.* The Defendants' blatant violation of NRCP Rule 11,  
22 coupled with the relevant authority, demonstrate an award of attorneys' fees is appropriate.

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///

1 **D. Conclusion**

2 For the forgoing reasons, Rule 11 sanctions should be imposed upon Defendants and  
3 Plaintiffs should be awarded their fees and costs incurred in preparing the opposition to  
4 Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint.

5 DATED this 3<sup>rd</sup> day of October 2019

6  
7  
8 **BLACK & LOBELLO**

9  
10 \_\_\_\_\_  
11 Rusty Graf, Esq.  
12 Nevada Bar No. 6322  
13 10777 W. Twain Ave., Suite 300  
14 Las Vegas, NV 89135  
15 [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
16 [swilson@blacklobello.law](mailto:swilson@blacklobello.law)  
17 *Attorneys for Plaintiff*  
18  
19  
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28



**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 3<sup>rd</sup> day of October 2019, I caused the above and foregoing document *Plaintiffs' Opposition To Defendant's Motion To Dismiss Plaintiff's First Amended Complaint*; to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and
- ☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;
- ☐ pursuant to EDCR 7.26, to be sent via facsimile;
- ☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.

Nevada Bar No. 7961

Jay T. Hopkins, Esq.

Nevada Bar No. 3223

Christopher M. Young, PC  
2640 Professional Court, #200  
Las Vegas, Nevada 89128

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & LoBello

**BLACK & LOBELLO**

10777 W. Twain Avenue, 3<sup>rd</sup> Floor

Las Vegas, Nevada 89135

(702) 869-8801 FAX: (702) 869-2669



# EXHIBIT 1

## SELLER'S REAL PROPERTY DISCLOSURE FORM

In accordance with Nevada Law, a seller of residential real property in Nevada must disclose any and all known conditions and aspects of the property which materially affect the value or use of residential property in an adverse manner (see NRS 113.130 and 113.140).

Date 10/24/2017

Do you currently occupy or have you ever occupied this property? YES ☒ NO ☐

Property address 42 Meadowhawk Lane

Effective October 1, 2011: A purchaser may not waive the requirement to provide this form and a seller may not require a purchaser to waive this form. (NRS 113.130(3))

Type of Seller: ☐ Bank (financial institution); ☐ Asset Management Company; ☒ Owner-occupier; ☐ Other: \_\_\_\_\_

**Purpose of Statement:** (1) This statement is a disclosure of the condition of the property in compliance with the Seller Real Property Disclosure Act, effective January 1, 1996. (2) This statement is a disclosure of the condition and information concerning the property known by the Seller which materially affects the value of the property. Unless otherwise advised, the Seller does not possess any expertise in construction, architecture, engineering or any other specific area related to the construction or condition of the improvements on the property or the land. Also, unless otherwise advised, the Seller has not conducted any inspection of generally inaccessible areas such as the foundation or roof. This statement is not a warranty of any kind by the Seller or by any Agent representing the Seller in this transaction and is not a substitute for any inspections or warranties the Buyer may wish to obtain. Systems and appliances addressed on this form by the seller are not part of the contractual agreement as to the inclusion of any system or appliance as part of the binding agreement.

**Instructions to the Seller:** (1) ANSWER ALL QUESTIONS. (2) REPORT KNOWN CONDITIONS AFFECTING THE PROPERTY. (3) ATTACH ADDITIONAL PAGES WITH YOUR SIGNATURE IF ADDITIONAL SPACE IS REQUIRED. (4) COMPLETE THIS FORM YOURSELF. (5) IF SOME ITEMS DO NOT APPLY TO YOUR PROPERTY, CHECK N/A (NOT APPLICABLE). EFFECTIVE JANUARY 1, 1996, FAILURE TO PROVIDE A PURCHASER WITH A SIGNED DISCLOSURE STATEMENT WILL ENABLE THE PURCHASER TO TERMINATE AN OTHERWISE BINDING PURCHASE AGREEMENT AND SEEK OTHER REMEDIES AS PROVIDED BY THE LAW (see NRS 113.150).

**Systems / Appliances:** Are you aware of any problems and/or defects with any of the following:

	YES	NO	N/A		YES	NO	N/A
Electrical System .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Shower(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Plumbing .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Sink(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Sewer System & line .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Sauna / hot tub(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Septic tank & leach field .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Built-in microwave .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Well & pump .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Range / oven / hood-fan .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Yard sprinkler system(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Dishwasher .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Fountain(s) .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Garbage disposal .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Heating system .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Trash compactor .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Cooling system .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Central vacuum .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Solar heating system .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Alarm system .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Fireplace & chimney .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	owned.. <input checked="" type="checkbox"/> leased.. <input type="checkbox"/>			
Wood burning system .....	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	Smoke detector .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Garage door opener .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Intercom .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Water treatment system(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Data Communication line(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
owned.. <input checked="" type="checkbox"/> leased.. <input type="checkbox"/>				Satellite dish(es) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Water heater .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	owned.. <input checked="" type="checkbox"/> leased.. <input type="checkbox"/>			
Toilet(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Other .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Bathtub(s) .....	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>				

EXPLANATIONS: Any "Yes" must be fully explained on page 3 of this form.

TS  
Seller(s) Initials

MF  
11/07/17 2:07PM EST  
Buyer(s) Initials

Property conditions, improvements and additional information:	YES	NO	N/A
Is the property in good condition?			
Are there any improvements or additions to the property?			
Is there any additional information that may affect the valuation?			

Are you aware of any of the following?:

### 1. Structure:

- (a) Previous or current moisture conditions and/or water damage? ☐ ☒
- (b) Any structural defect? ☐ ☒
- (c) Any construction, modification, alterations, or repairs made without required state, city or county building permits? ☐ ☒
- (d) Whether the property is or has been the subject of a claim governed by NRS 40.600 to 40.695 (construction defect claims)? ☐ ☒
- (If seller answers yes, FURTHER DISCLOSURE IS REQUIRED)

**2. Land / Foundation:**

- |  |                          |                                     |
|--|--------------------------|-------------------------------------|
| (a) Any of the improvements being located on unstable or expansive soil? .....   | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| (b) Any foundation sliding, settling, movement, upheaval, or earth stability problems<br>that have occurred on the property? ..... | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| (c) Any drainage, flooding, water seepage, or high water table? .....  | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| (d) The property being located in a designated flood plain? .....  | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| (e) Whether the property is located next to or near any known future development? .....  | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| (f) Any encroachments, easements, zoning violations or nonconforming uses? .....   | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
| (g) Is the property adjacent to "open range" land? .....   | <input type="checkbox"/> | <input checked="" type="checkbox"/> |
- (If seller answers yes, FURTHER DISCLOSURE IS REQUIRED under NRS 113.065)

3. **Roof:** Any problems with the roof?

4. Pool/spa: Any problems with structure, wall, liner, or equipment.

5. **Infestation:** Any history of infestation (termites, carpenter ants, etc.)? ☐ ☒

#### 6. Environmental:

- (a) Any substances, materials, or products which may be an environmental hazard such as but not limited to, asbestos, radon gas, urea formaldehyde, fuel or chemical storage tanks, contaminated water or soil on the property? ..... ☐ ☒
- (b) Has property been the site of a crime involving the previous manufacture of Methamphetamine where the substances have not been removed from or remediated on the Property by a certified entity or has not been deemed safe for habitation by the Board of Health? ..... ☐ ☒

7. Fungi / Mold: Any previous or current fungus or mold? ☐ ☒

8. Any features of the property shared in common with adjoining landowners such as walls, fences, road, driveways or other features whose use or responsibility for maintenance may have an effect on the property? ☐ ☒

9. **Common Interest Communities:** Any "common areas" (facilities like pools, tennis courts, walkways or other areas co-owned with others) or a homeowner association which has any authority over the property? .....

- |   |                                     |                                     |
|---|-------------------------------------|-------------------------------------|
| (a) Common Interest Community Declaration and Bylaws available? .....   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| (b) Any periodic or recurring association fees? .....   | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| (c) Any unpaid assessments, fines or liens, and any warnings or notices that may give rise to an assessment, fine or lien? .....                                    | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| (d) Any litigation, arbitration, or mediation related to property or common area? .....   | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |
| (e) Any assessments associated with the property (excluding property taxes)? .....  | <input checked="" type="checkbox"/> | <input type="checkbox"/>            |
| (f) Any construction, modification, alterations, or repairs made without required approval from the appropriate Common Interest Community board or committee? ..... | <input type="checkbox"/>            | <input checked="" type="checkbox"/> |

10. Any problems with water quality or water supply? ☐ ☒

11. Any other conditions or aspects of the property which materially affect its value or use in an adverse manner? ☐ ☒

12. Lead-Based Paint: Was the property constructed on or before 12/31/77? ..... ☐ ☒

(If yes, additional Federal EPA notification and disclosure documents are required)

13. Water source: Municipal ☒ Community Well ☐ Domestic Well ☐ Other ☐

If Community Well: State Engineer Well Permit # \_\_\_\_\_ Revocable ☐ Permanent ☐ Cancelled ☐

Use of community and domestic wells may be subject to change. Contact the Nevada Division of Water Resources for more information regarding the future use of this well.

14. Conservation Easements such as the SNWA's Water Smart Landscape Program: Is the property a participant?..... ☐ ☒

15. Solar panels: Are any installed on the property? ..... ☐ ☒

If yes, are the solar panels: Owned...☐ Leased...☐ or Financed...☐

16. Wastewater disposal: ☒ Municipal Sewer ☐ Septic System ☐ Other ☐

17. This property is subject to a Private Transfer Fee Obligation? ..... ☒ ☐

**EXPLANATIONS:** Any "Yes" must be fully explained on page 3 of this form

(standard transfer tax)

75  
Seller(s) Initials


  
 11/02/17 2:07PM EST 12/12/17 7:30PM EST  
 Buyer(s) Initials



**EXPLANATIONS:** Any "Yes" to questions on pages 1 and 2 must be fully explained here.  
**Attach additional pages if needed.**

JS  
Seller(s) Initials

JS  
11/07/17  
3:07PM EST

JS  
11/07/17  
3:07PM EST

Buyer(s) Initials



Buyers and sellers of residential property are advised to seek the advice of an attorney concerning their rights and obligations as set forth in Chapter 113 of the Nevada Revised Statutes regarding the seller's obligation to execute the Nevada Real Estate Division's approved "Seller's Real Property Disclosure Form". For your convenience, Chapter 113 of the Nevada Revised Statutes provides as follows:

**CONDITION OF RESIDENTIAL PROPERTY OFFERED FOR SALE**

**NRS 113.100 Definitions.** As used in NRS 113.100 to 113.150, inclusive, unless the context otherwise requires:

1. "Defect" means a condition that materially affects the value or use of residential property in an adverse manner.
2. "Disclosure form" means a form that complies with the regulations adopted pursuant to NRS 113.120.
3. "Dwelling unit" means any building, structure or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one person who maintains a household or by two or more persons who maintain a common household.
4. "Residential property" means any land in this state to which is affixed not less than one nor more than four dwelling units.
5. "Seller" means a person who sells or intends to sell any residential property.  
(Added to NRS by 1995, 842; A 1999, 1446)

**NRS 113.110 Conditions required for "conveyance of property" and to complete service of document.** For the purposes of NRS 113.100 to 113.150, inclusive:


1. A "conveyance of property" occurs:
  - (a) Upon the closure of any escrow opened for the conveyance; or
  - (b) If an escrow has not been opened for the conveyance, when the purchaser of the property receives the deed of conveyance.
2. Service of a document is complete:
  - (a) Upon personal delivery of the document to the person being served; or
  - (b) Three days after the document is mailed, postage prepaid, to the person being served at his last known address.  
(Added to NRS by 1995, 844)

**NRS 113.120 Regulations prescribing format and contents of form for disclosing condition of property.** The Real Estate Division of the Department of Business and Industry shall adopt regulations prescribing the format and contents of a form for disclosing the condition of residential property offered for sale. The regulations must ensure that the form:

1. Provides for an evaluation of the condition of any electrical, heating, cooling, plumbing and sewer systems on the property, and of the condition of any other aspects of the property which affect its use or value, and allows the seller of the property to indicate whether or not each of those systems and other aspects of the property has a defect of which the seller is aware.
2. Provides notice:
  - (a) Of the provisions of NRS 113.140 and subsection 5 of NRS 113.150.
  - (b) That the disclosures set forth in the form are made by the seller and not by his agent.
  - (c) That the seller's agent, and the agent of the purchaser or potential purchaser of the residential property, may reveal the completed form and its contents to any purchaser or potential purchaser of the residential property.  
(Added to NRS by 1995, 842)

**NRS 113.130 Completion and service of disclosure form before conveyance of property; discovery or worsening of defect after service of form; exceptions; waiver.**

1. Except as otherwise provided in subsection 2:
  - (a) At least 10 days before residential property is conveyed to a purchaser:
    - (1) The seller shall complete a disclosure form regarding the residential property; and
    - (2) The seller or the seller's agent shall serve the purchaser or the purchaser's agent with the completed disclosure form.
  - (b) If, after service of the completed disclosure form but before conveyance of the property to the purchaser, a seller or the seller's agent discovers a new defect in the residential property that was not identified on the completed disclosure form or discovers that a defect identified on the completed disclosure form has become worse than was indicated on the form, the seller or the seller's agent shall inform the purchaser or the purchaser's agent of that fact, in writing, as soon as practicable after the discovery of that fact but in no event later than the conveyance of the property to the purchaser. If the seller does not agree to repair or replace the defect, the purchaser may:
    - (1) Rescind the agreement to purchase the property; or
    - (2) Close escrow and accept the property with the defect as revealed by the seller or the seller's agent without further recourse.
2. Subsection 1 does not apply to a sale or intended sale of residential property:
  - (a) By foreclosure pursuant to chapter 107 of NRS.
  - (b) Between any co-owners of the property, spouses or persons related within the third degree of consanguinity.
  - (c) Which is the first sale of a residence that was constructed by a licensed contractor.
  - (d) By a person who takes temporary possession or control of or title to the property solely to facilitate the sale of the property on behalf of a person who relocates to another county, state or country before title to the property is transferred to a purchaser.
3. A purchaser of residential property may not waive any of the requirements of subsection 1. A seller of residential property may not require a purchaser to waive any of the requirements of subsection 1 as a condition of sale or for any other purpose.
4. If a sale or intended sale of residential property is exempted from the requirements of subsection 1 pursuant to paragraph (a) of subsection 2, the trustee and the beneficiary of the deed of trust shall, not later than at the time of the conveyance of the property to the purchaser of the residential property, or upon the request of the purchaser of the residential property, provide:
  - (a) Written notice to the purchaser of any defects in the property of which the trustee or beneficiary, respectively, is aware; and
  - (b) If any defects are repaired or replaced or attempted to be repaired or replaced, the contact information of any asset management company who provided asset management services for the property. The asset management company shall provide a service report to the purchaser upon request.
5. As used in this section:
  - (a) "Seller" includes, without limitation, a client as defined in NRS 645H.060.
  - (b) "Service report" has the meaning ascribed to it in NRS 645H.150.  
(Added to NRS by 1995, 842; A 1997, 349; 2003, 1339; 2005, 598; 2011, 2832)

  
\_\_\_\_\_  
Seller(s) Initials

  
\_\_\_\_\_  
Buyer(s) Initials



**NRS 113.135 Certain sellers to provide copies of certain provisions of NRS and give notice of certain soil reports; initial purchaser entitled to rescind sales agreement in certain circumstances; waiver of right to rescind.**

1. Upon signing a sales agreement with the initial purchaser of residential property that was not occupied by the purchaser for more than 120 days after substantial completion of the construction of the residential property, the seller shall:

(a) Provide to the initial purchaser a copy of NRS 11.202 to 11.206, inclusive, and 40.600 to 40.695, inclusive;

(b) Notify the initial purchaser of any soil report prepared for the residential property or for the subdivision in which the residential property is located; and

(c) If requested in writing by the initial purchaser not later than 5 days after signing the sales agreement, provide to the purchaser without cost each report described in paragraph (b) not later than 5 days after the seller receives the written request.

2. Not later than 20 days after receipt of all reports pursuant to paragraph (c) of subsection 1, the initial purchaser may rescind the sales agreement.

3. The initial purchaser may waive his right to rescind the sales agreement pursuant to subsection 2. Such a waiver is effective only if it is made in a written document that is signed by the purchaser.

(Added to NRS by 1999, 1446)

**NRS 113.140 Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.**

1. NRS 113.130 does not require a seller to disclose a defect in residential property of which he is not aware.

2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.

3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself.

(Added to NRS by 1995, 843; A 2001, 2896)

**NRS 113.150 Remedies for seller's delayed disclosure or nondisclosure of defects in property; waiver.**

1. If a seller or the seller's agent fails to serve a completed disclosure form in accordance with the requirements of NRS 113.130, the purchaser may, at any time before the conveyance of the property to the purchaser, rescind the agreement to purchase the property without any penalties.

2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent informs the purchaser or the purchaser's agent, through the disclosure form or another written notice, of a defect in the property of which the cost of repair or replacement was not limited by provisions in the agreement to purchase the property, the purchaser may:

(a) Rescind the agreement to purchase the property at any time before the conveyance of the property to the purchaser; or

(b) Close escrow and accept the property with the defect as revealed by the seller or the seller's agent without further recourse.

3. Rescission of an agreement pursuant to subsection 2 is effective only if made in writing, notarized and served not later than 4 working days after the date on which the purchaser is informed of the defect:

(a) On the holder of any escrow opened for the conveyance; or

(b) If an escrow has not been opened for the conveyance, on the seller or the seller's agent.

4. Except as otherwise provided in subsection 5, if a seller conveys residential property to a purchaser without complying with the requirements of NRS 113.130 or otherwise providing the purchaser or the purchaser's agent with written notice of all defects in the property of which the seller is aware, and there is a defect in the property of which the seller was aware before the property was conveyed to the purchaser and of which the cost of repair or replacement was not limited by provisions in the agreement to purchase the property, the purchaser is entitled to recover from the seller treble the amount necessary to repair or replace the defective part of the property, together with court costs and reasonable attorney's fees. An action to enforce the provisions of this subsection must be commenced not later than 1 year after the purchaser discovers or reasonably should have discovered the defect or 2 years after the conveyance of the property to the purchaser, whichever occurs later.

5. A purchaser may not recover damages from a seller pursuant to subsection 4 on the basis of an error or omission in the disclosure form that was caused by the seller's reliance upon information provided to the seller by:

(a) An officer or employee of this State or any political subdivision of this State in the ordinary course of his or her duties; or

(b) A contractor, engineer, land surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that profession in this State at the time the information was provided.

6. A purchaser of residential property may waive any of his or her rights under this section. Any such waiver is effective only if it is made in a written document that is signed by the purchaser and notarized.

(Added to NRS by 1995, 843; A 1997, 350, 1797)

The above information provided on pages one (1), two (2) and three (3) of this disclosure form is true and correct to the best of seller's knowledge as of the date set forth on page one (1). **SELLER HAS DUTY TO DISCLOSE TO BUYER AS NEW DEFECTS ARE DISCOVERED AND/OR KNOWN DEFECTS BECOME WORSE (See NRS 113.130(1)(b)).**

Seller(s): [Signature] Date: 10/24/2017

Seller(s): Co-trustee, the Shiraz Trust Date: \_\_\_\_\_

Seller(s): Manager, Lyons Development LLC Date: \_\_\_\_\_

**BUYER MAY WISH TO OBTAIN PROFESSIONAL ADVICE AND INSPECTIONS OF THE PROPERTY TO MORE FULLY DETERMINE THE CONDITION OF THE PROPERTY AND ITS ENVIRONMENTAL STATUS. Buyer(s) has/have read and acknowledge(s) receipt of a copy of this Seller's Real Property Disclosure Form and copy of NRS Chapter 113.100-160, inclusive, attached hereto as pages four (4) and five (5).**

Buyer(s): Joseph Folino Date: 10/25/2017

Buyer(s): Nicole Folino Date: 10/25/2017

## **EXHIBIT 3**



10777 W. Twain Avenue, Suite 300  
Las Vegas, Nevada 89135  
Phone: 702-869-8801  
www.blacklobello.law

## INVOICE

Invoice # 133832  
Date: 01/31/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

Date	Timekeeper	Description	Hours	Rate	Total
01/04/2018	TRB	INITIAL CONFERENCE WITH NICOLE FOLINO RE: QUEENS RIDGE PROPERTY	0.30	\$0.00	\$0.00
01/22/2018	TRB	RESEARCH RE: DIMINUTION IN VALUE; VIEW CASE	0.40	\$400.00	\$160.00
01/25/2018	TRB	REVIEW NRS 113; PREPARE MEMORANDUM FOR CLIENT MEETING; MEETING WITH CLIENT	1.40	\$400.00	\$560.00
01/31/2018	SMW	REVIEW DEED; RESEARCH RE SELLER; PREPARE PRESERVATION LETTERS; CONFER WITH ATTORNEY BLACK RE INSPECTION; LEFT VOICEMAIL AND E-CORRESPONDENCE WITH CLIENT RE ROOF INSPECTION; UPDATE FILE RE SAME	1.10	\$275.00	\$302.50

Time Keeper	Hours	Rate	Total
Tisha Black	1.8	\$400.00	\$720.00
Tisha Black	0.3	\$0.00	\$0.00
Shannon M. Wilson	1.1	\$275.00	\$302.50
Subtotal			\$1,022.50
Total			\$1,022.50
Payment (02/09/2018)			-\$1,022.50
Balance Owing			\$0.00

JA002126



**Matter Financial Summary**

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,022.50	) - ( \$1,022.50	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

**INVOICES ARE DUE UPON RECEIPT.**

Please make all amounts payable to: **Black & LoBello**. Please visit <https://www.blacklobello.law/client-resources/make-a-payment/> to pay via credit card or ACH online. (A processing fee of up to 3% will appear on your next bill for any payments or advanced deposits made with Credit Card beginning January 1, 2019).

If you have any questions regarding this invoice, please reply to this email or reach out to your attorney. **All billing concerns must be addressed within 30 days of receipt or they will be deemed correct.**

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Thank you for allowing Black & LoBello to be of service.



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Las Vegas, Nevada 89135  
Phone: 702-869-8801  
www.blacklobello.law

## INVOICE

Invoice # 135527  
Date: 02/28/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
02/01/2018	TEK	REVIEW DOCS	0.60	\$350.00	\$210.00
02/01/2018	TEK	REVIEW AND DISCUSS MATTER REGARDING PIPE ISSUE WITH PUCHASED HOUSE WITH TISHA	0.50	\$350.00	\$175.00
02/01/2018	SMW	REVIEW AND REPLY TO E-CORRESPONDENCE RE INSPECTION	0.20	\$275.00	\$55.00
02/01/2018	TRB	FINALIZE PRESERVATION LETTERS TO PARTIES TO PROPERTY SALE	0.50	\$400.00	\$200.00
02/06/2018	TRB	DRAFT PRESERVATION LETTERS TO SHER, RAKEMAN, SWANSON, AND REPIPE	0.80	\$400.00	\$320.00
02/08/2018	SMW	RECEIVE AND REPLY TO E-CORRESPONDENCE OF CLIENT RE INSPECTION STATUS	0.20	\$275.00	\$55.00
02/20/2018	SMW	CHECK FILE RE STATUS	0.20	\$275.00	\$55.00
02/20/2018	TRB	MEETING WITH CLIENT; AMEND DRAFT OF DEMAND; PREPARE AND FORWARD PRESERVATION TO UPONOR	1.40	\$400.00	\$560.00
Services Subtotal					\$1,630.00

### Expenses

Date	Quantity	Description	Rate	Total
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JA002128

02/07/2018	1.00	Postage to Repipe Specialists of Nevada Inc	\$0.47	\$0.47
02/07/2018	1.00	Postage to Aaron Hawley President - Rakeman Plumbing	\$0.47	\$0.47
02/07/2018	1.00	Postage to Mr. Ivan Sher/Ms. Kelly Contenta	\$0.47	\$0.47
02/07/2018	1.00	Postage to Lyons Development LLC	\$0.47	\$0.47
02/07/2018	1.00	Postage to Repipe Specialist of Nevada Inc	\$0.47	\$0.47
02/07/2018	1.00	Copies (15)	\$4.50	\$4.50
02/20/2018	1.00	Copies	\$7.50	\$7.50
02/21/2018	1.00	Postage to Uponor, Inc.	\$0.47	\$0.47
<b>Expenses Subtotal</b>			<b>\$14.82</b>	

Time Keeper	Hours	Rate	Total
Tisha Black	2.7	\$400.00	\$1,080.00
Todd Kennedy	1.1	\$350.00	\$385.00
Shannon M. Wilson	0.6	\$275.00	\$165.00
<b>Subtotal</b>			<b>\$1,644.82</b>
<b>Total</b>			<b>\$1,644.82</b>
<b>Payment (04/12/2018)</b>			<b>-\$1,644.82</b>
<b>Balance Owing</b>			<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,644.82	) - ( \$1,644.82	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

### INVOICES ARE DUE UPON RECEIPT.

Please make all amounts payable to: **Black & LoBello**. Please visit <https://www.blacklobello.law/client-resources/make-a-payment/> to pay via credit card or ACH online. (A processing fee of up to 3% will appear on your next bill for any payments or advanced deposits made with Credit Card beginning January 1, 2019).

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Payment is due upon receipt.

**Thank you for allowing Black & LoBello to be of service.**





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Las Vegas, Nevada 89135  
Phone: 702-869-8801  
www.blacklobello.law

## INVOICE

Invoice # 137226  
Date: 03/31/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
03/13/2018	SMW	REVIEW E-CORRESPONDENCE RE DEMAND LETTER; CHECK FILE STATUS; UPDATE FILE RE STATUS	0.30	\$275.00	\$82.50
03/13/2018	TRB	[NO CHARGE] TEXT RE: TIMING OF DEMAND LETTER	0.30	\$0.00	\$0.00
03/14/2018	SMW	REVIEW AND REVISE DEMAND LETTER PER ATTORNEY BLACK; CONFER WITH ATTORNEY BLACK RE SAME	0.50	\$275.00	\$137.50
03/14/2018	TRB	DEMAND CORRESPONDENCE; TEXTS AND EMAILS WITH CLIENT RE: PROPER ADDRESS FOR RECIPIENT	0.40	\$400.00	\$160.00
03/15/2018	TRB	DRAFT AND FORWARD DEMAND LETTER TO CLIENT FOR APPROVAL; REVISE AS REQUESTED AND FORWARD	1.10	\$400.00	\$440.00
03/26/2018	TRB	RECEIVE AND REVIEW CORRESPONDENCE FROM ATTORNEY YOUNG; FORWARD TO CLIENT	0.30	\$400.00	\$120.00
03/28/2018	JRG	RECEIVE AND REVIEW MARCH 21, 2018 LETTER FROM COUNSEL FOR DR SWANSON, CHRIS YOUNG; COMPARE TO OUR DEMAND DATED MARCH 15, 2018 TO PREPARE RESPONSE; PREPARE DRAFT OF RESPONSE; REVIEW OF FILE FOR EXHIBITS TO ATTACH TO RESPONSE LETTER (UPONOR INVOICE AND PAYMENT CONFIRMATION DATED MAY AND JUNE OF 2017) PRIOR TO SRPD DATED OCTOBER 2017	1.00	\$350.00	\$350.00
03/30/2018	SMW	REVIEW E-CORRESPONDENCE OF ATTORNEY GRAF RE RESPONSE TO CHRIS YOUNG CORRESPONDENCE	0.20	\$275.00	\$55.00
Services Subtotal					<b>\$1,345.00</b>

JA002131

**Expenses**

Date	Quantity	Description	Rate	Total
03/14/2018	1.00	Legal Research - Westlaw (JRG)	\$18.35	\$18.35
03/14/2018	1.00	Copies	\$9.00	\$9.00
03/15/2018	1.00	Copies	\$7.20	\$7.20
03/15/2018	1.00	FedEx to Todd Swanson	\$61.44	\$61.44
03/16/2018	1.00	Postage to Todd Swanson (certified)	\$6.88	\$6.88
<b>Expenses Subtotal</b>				<b>\$102.87</b>

Time Keeper	Hours	Rate	Total
Tisha Black	1.8	\$400.00	\$720.00
Tisha Black	0.3	\$0.00	\$0.00
Rusty Graf	1.0	\$350.00	\$350.00
Shannon M. Wilson	1.0	\$275.00	\$275.00
<b>Subtotal</b>			<b>\$1,447.87</b>
<b>Total</b>			<b>\$1,447.87</b>
<b>Payment (04/12/2018)</b>			<b>-\$1,447.87</b>
<b>Balance Owing</b>			<b>\$0.00</b>

**Matter Financial Summary**

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,447.87	) - ( \$1,447.87	= <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 138753  
Date: 04/30/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

Date	Attorney	Description	Hours	Rate	Total
04/04/2018	TRB	REVISE AND FORWARD CORRESPONDENCE TO OPPOSING COUNSEL RE: PRESERVATION CORRESPONDENCE AND NRS 113; FORWARD TO CLIENT	0.30	\$400.00	\$120.00
04/24/2018	SMW	REVIEW FILE RE STATUS OF RESPONSE TO DEMAND LETTER	0.20	\$275.00	\$55.00
04/24/2018	TRB	TELEPHONE CALL WITH IVAN SHER RE: STATUS	0.20	\$400.00	\$80.00
04/25/2018	JRG	TELEPHONE CONVERSATION WITH CHRIS YOUNG, ATTORNEY FOR DR SWANSON ABOUT DEMAND AND POSSIBLE MEDIATION; PREPARE EMAIL TO TISHA BLACK REGARDING SAME	0.40	\$350.00	\$140.00
04/26/2018	TRB	PREPARE AND FORWARD STATUS LETTER TO CLIENT	0.30	\$400.00	\$120.00
04/27/2018	JRG	RECEIVE AND REVIEW EMAIL WITH RESPONSE TO CLIENT'S INQUIRY ABOUT MEDIATION; REVIEW OF SALE CONTRACT TO SEE IF MEDIATION OR ARBITRATION REQUIRED; PREPARE AND SEND RESPONSE TO CLIENT ABOUT TELEPHONE CONFERENCE FOR NEXT WEEK	0.40	\$350.00	\$140.00
04/30/2018	JRG	TELEPHONE CONVERSATION WITH NICOLE FOLINO ABOUT STRATEGY AND HOW TO PROCEED WITH MEDIATION VERSUS LITIGATION	0.50	\$350.00	\$175.00
04/30/2018	TRB	BRIEF CONFERENCE	0.20	\$0.00	\$0.00

Time Keeper	Hours	Rate	Total
Tisha Black	0.8	\$400.00	\$320.00

JA002134



Tisha Black	0.2	\$0.00	\$0.00
Rusty Graf	1.3	\$350.00	\$455.00
Shannon M. Wilson	0.2	\$275.00	\$55.00
		<b>Subtotal</b>	<b>\$830.00</b>
		<b>Total</b>	<b>\$830.00</b>
		<b>Payment (05/11/2018)</b>	<b>-\$830.00</b>
		<b>Balance Owning</b>	<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$830.00	) - ( \$830.00	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18139502  
Date: 05/31/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
05/04/2018	TRB	BRIEF CONFERENCE WITH ATTORNEY GRAF RE: STATUS	0.20	\$400.00	\$80.00
05/08/2018	TRB	REVIEW MEDIATION V. TRIAL CORRESPONDENCE AND AMEND (NO CHARGE)	0.20	\$0.00	\$0.00
05/11/2018	JRG	MEETING WITH NICOLE FOLINO AND TELEPHONIC MEETING WITH JOE FOLINO REGARDING ESTIMATE FOR LITIGATION AND OTHER TASKS ASSIGNED; TELEPHONE MESSAGE LEFT FOR REALTOR	1.00	\$350.00	\$350.00
05/16/2018	JRG	RECEIVE AND REVIEW EMAILS FROM CLIENT ABOUT CONTACTING THEIR REALTOR; TELEPHONE CONVERSATION STEVE KITNIC ABOUT CONTACT THAT THE REALTOR HAD WITH THE SELLER OR SELLER'S AGENT; PREPARE AND SEND EMAIL TO CLIENT ABOUT CONTENT OF CONVERSATION	0.60	\$350.00	\$210.00
05/17/2018	JRG	RECEIVE AND REVIEW RESPONSIVE EMAILS FROM STEVE KITNIC ABOUT A CALL COMING FROM OUR REALTOR; TELEPHONE CONVERSATION WITH ASHLEY LAZOSKY; PREPARE AND SEND EMAIL TO CLIENT WITH STATUS OF CONVERSATION WITH REALTOR	0.60	\$350.00	\$210.00
05/23/2018	JRG	RECEIVE AND REVIEW EMAIL FROM CLIENT ABOUT STATUS; PREPARE AND SEND RESPONSE TO STATUS AS TO SAME; MAKE PRELIMINARY CALL TO JAMS FOR LIST OF AVAILABLE MEDIATORS IN THE MONTH OF JUNE TO SCHEDULE MEDIATION	0.40	\$350.00	\$140.00
05/23/2018	TRB	STATUS CHECK WITH CLIENT; CONFERENCE WITH ATTORNEY GRAF (NO CHARGE)	0.30	\$0.00	\$0.00

JA002136

Services Subtotal \$990.00

**Expenses**

Date	Description	Rate	Total
05/07/2018	Copies	\$1.50	\$1.50
05/08/2018	Copies	\$4.50	\$4.50
05/08/2018	Copies	\$39.90	\$39.90
05/11/2018	Copies	\$6.60	\$6.60
Expenses Subtotal			\$52.50

Time Keeper	Hours	Rate	Total
Tisha Black	0.2	\$400.00	\$80.00
Tisha Black	0.5	\$0.00	\$0.00
Rusty Graf	2.6	\$350.00	\$910.00
Subtotal			\$1,042.50
Total			\$1,042.50
Payment (06/18/2018)			-\$1,042.50
Balance Owing			\$0.00

**Matter Financial Summary**

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,042.50	) - ( \$1,042.50	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18141467  
Date: 06/30/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
06/04/2018	JRG	RECEIVE AND REVIEW EMAIL FROM CLIENT ABOUT A SECOND LEAK SINCE THE RE-PLUMB; PREPARE AND SEND RESPONSE TO SAME	0.30	\$350.00	\$105.00
06/04/2018	JRG	LEAVE VOICEMAIL FOR CHRIS YOUNG ON SETTING OF MEDIATION AND MEDIATOR; PREPARE AND SEND EMAIL ABOUT SAME	0.20	\$350.00	\$70.00
06/04/2018	TRB	RECEIVE, REVIEW AND RESPOND TO E-CORRESPONDENCE FROM CLIENT [NO CHARGE]	0.20	\$0.00	\$0.00
06/05/2018	JRG	PREPARE AND SEND EMAIL TO CHRIS YOUNG CONFIRMING TELEPHONE CONVERSATION WITH HIM ABOUT MEDIATORS AND TIMING OF MEDIATION; CALL WITH HIM REGARDING SAME	0.40	\$350.00	\$140.00
06/05/2018	JRG	RECEIVE AND REVIEW EMAILS FROM CLIENT ABOUT NEW LEAK AND CONTACT WITH UPONOR	0.20	\$350.00	\$70.00
06/06/2018	JRG	RECEIVE AND REVIEW MULTIPLE EMAILS ABOUT NEW LEAK AND HAVING A CALL TODAY;	0.30	\$350.00	\$105.00
06/06/2018	JRG	RECEIVE AND REVIEW EMAIL RESPONSE FROM CHRIS YOUNG ABOUT LIST OF PROPOSED MEDIATORS	0.20	\$350.00	\$70.00
06/06/2018	JRG	TELEPHONE CONVERSATION WITH CLIENTS ABOUT STATUS AND RECENT ISSUES	0.40	\$350.00	\$140.00
06/12/2018	JRG	RECEIVE AND REVIEW EMAIL CONFIRMING THE USE OF FLOYD HALE AS MEDIATOR; TELEPHONE CONVERSATION WITH FLOYD HALE'S OFFICE ABOUT USE AS MEDIATOR; RECEIVE AND REVIEW	0.60	\$350.00	\$210.00

JA002139

EMAIL FROM CLIENT REQUESTING STATUS; PREPARE AND SEND  
RESPONSE WITH COPY OF EMAIL SENT TO CHRIS YOUNG ABOUT  
DATES AND COSTS OF MEDIATOR

06/27/2018	JRG	PREPARE AND SEND EMAILS ABOUT SCHEDULING MEDIATION TO CHRIS YOUNG; RECEIVE AND REVIEW RESPONSE; CONTACT FLOYD HALE'S OFFICE TO REQUEST AGREEMENT BE PREPARED AND CIRCULATED	0.40	\$350.00	\$140.00
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**Services Subtotal** **\$1,050.00**

### Expenses

Date	Quantity	Description	Rate	Total
06/05/2018	1.00	Postage to Christopher Young	\$0.47	\$0.47
06/05/2018	1.00	Copies	\$0.60	\$0.60
06/12/2018	1.00	Copies	\$3.30	\$3.30
06/14/2018	1.00	Copies	\$0.60	\$0.60
06/27/2018	1.00	Copies	\$0.60	\$0.60
<b>Expenses Subtotal</b>				<b>\$5.57</b>

Time Keeper	Hours	Rate	Total
Tisha Black	0.2	\$0.00	\$0.00
Rusty Graf	3.0	\$350.00	\$1,050.00
<b>Subtotal</b>			<b>\$1,055.57</b>
<b>Total</b>			<b>\$1,055.57</b>
<b>Payment (07/19/2018)</b>			<b>-\$1,055.57</b>
<b>Balance Owing</b>			<b>\$0.00</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18152427  
Date: 07/31/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
07/17/2018	JRG	RECEIVE AND REVIEW FORMAL CONFIRMATION OF MEDIATION AUGUST 17; PREPARE AND SEND CORRESPONDENCE TO CLIENT ABOUT SAME	0.40	\$350.00	\$140.00
07/19/2018	TRB	CONFERENCE RE: MEDIATION AND MEDIATION BRIEF	0.20	\$400.00	\$80.00
Services Subtotal					\$220.00

### Expenses

Date	Description	Rate	Total
07/09/2018	Copies	\$2.10	\$2.10
07/10/2018	Copies	\$0.30	\$0.30
07/11/2018	Copies	\$1.50	\$1.50
07/17/2018	Copies	\$2.40	\$2.40
07/18/2018	Copies	\$0.30	\$0.30
07/24/2018	Copies	\$0.60	\$0.60
07/25/2018	Postage to JAMS	\$0.47	\$0.47
Expenses Subtotal			\$7.67

JA002142



Time Keeper	Hours	Rate	Total
Tisha Black	0.2	\$400.00	\$80.00
Rusty Graf	0.4	\$350.00	\$140.00
		<b>Subtotal</b>	<b>\$227.67</b>
		<b>Total</b>	<b>\$227.67</b>
		<b>Payment (08/14/2018)</b>	<b>-\$227.67</b>
		<b>Balance Owing</b>	<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$227.67	) - ( \$227.67	= <b>\$44,706.99</b>

## Client Trust Account (PP)

Date	Type	Description	Matter	Receipts	Payments	Balance
01/25/2018	Credit/ Debit Card	Advanced Deposit	6239-0001		\$2,500.00	\$2,500.00
06/14/2018	Credit Card	Payment	6239-0001		\$1,042.50	\$3,542.50
06/18/2018		Payment for invoice #18139502	6239-0001	\$1,042.50		\$2,500.00
07/17/2018	Check	JAMS: invoice 0004458196-260, Mediation	6239-0001	\$2,035.00		\$465.00
07/17/2018	Credit Card	Payment	6239-0001		\$1,130.00	\$1,595.00
07/19/2018		Payment for invoice #18141467	6239-0001	\$1,055.57		\$539.43
08/10/2018	Credit Card	Payment	6239-0001		\$227.67	\$767.10
08/14/2018		Payment for invoice #18152427	6239-0001	\$227.67		\$539.43
10/22/2018	Credit Card	Payment for 6239-0001 and 6239-0002	6239-0001		\$9,044.42	\$9,583.85
10/24/2018		Payment for invoice #18154848	6239-0001	\$7,154.40		\$2,429.45
10/24/2018		Payment for invoice #18154848	6239-0001	\$112.90		\$2,316.55
10/24/2018		Payment for invoice #18156329	6239-0001	\$1,374.30		\$942.25
11/08/2018	Credit Card	Payment	6239-0001		\$1,674.40	\$2,616.65

11/12/2018	Payment for invoice #18157950	6239-0001	\$1,198.60	\$1,418.05
05/27/2019	Bill Nelson & Associates: Certified Court Reporters	6239-0001	\$75.00	\$1,343.05
12/11/2019	Coronado Legal Services, LLC: Invoice #CRN-2019001098, Service	6239-0001	\$70.00	\$1,273.05
12/31/2019	NOW! Services: Invoice #31684; Service, The Summerlin Association, COR	6239-0001	\$45.00	\$1,228.05
12/31/2019	NOW! Services: Invoice #31704; Service Frontsteps, out of state	6239-0001	\$105.00	\$1,123.05
12/31/2019	NOW! Services: Invoice #31683; Service Lyons Development	6239-0001	\$45.00	\$1,078.05
12/31/2019	NOW! Services: Invoice #31685; Service The Ivan Sher Group	6239-0001	\$45.00	\$1,033.05
12/31/2019	NOW! Services: Invoice #31903; Service Repipe Specialists, Inc	6239-0001	\$105.00	\$928.05
01/07/2020	NOW! Services: Invoice #31955; Service Americana, LLC dba Berkshire	6239-0001	\$45.00	\$883.05
02/06/2020	Trust Transfer (PP) - Payment for invoice #181483083	6239-0001	\$4.33	\$878.72
Client Trust Account (PP) Balance				\$0.00

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## INVOICE

Invoice # 18154848  
Date: 08/31/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
08/03/2018	JRG	CONTINUE REVIEW OF FILE TO PREPARE MEDIATION BRIEF; CONTINUE TO DICTATE MEDIATION BRIEF	2.20	\$350.00	\$770.00
08/07/2018	JRG	FINISH PREPARING THE MEDIATION BRIEF; REVIEW OF FILE; RESEARCH AS TO DAMAGES AND DEMAND PREVIOUSLY MADE; FINALIZE AND HAVE SENT TO MEDIATOR	1.20	\$350.00	\$420.00
08/07/2018	SMW	REVIEW AND REVISE MEDIATION SUBMISSION	0.40	\$275.00	\$110.00
08/08/2018	JRG	REVIEW OF FILE FOR MATERIALS TO ADD TO MEDIATION BRIEF FOR DIMINUTION IN VALUE; TELEPHONE CONVERSATION WITH APPRAISER, RICHARD CARLSON; PREPARE AND SEND EMAIL TO CLIENT LOOKING FOR APPRAISAL; REVIEW OF APPRAISAL AS RECEIVED FROM CLIENT; TELEPHONE CONVERSATION WITH NEW APPRAISER CRAIG JUI	1.00	\$350.00	\$350.00
08/08/2018	JRG	LEGAL RESEARCH ABOUT DIMINUTION IN VALUE AND SEPARATE DUTY CREATED BY STATUTE (NRS 113)	0.80	\$350.00	\$280.00
08/09/2018	TRB	BRIEF DISCUSSION RE: EXPERT AND DAMAGE STRATEGY	0.20	\$400.00	\$80.00
08/10/2018	JRG	RECEIVE AND REVIEW EMAIL FROM CLIENT ABOUT NEED FOR THE APPRAISER; PREPARE AND SEND RESPONSE; PREPARE AND SEND EMAIL TO APPRAISER TO HOLD OFF	0.30	\$350.00	\$105.00
08/14/2018	TRB	[NO CHARGE] CONFERENCE RE: MEDIATION	0.30	\$400.00	\$120.00
08/16/2018	JRG	MEDIATION PREP WITH CLIENT	0.40	\$350.00	\$140.00

JA002145

08/16/2018	JRG	REVIEW OF FILE IN PREPARATION FOR MEDIATION TOMORROW; REVIEW OF BRIEF FOR SAME; REVIEW OF CLIENT DOCUMENTS FOR SAME	0.50	\$350.00	\$175.00
08/17/2018	JRG	ATTEND AND CONDUCT MEDIATION WITH CLIENTS; MATTER DID NOT SETTLE	6.50	\$350.00	\$2,275.00
08/20/2018	JRG	REVIEW OF FILE TO BEGIN DRAFTING COMPLAINT; PREPARE AND DRAFT COMPLAINT	2.00	\$350.00	\$700.00
08/21/2018	JRG	BEGIN DRAFTING COMPLAINT; REVIEW OF FILE FOR SAME	1.50	\$350.00	\$525.00
08/27/2018	JRG	REVIEW AND REVISE DRAFT OF COMPLAINT;	1.40	\$350.00	\$490.00
08/28/2018	JRG	REVIEW AND REVISE COMPLAINT FROM CALL WITH CLIENT TODAY	1.00	\$350.00	\$350.00
08/28/2018	JRG	DISCUSSION WITH CLIENT ABOUT COMPLAINT AND NEGOTIATIONS; PREPARE AND SEND EMAIL TO FLOYD HALE ABOUT SAME	0.50	\$350.00	\$175.00
				<b>Services Subtotal</b>	<b>\$7,065.00</b>

**Expenses**

Date	Quantity	Description	Rate	Total
08/01/2018	1.00	Copies on 7/31/18	\$1.80	\$1.80
08/06/2018	1.00	Copies	\$12.60	\$12.60
08/07/2018	1.00	Copies	\$64.20	\$64.20
08/08/2018	1.00	Copies	\$3.60	\$3.60
08/28/2018	1.00	Copies	\$3.60	\$3.60
08/29/2018	1.00	Copies	\$3.60	\$3.60
Expenses Subtotal				\$89.40

Time Keeper	Hours	Rate	Total
Tisha Black	0.5	\$400.00	\$200.00
Rusty Graf	19.3	\$350.00	\$6,755.00
Shannon M. Wilson	0.4	\$275.00	\$110.00
		<b>Subtotal</b>	<b>\$7,154.40</b>

**Interest**

Type	Date	Description	Total
Interest	10/02/2018	Interest on overdue invoice #18154848	\$112.90
Interest Subtotal			\$112.90



Subtotal	\$7,154.40
Interest	\$112.90
Total	\$7,267.30
Payment (10/24/2018)	-\$7,154.40
Payment (10/24/2018)	-\$112.90
Balance Owing	\$0.00

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18156329  
Date: 09/30/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
09/04/2018	JRG	REVIEW AND REVISE DRAFT OF COMPLAINT	0.80	\$350.00	\$280.00
09/05/2018	JRG	TELEPHONE CONVERSATION WITH FLOYD HALE ABOUT STATUS OF NEGOTIATIONS AND OUR SUGGESTED STRATEGY GOING FORWARD	0.30	\$350.00	\$105.00
09/06/2018	JRG	RECEIVE AND REVIEW EMAIL DIRECTION FROM CLIENT; PREPARE AND SEND RESPONSE WITH UPDATE AS TO CONVERSATION WITH FLOYD HALE	0.20	\$350.00	\$70.00
09/06/2018	JRG	PREPARE FINAL REVISIONS TO COMPLAINT; DICTATE CHANGES AND ADDITIONS TO SAME, INCLUDING ADDITIONAL PARTIES AND THE FACTUAL ALLEGATIONS	1.20	\$350.00	\$420.00
09/11/2018	JRG	RECEIVE AND REVIEW EMAILS FROM CLIENT ABOUT STATUS; PREPARE AND SEND EMAILS TO FLOYD HALE ABOUT THE SAME; LEFT VOICEMAIL FOR FLOYD HALE ALSO	0.40	\$350.00	\$140.00
09/24/2018	JRG	TELEPHONE CONVERSATION WITH CHRIS YONG ABOUT NEGOTIATIONS	0.50	\$350.00	\$175.00
09/28/2018	JRG	CALL WITH CHRIS YONG ABOUT SETTLEMENT NEGOTIATIONS	0.50	\$350.00	\$175.00
Services Subtotal					\$1,365.00

### Expenses

JA002148

Date	Description	Rate	Total
09/10/2018	Copies	\$9.30	\$9.30
Expenses Subtotal			\$9.30

Time Keeper	Hours	Rate	Total
Rusty Graf	3.9	\$350.00	\$1,365.00
Subtotal			\$1,374.30
Total			\$1,374.30
Payment (10/24/2018)			-\$1,374.30
Balance Owing			\$0.00

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,374.30	) - ( \$1,374.30	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
Total Account Balance	\$0.00

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## INVOICE

Invoice # 18157950  
Date: 10/31/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
10/01/2018	JRG	CALL WITH FLOYD HALE ABOUT STATUS OF NEGOTIATIONS	0.60	\$350.00	\$210.00
10/08/2018	JRG	RECEIVE AND REVIEW EMAIL FROM CLIENT; TELEPHONE CONVERSATION WITH CHRIS YOUNG; TELEPHONE CONVERSATION WITH CLIENT AND DISCUSS FILING THE COMPLAINT	0.50	\$350.00	\$175.00
10/08/2018	JRG	REVIEW OF COMPLAINT TO PUT IN FINAL AND FILE TOMORROW	0.60	\$350.00	\$210.00
10/08/2018	SK	REVIEW AND REVISE COMPLAINT; DRAFT SUMMONSES; DRAFT INITIAL APPEARANCE FEE DISCLOSURE.	1.50	\$175.00	\$262.50
10/09/2018	SMW	REVIEW AND REVISE COMPLAINT; ENSURE PROPER EXHIBITS FOR FILING	0.80	\$275.00	\$220.00
10/10/2018	SK	REVIEW AND REVISE COMPLAINT.	0.30	\$175.00	\$52.50
Services Subtotal					<b>\$1,130.00</b>

### Expenses

Date	Quantity	Description	Rate	Total
10/08/2018	1.00	Copies	\$3.90	\$3.90
10/11/2018	1.00	Postage to Joe & Nicole Folino	\$6.70	\$6.70

JA002151

10/11/2018	1.00	Copies	\$23.10	\$23.10
10/12/2018	1.00	Court Filing Fee	\$3.50	\$3.50
10/12/2018	1.00	Copies	\$27.60	\$27.60
10/18/2018	1.00	Copies	\$0.30	\$0.30
10/23/2018	1.00	Court Filing Fee	\$3.50	\$3.50
			<b>Expenses Subtotal</b>	<b>\$68.60</b>

Time Keeper	Hours	Rate	Total
Rusly Graf	1.7	\$350.00	\$595.00
Shannon Kearsley	1.8	\$175.00	\$315.00
Shannon M. Wilson	0.8	\$275.00	\$220.00
Subtotal			\$1,198.60
Total			\$1,198.60
Payment (11/12/2018)			-\$1,198.60
Balance Owning			\$0.00

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,198.60	) - ( \$1,198.60	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18159689  
Date: 11/30/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
11/06/2018	JRG	RECEIVE AND REVIEW ODDLY WORDED LETTER FROM FLOYD HALE; TELEPHONE MESSAGE LEFT FOR HIM TO DISCUSS	0.30	\$350.00	\$105.00
11/07/2018	JRG	TELEPHONE CONVERSATION WITH CLIENT ABOUT FLOYD HALE EMAIL AND SETTLEMENT NUMBERS	0.30	\$350.00	\$105.00
11/07/2018	JRG	PREPARE AND SEND CORRESPONDENCE ABOUT ACCEPTING SERVICE OF PROCESS; PREPARE TO BE SENT ACCEPTANCE OF SERVICE OF PROCESS FOR TODD SWANSON	0.30	\$350.00	\$105.00
11/25/2018	JRG	REVIEW OF FILE FOR SERVICE ON DEFENDANTS; FOLLOW UP WITH EMAIL TO SERVICE COMPANY ON SAME	0.30	\$350.00	\$105.00
Services Subtotal					\$420.00

### Expenses

Date	Description	Rate	Total
11/08/2018	Copies	\$0.60	\$0.60
Expenses Subtotal			\$0.60

Time Keeper	Hours	Rate	Total
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JA002154



Rusty Graf	1.2	\$350.00	\$420.00
		<b>Subtotal</b>	<b>\$420.60</b>
		<b>Total</b>	<b>\$420.60</b>
		<b>Payment (12/07/2018)</b>	<b>-\$420.60</b>
		<b>Balance Owing</b>	<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$420.60	) - ( \$420.60	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18161798  
Date: 12/31/2018

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
12/05/2018	JRG	REVIEW OF FILE FOR SERVICE OF COMPLAINT AFFIDAVITS NECESSARY TO FILE MOTION TO SERVE VIA PUBLICATION; PREPARE LETTER TO CHRIS YOUNG ABOUT ACCEPTING SERVICE AND LEAVE MESSAGE FOR HIM REGARDING SAME	0.40	\$350.00	\$140.00
12/18/2018	JRG	REVIEW OF FILE TO DETERMINE SERVICE OF COMPLAINT AND TO DRAFT MOTION TO SERVE VIA PUBLICATION AND ENLARGE TIME TO SERVE; PREPARE AND SEND FOLLOW UP LETTER TO CHRIS YOUNG	0.40	\$350.00	\$140.00
12/19/2018	SMW	UPDATE FILE RE STATUS OF MOTION TO EXTEND SERVICE FOR SWANSON	0.20	\$275.00	\$55.00
12/20/2018	JRG	TELEPHONE CONVERSATION WITH CHRIS YOUNG ABOUT NEGOTIATIONS, SERVICE ON DR SWANSON AND OPEN ISSUES ACCEPTANCE OF SERVICE.	0.50	\$350.00	\$175.00
Services Subtotal					\$510.00

### Expenses

Date	Description	Rate	Total
10/31/2018	JAMS: Invoice #1260004936 Mediation Expense, ChkNo. 164.75	\$164.75	\$164.75
12/10/2018	JAMS: Invoice #1260004936 Mediation Expense, ChkNo. 1632	\$49.50	\$49.50

JA002156

Expenses Subtotal **\$214.25**

Time Keeper	Hours	Rate	Total
Rusty Graf	1.3	\$350.00	\$455.00
Shannon M. Wilson	0.2	\$275.00	\$55.00
		<b>Subtotal</b>	<b>\$724.25</b>
		<b>Total</b>	<b>\$724.25</b>
		<b>Payment (01/18/2019)</b>	<b>-\$724.25</b>
		<b>Balance Owning</b>	<b>\$0.00</b>

**Matter Financial Summary**

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$724.25	) - ( \$724.25	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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JA002157







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## INVOICE

Invoice # 18163673  
Date: 01/31/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
01/04/2019	SMW	CHECK STATUS ON SERVICE OF SWANSON AND SHIRAZ TRUST; CHECK STATUS RE MOTION TO ENLARGE AND SERVE BY PUBLICATION; EMAIL ATTORNEY GRAF RE SAME	0.30	\$275.00	\$82.50
01/04/2019	SMW	CALENDAR LITIGATION DEADLINES [NO CHARGE]	0.20	\$0.00	\$0.00
01/07/2019	JRG	TELEPHONE CONVERSATION WITH CHRIS YOUNG CONFIRMING ACCEPTANCE OF SERVICE	0.40	\$350.00	\$140.00
01/10/2019	JRG	RECEIVE AND REVIEW EMAIL FROM CLIENT; PREPARE AND SEND RESPONSE AND INVITE FOR CALL TO TAKE PLACE 1/21/19	0.30	\$350.00	\$105.00
01/10/2019	JRG	RECEIVE AND REVIEW SIGNED ACCEPTANCE OF SERVICE FOR SWANSON AND SWANSON AS TRUSTEE	0.20	\$350.00	\$70.00
01/21/2019	JRG	CALL WITH CLIENTS TO DISCUSS STATUS AND TIMELINE FROM HERE TO TRIAL	0.30	\$350.00	\$105.00
01/23/2019	JRG	RECEIVE AND REVIEW LETTER CONFIRMING ADDITIONAL EXTENSION TO FILE ANSWERS	0.20	\$350.00	\$70.00
01/31/2019	JRG	RECEIVE AND REVIEW MOTION TO DISMISS OR FOR MORE DEFINITE STATEMENT; FORWARD TO CLIENTS FOR REVIEW AND FURTHER DISCUSSION	0.80	\$350.00	\$280.00
02/01/2019	JRG	RESEARCH REGARDING THE CASES CITED FOR THE MORE DEFINITE STATEMENT PART OF THE MOTION; RESEARCH REGARDING POTENTIAL COUNTER MOTION TO AMEND COMPLAINT	0.80	\$350.00	\$280.00

JA002159

Services Subtotal      **\$1,132.50**

### Expenses

Date	Description	Rate	Total
01/02/2019	NOW! Services: Invoice #24188 Service: Summons, Complaint, Todd Swanson	\$75.00	\$75.00
01/03/2019	Court Filing Fee	\$3.50	\$3.50
01/03/2019	Copies	\$0.60	\$0.60
01/04/2019	Copies	\$23.10	\$23.10
01/08/2019	RUNNER SERVICE: Drop-off/Hand Deliver, Two Summons, Two copies of complaint, two copies of Acceptance of Service	\$35.00	\$35.00
01/08/2019	Copies	\$52.20	\$52.20
01/11/2019	Postage to JAMS	\$0.47	\$0.47
01/14/2019	Court Filing Fee	\$3.50	\$3.50
01/31/2019	Copies	\$3.90	\$3.90
Expenses Subtotal			<b>\$197.27</b>

Time Keeper	Hours	Rate	Total
Rusty Graf	3.0	\$350.00	\$1,050.00
Shannon M. Wilson	0.3	\$275.00	\$82.50
Shannon M. Wilson	0.2	\$0.00	\$0.00
		<b>Subtotal</b>	<b>\$1,329.77</b>
		<b>Total</b>	<b>\$1,329.77</b>
		<b>Payment (02/20/2019)</b>	<b>-\$1,329.77</b>
		<b>Balance Owing</b>	<b>\$0.00</b>

### Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,329.77	) - ( \$1,329.77	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18165424  
Date: 02/28/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
02/01/2019	SMW	BRIEF REVIEW OF MOTION TO DISMISS AND MOTION FOR DEFINITE STATEMENT AND MEET WITH ATTORNEY GRAF RE STRATEGY FOR RESPONSE IN PREPARATION OF SAME	0.30	\$275.00	\$82.50
02/04/2019	SMW	BEGIN OPPOSITION TO MOTION TO DISMISS; PERFORM LEGAL RESEARCH RE DECEPTIVE TRADE PRACTICES AND CIVIL RICO CLAIMS	2.50	\$275.00	\$687.50
02/06/2019	JRG	PREPARE PETITION FOR EXEMPTION FROM MANDATORY ARBITRATION PROGRAM	0.60	\$350.00	\$210.00
02/07/2019	SMW	REVIEW AND REVISE OPPOSITION TO MOTION TO DISMISS	2.00	\$275.00	\$550.00
02/11/2019	SMW	REVIEW AND REVISE OPPOSITION RE RICO ACTION AND PERFORM LEGAL RESEARCH RELATED THERETO	0.90	\$275.00	\$247.50
02/11/2019	JRG	REVIEW AND REVISE OPPOSITION TO MOTION TO DISMISS	1.20	\$350.00	\$420.00
02/12/2019	SMW	REVIEW AND REVISE ATTORNEY GRAF'S REVISIONS TO OPPOSITION; REVISE OPPOSITION RE ALTER EGO THEORY AND PERFORM LEGAL RESEARCH RELATED THERETO; REVIEW AND REVISE FIRST AMENDED COMPLAINT	2.00	\$275.00	\$550.00
02/12/2019	JRG	PREPARE AMENDED COMPLAINT WITH ALTER EGO ALLEGED	0.80	\$350.00	\$280.00
02/13/2019	SMW	FINALIZE COMPLAINT AND MOTION TO DISMISS	0.20	\$275.00	\$55.00
Services Subtotal					\$3,082.50

JA002162



**Expenses**

Date	Description	Rate	Total
01/02/2019	NOW! Services, Inc: Invoice #24188 Service: Todd Swanson, 12.19.2018	\$40.00	\$40.00
02/04/2019	Legal Research - Westlaw (SMW)	\$54.34	\$54.34
02/04/2019	Copies	\$3.90	\$3.90
02/05/2019	Copies	\$0.30	\$0.30
02/07/2019	Copies	\$3.90	\$3.90
02/07/2019	Legal Research - Westlaw (SMW)	\$7.18	\$7.18
02/08/2019	Court Filing Fee	\$3.50	\$3.50
02/11/2019	Legal Research - Westlaw (SMW)	\$56.48	\$56.48
02/12/2019	Legal Research - Westlaw (SMW)	\$47.12	\$47.12
02/13/2019	Copies	\$10.20	\$10.20
02/13/2019	Court Filing Fee	\$3.50	\$3.50
<b>Expenses Subtotal</b>			<b>\$230.42</b>

Time Keeper	Hours	Rate	Total
Rusty Graf	2.6	\$350.00	\$910.00
Shannon M. Wilson	7.9	\$275.00	\$2,172.50
<b>Subtotal</b>			<b>\$3,312.92</b>
<b>Total</b>			<b>\$3,312.92</b>
<b>Payment (03/20/2019)</b>			<b>-\$3,312.92</b>
<b>Balance Owing</b>			<b>\$0.00</b>

**Matter Financial Summary**

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$3,312.92	) - ( \$3,312.92	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

INVOICES ARE DUE UPON RECEIPT.

JA002163

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## INVOICE

Invoice # 18167140  
Date: 03/31/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Attorney	Description	Hours	Rate	Total
03/06/2019	JRG	ATTEND HEARING ON TRAFFIC CITATION (NO CHARGE)	1.00	\$0.00	\$0.00
03/18/2019	JRG	MEETING WITH CLIENT S AT THEIR HOME	1.50	\$350.00	\$525.00
03/21/2019	JRG	RECEIVE AND REVIEW EMAIL ABOUT NEW HEARING DATES	0.20	\$350.00	\$70.00
03/21/2019	TRB	STATUS CONFERENCE RE: CONSTRUCTION MATTER	0.40	\$400.00	\$160.00
03/21/2019	SMW	OBTAIN STATUS RE OUTCOME OF CONSTRUCTION INSPECTION; UPDATE FILE RE SAME	0.30	\$275.00	\$82.50
03/28/2019	JRG	RECEIVE AND REVIEW NOTICE OF RESCHEDULING OF HEARING FROM THE COURT	0.20	\$350.00	\$70.00
Services Subtotal					<b>\$907.50</b>

### Expenses

Date	Description	Rate	Total
03/14/2019	Rusty Graf: Douglas Parking LV10 Receipt	\$10.00	\$10.00
03/14/2019	Copies	\$0.60	\$0.60
03/25/2019	Copies	\$7.80	\$7.80
03/29/2019	RUNNER SERVICE: Drop-off/Hand Deliver: Courtesy Copy of Hearing Documents; District Court,	\$20.00	\$20.00

JA002165

03/29/2019	Copies	\$121.30	\$121.30
		<b>Expenses Subtotal</b>	<b>\$159.70</b>

Time Keeper	Hours	Rate	Total
Tisha Black	0.4	\$400.00	\$160.00
Rusty Graf	1.9	\$350.00	\$665.00
Rusty Graf	1.0	\$0.00	\$0.00
Shannon M. Wilson	0.3	\$275.00	\$82.50
<b>Subtotal</b>			<b>\$1,067.20</b>
<b>Total</b>			<b>\$1,067.20</b>
<b>Payment (04/12/2019)</b>			<b>-\$1,067.20</b>
<b>Balance Owning</b>			<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	<b>Total Amount Outstanding</b>
( \$44,706.99	+ \$1,067.20	) - ( \$1,067.20	<b>= \$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18168933  
Date: 04/30/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
04/01/2019	JRG	REVIEW OF FILE AND PLEADINGS FOR MATERIALS TO BE SENT TO THE COURT PER REQUEST OF LAW CLERK	0.50	\$350.00	\$175.00
04/03/2019	JRG	RECEIVE AND REVIEW REPLY TO THE OPPOSITION TO THE MOTION TO DISMISS	0.50	\$350.00	\$175.00
04/03/2019	JRG	CALL WITH DUKE PHELPS ABOUT WHAT HE FOUND IN HIS INSPECTION OF THE PLANS AND THE COO; PREPARE EMAIL TO CLIENTS WITH STATUS	0.40	\$350.00	\$140.00
04/08/2019	JRG	REVIEW OF MATERIALS FOR HEARING ON MOTION TO DISMISS	0.60	\$350.00	\$210.00
04/09/2019	JRG	ATTEND AND ARGUE AT MOTION TO DISMISS AND COUNTER MOTION TO AMEND; COUNTER MOTION GRANTED AND PREPARED ORDER FOR SAME;	1.50	\$350.00	\$525.00
04/09/2019	JRG	PREPARE ORDER GRANTING COUNTER MOTION TO AMEND THE COMPLAINT AND DENYING THE MOTION TO DISMISS	0.50	\$350.00	\$175.00
04/18/2019	JRG	RECEIVE AND REVIEW ORDER SIGNED BY THE COURT; FILE AND PREPARE AND FILE NOTICE OF ENTRY OF SAME; PRINT AND SIGN FINAL OF AMENDED COMPLAINT; HAVE FILED	0.30	\$350.00	\$105.00
Services Subtotal					\$1,505.00

### Expenses

JA002168

Date	Quantity	Description	Rate	Total
04/02/2019	1.00	RUNNER SERVICE: Courtesy Copy: Plaintiffs' Opposition to Defendant's Motion to Dismiss and/or Motion for More Definite Statement; Counter Motion to Amend the Complaint; District Court, eFile	\$25.00	\$25.00
04/02/2019	1.00	Copies	\$7.20	\$7.20
04/09/2019	1.00	Copies	\$22.50	\$22.50
04/10/2019	1.00	Copies	\$6.90	\$6.90
04/11/2019	1.00	RUNNER SERVICE: Leave for Signature: Order on Defendants' Motion to Dismiss and/or Motion For More Definite Statement; Countermotion to Amend Complaint; District Court, eFile	\$25.00	\$25.00
04/11/2019	1.00	Copies	\$0.60	\$0.60
04/12/2019	1.00	RUNNER SERVICE: Leave for Signature: Order on Defendants' Motion to Dismiss and/or Motion For More Definite Statement; Countermotion to Amend the Complaint; District Court, eFile	\$25.00	\$25.00
04/15/2019	1.00	RUNNER SERVICE: Pick-up: Order on Defendants' Motion to Dismiss and/or Motion For More Definite Statement; Countermotion to Amend the Complaint; District Court, eFile	\$25.00	\$25.00
04/18/2019	83.00	Copies	\$0.30	\$24.90
04/18/2019	2.00	Copies	\$0.30	\$0.60
04/18/2019	1.00	Court Filing Fee	\$3.50	\$3.50
04/19/2019	1.00	RUNNER SERVICE: Courtesy Copy: Notice of Entry of Order and First Amended Complaint; District Court,	\$20.00	\$20.00
<b>Expenses Subtotal</b>				<b>\$186.20</b>

Time Keeper	Hours	Rate	Total
Rusty Graf	4.3	\$350.00	\$1,505.00
<b>Subtotal</b>			<b>\$1,691.20</b>
<b>Total</b>			<b>\$1,691.20</b>
<b>Payment (05/13/2019)</b>			<b>-\$1,691.20</b>
<b>Balance Owning</b>			<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,691.20	) - ( \$1,691.20	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00

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Total Account Balance	\$0.00
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## INVOICE

Invoice # 18171040  
Date: 05/31/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
05/20/2019	JRG	RECEIVE AND REVIEW MOTION TO DISMISS THE FIRST AMENDED COMPLAINT; FORWARD TO CLIENT	0.60	\$350.00	\$210.00
05/21/2019	MXL	REVIEWING MOTION TO DISMISS AND OPP TO MOTION TO DISMISS	0.90	\$150.00	\$135.00
05/21/2019	MXL	RESEARCH ON DECEPTIVE TRADE PRACTICES IN REAL ESTATE NV CASE LAW, CIVIL RICO SPECIFICITY, AND UNITY OF INTEREST REQUIREMENT FOR PIERCING CORP VEIL, AND OTHER APPLICABLE ISSUES FOR THE OPPOSITION TO THE MOTION TO DISMISS	1.50	\$150.00	\$225.00
05/21/2019	MXL	REVIEWING MOTION TO DISMISS AND OPPO TO MOTION TO DISMISS	1.20	\$150.00	\$180.00
05/23/2019	MXL	REVIEWING DOCUMENTS AND CORRESPONDENCE FROM FILE & DRAFTING OPPOSITION TO MOTION TO DISMISS	1.10	\$150.00	\$165.00
05/23/2019	JRG	CALL WITH CLIENT ABOUT STATUS AND MOTION TO DISMISS/ OPPOSITION TO BE FORWARDED	0.40	\$350.00	\$140.00
05/23/2019	MXL	ANSWERED THE FOLINO'S QUESTION ABOUT WHEN DEFENDANTS ALLEGE TO HAVE PROVIDED NOTICE THROUGH EMAIL.	0.60	\$150.00	\$90.00
05/23/2019	MXL	DRAFTING OPPOSITION TO MOTION TO DISMISS	1.30	\$150.00	\$195.00
05/28/2019	MXL	REVIEWING DOCUMENTS TO FIND REQUESTED DATE OF DISCLOSURE	0.80	\$150.00	\$120.00

JA002171

05/28/2019	MXL	CONTINUE DRAFTING OPPOSITION	2.00	\$150.00	\$300.00
05/30/2019	MXL	ECONOMIC LOSS DOCTRINE RESEARCH AND FINISHING DRAFTING	0.90	\$150.00	\$135.00
				<b>Services Subtotal</b>	<b>\$1,895.00</b>

**Expenses**

Date	Quantity	Description	Rate	Total
05/29/2019	1.00	Postage to Bill Nelson & Assoc. Certified Court Reporters	\$0.50	\$0.50
05/30/2019	15.00	Copies	\$0.30	\$4.50
Expenses Subtotal				\$5.00

Time Keeper	Hours	Rate	Total
Rusty Graf	1.0	\$350.00	\$350.00
Mark Lounsbury	10.3	\$150.00	\$1,545.00
<b>Subtotal</b>			<b>\$1,900.00</b>
<b>Total</b>			<b>\$1,900.00</b>
<b>Payment (06/21/2019)</b>			<b>-\$1,900.00</b>
<b>Balance Owing</b>			<b>\$0.00</b>

**Matter Financial Summary**

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	<b>Total Amount Outstanding</b>
( \$44,706.99	+ \$1,900.00	) - ( \$1,900.00	<b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 18173364  
 Date: 06/30/2019

Nicole Folino  
 42 Meadowhawk Lane  
 Las Vegas, NV 89135  
 Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
06/04/2019	MXL	FACTS REQUESTED BY NICOLE FOLINO TO OPPOSITION	0.40	\$150.00	\$60.00
06/04/2019	MXL	CASE CITES RUSTY REQUESTED TO OPPOSITION	0.80	\$150.00	\$120.00
06/04/2019	JRG	RECEIVE AND REVIEW REVISIONS AND REVISE SAME; RECEIVE AND REVIEW COMMENTS FROM CLIENT AND REVISE SAME TO FILE	0.40	\$350.00	\$140.00
06/04/2019	TRB	BRIEF STATUS UPDATE WITH ATTORNEY GRAF	0.20	\$0.00	\$0.00
Services Subtotal					\$320.00

### Expenses

Date	Quantity	Description	Rate	Total
06/05/2019	1.00	Court Filing Fee	\$3.50	\$3.50
06/05/2019	14.00	Copies	\$0.30	\$4.20
06/18/2019	4.00	Copies	\$0.30	\$1.20
Expenses Subtotal				\$8.90

Time Keeper	Hours	Rate	Total
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JA002174



Tisha Black	0.2	\$0.00	\$0.00
Rusty Graf	0.4	\$350.00	\$140.00
Mark Lounsbury	1.2	\$150.00	\$180.00
		<b>Subtotal</b>	<b>\$328.90</b>
		<b>Total</b>	<b>\$328.90</b>
		<b>Payment (07/22/2019)</b>	<b>-\$328.90</b>
		<b>Balance Owing</b>	<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$328.90	) - ( \$328.90	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 181474494  
Date: 07/31/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
06/25/2019	MXL		0.30	\$150.00	\$45.00
07/03/2019	JRG	RECEIVE AND REVIEW REPLY TO MOTION TO DISMISS	0.60	\$350.00	\$210.00
07/03/2019	JRG	CALL WITH COUNSEL AND THE COURT TO RESCHEDULE THE HEARING DUE TO CALENDAR CONFLICT	0.30	\$350.00	\$105.00
07/17/2019	JRG	REVIEW OF MATERIALS FOR MOTION TO DISMISS TOMORROW	0.50	\$350.00	\$175.00
07/18/2019	JRG	ATTEND AND ARGUE MOTION TO DISMISS; LEAVE VOICEMAIL TO CLIENT ABOUT OUTCOME	2.50	\$350.00	\$875.00
07/23/2019	JRG	CALL WITH CLIENT TO DISCUSS HEARING RESULTS FROM LAST WEEK	0.30	\$350.00	\$105.00
Services Subtotal					\$1,515.00

### Expenses

Date	Quantity	Description	Rate	Total
07/08/2019	1.00	PACER - Document Retrieval	\$0.10	\$0.10
07/22/2019	1.00	Phelps Consulting Group, LLC: Visual Inspection of Homeowners Concerns, Site Visit to CC Development Services, review plans and Cert. of Occupancy	\$1,575.00	\$1,575.00
07/26/2019	1.00	Postage to Jamie Clymer	\$0.50	\$0.50

JA002176



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## INVOICE

Invoice # 181475801  
Date: 08/31/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
08/09/2019	JRG	MEETING WITH CLIENTS TO DISCUSS STRATEGY AND DISCOVERY GOING FORWARD	1.00	\$350.00	\$350.00
08/15/2019	JRG	RECEIVE AND REVIEW NOTICE OF ENTRY AND ORDER ON MOTION TO DISMISS AND FILING OF NEW COMPLAINT	0.30	\$350.00	\$105.00
08/26/2019	MXL	REVIEWING ORDER & ORIGINAL COMPLAINT	0.50	\$150.00	\$75.00
08/27/2019	MXL	DRAFTING MOTION TO FILE FIRST AMENDED COMPLAINT AND AMENDED COMPLAINT	2.10	\$150.00	\$315.00
08/28/2019	MXL	FINDING AND ATTACHING EXHIBITS TO MOTION TO AMEND AND AMENDED COMPLAINT	0.30	\$150.00	\$45.00
Services Subtotal					<b>\$890.00</b>

### Expenses

Date	Quantity	Description	Rate	Total
08/05/2019	1.00	Rusty Graf: Parking 7/18/19 - 30.00	\$30.00	\$30.00
Expenses Subtotal				<b>\$30.00</b>

Time Keeper	Hours	Rate	Total
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JA002179

Rusty Graf	1.3	\$350.00	\$455.00
Mark Lounsbury	2.9	\$150.00	\$435.00
		<b>Subtotal</b>	<b>\$920.00</b>
		<b>Total</b>	<b>\$920.00</b>
		<b>Payment (09/12/2019)</b>	<b>-\$920.00</b>
		<b>Balance Owing</b>	<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$920.00	) - ( \$920.00	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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## INVOICE

Invoice # 181478003  
Date: 09/30/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
09/03/2019	MXL	FINALIZING AMENDED COMPLAINT FOR FILING, FIXING PRAYER FOR RELIEF, AND ATTACHING EXHIBITS	0.30	\$150.00	\$45.00
09/03/2019	JRG	REVIEW AND FINAL AMENDED COMPLAINT PER COURT ORDER; FILE SAME	0.40	\$350.00	\$140.00
09/12/2019	TRB	CONFERENCE RE: STATUS OF CASE (MOTION TO DISMISS THIRD)	0.30	\$450.00	\$135.00
09/24/2019	MXL	REVIEWING NEW MOTION TO DISMISS AND ATTACHED AFFIDAVIT AND OTHER EXHIBITS	0.40	\$150.00	\$60.00
09/24/2019	JRG	RECEIVE AND REVIEW NOTICE OF HEARING FOR MOTION TO DISMISS SECOND AMENDED COMPLAINT	0.20	\$350.00	\$70.00
09/25/2019	MXL	REVIEWING PAST COURT ORDERS AND FIRST TWO MOTIONS TO DISMISS & BEGINNING DRAFTING ON NEW OPPO TO MOTION TO DISMISS	1.40	\$150.00	\$210.00
09/26/2019	MXL	LOOKING UP CASES CITED IN MTD NELSON v. HEER & BRELIANT	0.50	\$150.00	\$75.00
09/27/2019	MXL	MET WITH RUSTY TO DISCUSS FOLINO OPPO CONTENT, MOTION FOR RULE 11 SANCTIONS, MOTION TO AMEND TO REINTRODUCE DISMISSED CLAIMS AND CONFERENCE CALL AT 4:00 PM	0.20	\$150.00	\$30.00
09/27/2019	MXL	DRAFTING OPPO	1.30	\$150.00	\$195.00
09/27/2019	MXL	CONFERENCE CALL WITH FOLINOS	0.30	\$150.00	\$45.00
09/30/2019	MXL	DRAFTING AND ADDITIONAL CASE RESEARCH FOR OPPO	1.50	\$150.00	\$225.00

JA002181

Services Subtotal \$1,230.00

**Expenses**

Date	Quantity	Description	Rate	Total
09/03/2019	1.00	Court Filing Fee	\$3.50	\$3.50
09/17/2019	9.00	Copies	\$0.30	\$2.70
09/27/2019	1.00	WestLaw - Online Research, Multi-Search Document Displays (JRG)	\$23.70	\$23.70
09/27/2019	1.00	WestLaw - Online Research, Multi-Search Transactional Searches (JRG)	\$48.56	\$48.56
<b>Expenses Subtotal</b>				<b>\$78.46</b>

Time Keeper	Hours	Rate	Total
Tisha Black	0.3	\$450.00	\$135.00
Rusty Graf	0.6	\$350.00	\$210.00
Mark Lounsbury	5.9	\$150.00	\$885.00
<b>Subtotal</b>			<b>\$1,308.46</b>
<b>Total</b>			<b>\$1,308.46</b>
<b>Payment (10/09/2019)</b>			<b>-\$1,308.46</b>
<b>Balance Owning</b>			<b>\$0.00</b>

**Matter Financial Summary**

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	Total Amount Outstanding
( \$44,706.99	+ \$1,308.46	) - ( \$1,308.46	) = <b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

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Las Vegas, Nevada 89135  
Phone: 702-869-8801  
www.blacklobello.law

## INVOICE

Invoice # 181480115  
Date: 10/31/2019

Nicole Folino  
42 Meadowhawk Lane  
Las Vegas, NV 89135  
Via Email: nfolino@sandlerpartners.com

**6239-0001**

**Folino re: 42 Meadowhawk Lane, LV, NV (APN 164-14-414-014)**

### Services

Date	Timekeeper	Description	Hours	Rate	Total
10/01/2019	MXL	FINISHING FOLINO OPPOSITION TO MTD DRAFT	3.00	\$150.00	\$450.00
10/02/2019	JRG	REVIEW AND REVISE OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND/OR MOTION TO DISMISS	0.60	\$350.00	\$210.00
10/02/2019	MXL	UPDATING OPPOSITION TO MTD WITH RUSTY'S EDITS	0.50	\$150.00	\$75.00
10/03/2019	MXL	FINAL DRAFT OF OPPOSITION TO INCORPORATE RUSTY'S EDITS, ALLEGATIONS OF SYSTEMIC FAILURE OF PLUMBING SYSTEM, AND ADD COUNTERMOTION TO COMPEL DISCOVERY	1.30	\$150.00	\$195.00
10/03/2019	MXL	INCORPORATING ADDITIONAL EDITS AND FINALIZING TO FILE OPPOSITION - MOTION TO DISMISS	0.30	\$150.00	\$45.00
10/03/2019	JRG	REVIEW AND REVISE OPPOSITION TO MOTION TO DISMISS	0.40	\$350.00	\$140.00
10/31/2019	JRG	RECEIVE AND REVIEW REPLY TO MOTION TO DISMISS AND OPPOSITION TO MOTION FOR SANCTIONS	0.40	\$350.00	\$140.00
Services Subtotal					\$1,255.00

### Expenses

Date	Quantity	Description	Rate	Total
10/01/2019	1.00	WestLaw - Online Research - Multi-Search Document Displays (MXL)	\$6.97	\$6.97

JA002184

10/04/2019	1.00	Court Filing Fee	\$3.50	\$3.50
10/09/2019	1.00	Postage to Phelps Consulting Group, LLC	\$0.55	\$0.55
10/28/2019	17.00	Copies	\$0.30	\$5.10
<b>Expenses Subtotal</b>			<b>\$16.12</b>	

Time Keeper	Hours	Rate	Total
Rusty Graf	1.4	\$350.00	\$490.00
Mark Lounsbury	5.1	\$150.00	\$765.00
<b>Subtotal</b>			<b>\$1,271.12</b>
<b>Total</b>			<b>\$1,271.12</b>
<b>Payment (11/11/2019)</b>			<b>-\$1,271.12</b>
<b>Balance Owing</b>			<b>\$0.00</b>

## Matter Financial Summary

Outstanding Balance	New Charges (Current Invoice)	Payments Received on this Invoice	<b>Total Amount Outstanding</b>
( \$44,706.99	+ \$1,271.12	) - ( \$1,271.12	<b>\$44,706.99</b>

Account	Balance
Client Trust Account (PP) Balance	\$0.00
<b>Total Account Balance</b>	<b>\$0.00</b>

### INVOICES ARE DUE UPON RECEIPT.

Please make all amounts payable to: **Black & LoBello**. Please visit <https://www.blacklobello.law/client-resources/make-a-payment/> to pay via credit card or ACH online. (A processing fee of up to 3% will appear on your next bill for any payments or advanced deposits made with Credit Card beginning January 1, 2019).

If you have any questions regarding this invoice, please reply to this email or reach out to your attorney. **All billing concerns must be addressed within 30 days of receipt or they will be deemed correct.**

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Payment is due upon receipt. 18.0% simple annual interest will be charged every 31 days.

**Thank you for allowing Black & LoBello to be of service.**



# **EXHIBIT 4**

1 CHRISTOPHER M. YOUNG, ESQ.  
Nevada Bar No. 7961  
2 JAY T. HOPKINS, ESQ.  
Nevada Bar No. 3223  
3 CHRISTOPHER M. YOUNG, PC  
2460 Professional Court, #200  
4 Las Vegas, Nevada 89128  
Tel: (702) 240-2499  
5 Fax: (702) 240-2489  
[cyoung@cotomlaw.com](mailto:cyoung@cotomlaw.com)  
6 [jaythopkins@gmail.com](mailto:jaythopkins@gmail.com)

7 Jeffrey L. Galliher, Esq.  
Nevada Bar No. 8078  
8 GALLIHER LEGAL P.C.  
1850 East Sahara Avenue, Suite 107  
9 Las Vegas, Nevada 89104  
Telephone: (702) 735-0049  
10 Facsimile: (702) 735-0204  
[jgalliher@galliherlawfirm.com](mailto:jgalliher@galliherlawfirm.com)

11 Attorneys for Todd Swanson, et al.  
12

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 JOSEPH FOLINO, an individual and NICOLE  
FOLINO, an individual,

16 Plaintiff(s),  
17

18 v.

19 TODD SWANSON, an individual; TODD  
SWANSON, Trustee of the SHIRAZ TRUST;  
SHIRAZ TRUST, a Trust of unknown origin;  
20 LYON DEVELOPMENT, LLC, a Nevada  
limited liability company; DOES I through X;  
21 and ROES I through X,

22 Defendant(s).  
23

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

24 **DEFENDANTS TODD SWANSON; TODD SWANSON AS, TRUSTEE OF THE SHIRAZ**  
25 **TRUST; SHIRAZ TRUST; AND LYON DEVELOPMENT, LLC'S FIRST**  
26 **SUPPLEMENTAL LIST OF WITNESSES AND PRODUCTION OF DOCUMENTS**  
27 **PURSUANT TO N.R.C.P. 16.1**

28 Pursuant to N.R.C.P. 16.1, Defendants, TODD SWANSON, an individual; TODD  
SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin;

1 LYON DEVELOPMENT, LLC, (hereinafter referred to as "Defendants") by and through their  
2 counsel of record CHRISTOPHER M. YOUNG, ESQ., and JAY T. HOPKINS, ESQ., of the law  
3 firm of CHRISTOPHER M. YOUNG, PC, and JEFFREY L. GALLIHER, ESQ., of the law firm  
4 of GALLIHER LEGAL P.C., hereby submit their First Supplemental List of Witnesses and  
5 Production of Documents Pursuant to N.R.C.P. 16.1 as follows with new information in **bold**:

6  
7 **I.**

8 **WITNESSES**

- 9 1. Joseph Folino and Nicole Folino  
10 c/o Rusty Graf, Esq.  
11 Shannon M. Wilson, Esq.  
12 10777 West Twain Avenue, 3<sup>rd</sup> Floor  
13 Las Vegas, Nevada 89135  
14 [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
15 [swilson@blacklobello.law](mailto:swilson@blacklobello.law)  
16 Attorney for Plaintiffs

17 Joseph Folino and Nicole Folino are expected to testify regarding the facts and  
18 circumstances surrounding the alleged incident that occurred on or about October 22, 2017.

- 19 2. Todd Swanson, M.D.  
20 c/o Christopher M. Young, Esq.  
21 Christopher M. Young, PC  
22 2460 Professional Court, #200  
23 Las Vegas, Nevada 89128  
24 Tel: (702) 240-2499  
25 Fax: (702) 240-2489

26 Dr. Swanson is expected to testify regarding the facts and circumstances surrounding the  
27 alleged incident that occurred on or about October 22, 2017.

- 28 3. Custodian of Records/Person Most Knowledgeable for  
Lyon Development, LLC  
c/o Christopher M. Young, Esq.  
Christopher M. Young, PC  
2460 Professional Court, #200  
Las Vegas, Nevada 89128  
Tel: (702) 240-2499  
Fax: (702) 240-2489

The Custodian of Records/Person Most Knowledgeable will testify as to the facts and  
circumstances of the subject incident, authentication of any reports, and photographs.

///

1     ///

- 2           4.     Todd Swanson, Trustee of The Shiraz Trust  
3                   c/o Christopher M. Young, Esq.  
4                   Christopher M. Young, PC  
5                   2460 Professional Court, #200  
                  Las Vegas, Nevada 89128  
                  Tel: (702) 240-2499  
                  Fax: (702) 240-2489

6           Dr. Swanson is expected to testify regarding the facts and circumstances surrounding the  
7     alleged incident that occurred on or about October 22, 2017.

- 8           5.     Nikki Whitfield  
9                   c/o Christopher M. Young, Esq.  
10                  Christopher M. Young, PC  
11                  2460 Professional Court, #200  
                  Las Vegas, Nevada 89128  
                  Tel: (702) 240-2499  
                  Fax: (702) 240-2489

12          Ms. Whitfield is Dr. Swanson's assistant and is expected to testify regarding the facts and  
13     circumstances surrounding the alleged incident that occurred on or about October 22, 2017 and  
14     other issues related to the sale of 42 Meadowhawk.

- 15          6.     Aaron Hawley  
16                  c/o Rakeman Plumbing, Inc.  
17                  4075 Losee Road  
18                  North Las Vegas, Nevada 89030  
                  Tel: (702) 642-8553  
                  Fax: (702) 399-1410

19          Mr. Hawley is expected to testify regarding the work performed on 42 Meadowhawk  
20     Lane, Las Vegas, Nevada 89135.

- 21          7.     William "Rocky" Gerber  
22                  c/o Rakeman Plumbing, Inc.  
23                  4075 Losee Road  
24                  North Las Vegas, Nevada 89030  
                  Tel: (702) 642-8553  
                  Fax: (702) 399-1410

25          Mr. Gerber is expected to testify regarding the work performed on 42 Meadowhawk  
26     Lane, Las Vegas, Nevada 89135.

27          Defendant also names as witnesses all witnesses designated by all parties.

28          Defendant reserves the right to call any and all other witnesses who may have relevant



1 knowledge of the facts and circumstances surrounding the subject incident.

2 Defendant reserves the right to supplement their list of witnesses as new witnesses  
3 become known, including expert witnesses and as Plaintiff's testimony at trial may make  
4 necessary.

5 Defendant reserves the right to call rebuttal and/or impeachment witnesses; to call the  
6 records custodian of any person(s) or institution(s) to which there is an objection concerning  
7 authenticity; and to call any and all witnesses of any other party in this matter.

8 Defendant intends to retain a construction and landscaping experts related to the various  
9 alleged property damages. Defendant will designate experts pursuant to the Court's Discovery  
10 Scheduling Order. It is anticipated that these experts will testify regarding their review and  
11 examination of Plaintiff's property damages.

12 Defendant hereby reserves the right to supplement this proposed list of witnesses and  
13 documents as discovery continues. Defendant also reserves the right to utilize any witnesses and  
14 documents identified by the Plaintiff and/or other Defendants.

## 15 II.

### 16 DOCUMENTS

- 17 1. BHHS Nevada Properties Listing Packet (Bate Nos. DEF000001 –  
18 DEF000015).
- 19 2. Counter Offer No. 1 (Bate No. DEF000016).
- 20 3. Residential Purchase Agreement (Bate Nos. DEF000017 – DEF000027).
- 21 4. Seller's Real Property Disclosure Form (Bate Nos. DEF000028 –  
22 DEF000032).
- 23 5. Addendum No. 1 to Purchase Agreement (Bate No. DEF000033).
- 24 6. Request for Repair No. 1 (Bate Nos. DEF000034 – DEF000035).
- 25 7. Addendum No. 2 to Purchase Agreement (Bate No. DEF000036).
- 26 8. Addendum No. 3 to Purchase Agreement (Bate No. DEF000037).
- 27 9. Addendum Final to Purchase Agreement (Bate No. DEF000038).
- 28 10. Addendum No. 4A To Purchase Agreement (Bate No. DEF000039).
11. Caveat Emptor Inspection Report (Bate Nos. DEF000049 - DEF000049).

- 1           12.    Photos of Pool Deck and Roof Stucco (Bate Nos. DEF000050 – DEF000051).  
2           13.    Agreement to Occupy After the Close of Escrow (Bate Nos. DEF000052 –  
3           DEF000053).  
4           14.    Rakeman Plumbing correspondence dated November 16, 2017 (Bate Nos.  
5           DEF000054).  
6           15.    Equity Title of Nevada – Closing Packet (Bates Nos. DEF000055 –  
7           DEF000068).  
8           16.    **E-mails between Todd Swanson, Austin Sherwood and Ivan Sher dated**  
9           **December 6-7, 2017 (Bates Nos. DEF000069-DEF000072.)**

10          DATED this 23rd day of January 2020..

11                               Respectfully Submitted,

12                               /s/ *Jeffrey L. Galliher, Esq.*

13                               CHRISTOPHER M. YOUNG, ESQ.  
14                               Nevada Bar No. 7961  
15                               JAY T. HOPKINS, ESQ.  
16                               Nevada Bar No. 3223  
17                               CHRISTOPHER M. YOUNG, PC  
18                               2460 Professional Court, #200  
19                               Las Vegas, Nevada 89128  
20                               Tel: (702) 240-2499  
21                               Fax: (702) 240-2489  
22                               [cyoung@cotomlaw.com](mailto:cyoung@cotomlaw.com)  
23                               [jaythopkins@gmail.com](mailto:jaythopkins@gmail.com)

24                               Jeffrey L. Galliher, Esq.  
25                               Nevada Bar No. 8078  
26                               GALLIHER LEGAL P.C.  
27                               1850 East Sahara Avenue, Suite 107  
28                               Las Vegas, Nevada 89104  
Telephone: (702) 735-0049  
Facsimile: (702) 735-0204  
[jgalliher@galliherlawfirm.com](mailto:jgalliher@galliherlawfirm.com)

Attorneys for Todd Swanson, et al.

1 CERTIFICATE OF E-SERVICE

2 Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and  
3 N.E.F.C.R. 9, I hereby certify that on the 23rd day of January 2020 I caused the foregoing  
4 DEFENDANTS TODD SWANSON, TODD SWANSON, TRUSTEE OF THE SHIRAZ  
5 TRUST; SHIRAZ TRUST, LYON DEVELOPMENT, LLC'S FIRST SUPPLEMENTAL  
6 LIST OF WITNESSES AND PRODUCTION OF DOCUMENTS PURSUANT TO  
7 N.R.C.P. 16.1

8 to be electronically e-served on counsel as follows:

9 Rusty Graf, Esq.  
10 Shannon M. Wilson, Esq.  
10777 West Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
11 [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
12 [swilson@blacklobello.law](mailto:swilson@blacklobello.law)

13  
14 *.s. Kimalee Goldstein*  
15 An Employee of  
GALLIHER LEGAL, PC  
16  
17  
18  
19  
20  
21

22 H:\Open Case Files\0300.003\PLEADING\16.1  
23  
24  
25  
26  
27  
28

## Todd Swanson

---

**From:** Austin Sherwood <Austin@shapiroandsher.com>  
**Sent:** Thursday, December 7, 2017 11:27 AM  
**To:** Todd Swanson  
**Cc:** Ivan Sher  
**Subject:** RE: 42 Meadowhawk

Hello Todd,

Thank you for sending this over.

Ivan is traveling at the moment but will be reaching out to discuss tomorrow.

Best Regards,

### Austin Sherwood

Fine Home Specialist | Transaction Manager

Phone: 702-686-6638

Office: 702-315-0223

e-Fax: 702-317-3175

Shapiro & Sher • Berkshire Hathaway

HomeServices | Luxury Collection

lasvegasfinehomes.com

---

**From:** Todd Swanson [mailto:tvsw@tswansonmd.com]  
**Sent:** Wednesday, December 6, 2017 9:26 PM  
**To:** Austin Sherwood <Austin@shapiroandsher.com>  
**Cc:** Ivan Sher <Ivan@ShapiroandSher.com>  
**Subject:** RE: 42 Meadowhawk

Austin and Ivan,

I am sorry that the buyer is frustrated, but I have been out of the country since I moved out, so Nicky has been keeping me informed as to what is going on. I also want to remain on good terms with the buyers, but unfortunately, they are trying to blame me for things that are not my fault:

1. Nicky notified me before I even came home from Denver that the buyer found the sliding glass door was not working. Nicky says she never opened that door in the past several months. I attempted to open the door when I arrived home on 11/21, but to no avail. The usual "reset/unlock/open" sequence that usually causes the door to open did not work. That problem occurred for reasons unknown to me and out of my control. We never even use that door. Nicky's time in the past month, and my 6 days in the house before I moved out, were spent packing my remaining items. I only touched the sliding door controls once, to try to troubleshoot the problem, but to no avail. We absolutely had NOTHING to do with those doors now not working. I had a similar problem over a year ago, and I think I contacted Blue Heron to fix the problem. That is who I recommend they start with.
2. The buyers wanted the desks. (I could have used the desks, and yes, they could have been moved. The large one comes apart, so it is moved in pieces.) I left the rug under the desk not because I couldn't have moved it,



but because I thought the buyer might want it. I didn't have a use for the rug, which is why I had no problem giving it to the buyer. The gesture was meant to be a gift, not one that turned into a problem for them.

3. The table top was left in the basement because a) Kelly Contenta, your agent, told me that the buyers' workers could remove it and b) because Nicky talked to Mrs. Folino who apparently also said she would have her workers remove the table top. I could have also had my movers remove that easily if it were not for the instructions from Kelly and Mrs. Folino. Now, because they have workers in the house, it seems that they could easily take it out the sliding glass door and dispose of it.
4. Regarding the scratches on the walls and stairway, I saw damage to the wall and steps before my movers came on 11/27. The buyers had workers in the upstairs closet remove almost all of the cabinets when I was there from 11/21-11/27. They carried large pieces of cabinet down those stairs to the garage. In fact, I noticed 1 particularly large gouge fairly high up that could only have been caused by their workers moving some of those large cabinet pieces out of the closet. I didn't move any large pieces out of the upstairs except for a dresser—definitely nothing that could reach that high. And realistically, it is much more likely that any damage to the stairs was caused by the buyer's workers than my movers. My movers were professionals who covered and protected the stairs. To say that they caused any scratches or damage to the stairway is speculation at best—and very unfair to me.
5. Regarding keys, I never used keys for the house. I will try to find them when I come home next week, but if I were the buyers, I would have the doors re-keyed. Most people re-key a house when they buy it. Who knows who might have keys to those doors? And I don't want them accusing me of ever entering their home if they don't re-key the doors. It costs a few hundred dollars to re-key a house. But I'll look for the keys and return them if I can find them.

Furthermore, I thought you told me there was no holdback from the sale of the house. If the furniture was part of the purchase agreement, was it not paid for at closing? If not, and if the buyer doesn't plan on paying for the furniture, I suggest that we sign a full mutual release and go our separate ways. We have been working diligently trying to get someone out to evaluate the stucco/paint issue. Blue Heron has communicated to Nicky that if it is a construction defect, they will take care of it. We are just trying to get them out to inspect the area and put something in writing. I'd be happy to pass that task on to the buyer and be done with all of these lingering issues.

I'm cc'ing Nicky in case I've mis-stated anything in this email. But all in all, mixed messages from the buyer, their agent, and your agent caused some of these issues, and now it sounds like the buyer is trying to pass blame on to me for items that are not in any way my fault. I am surprised they feel like I am taking advantage of them because I feel like they are nickel and diming me now to get as much from me as possible. I'll take responsibility for leaving the rug and table top in the house, but \$3,000 sounds like a pretty steep price to pay for that. If they don't want to sign a mutual release, I'll have those items removed (if they are now legally my responsibility), but I expect to be paid for my furniture.

I hope we can resolve these issues amicably. My new neighbor, who I have known for years, is good friends with the Folinos, and I don't want there to be any lingering bad blood between us.

Regards,  
Todd

Ps—I am 15 hours ahead of you, so I can call you tomorrow to discuss if needed.

Todd V. Swanson, M.D.  
2360 E. Evans Ave., Apt. #837  
Denver, CO 80210

(702) 249-9219  
tvs@tswansonmd.com

**From:** Austin Sherwood [mailto:Austin@shapiroandsher.com]  
**Sent:** Wednesday, December 6, 2017 7:07 PM  
**To:** Todd Swanson <ts@tswansonmd.com>  
**Subject:** Fwd: 42 Meadowhawk

Hello Todd,

Additional email received from the buyers agent.

Thank you,

Get [Outlook for iOS](#)

**Austin Sherwood**  
Fine Home Specialist | Transaction Manager  
Phone: 702-686-6638  
Office: 702-315-0223  
e-Fax: 702-317-3175

**Shapiro & Sher • Berkshire Hathaway**  
**HomeServices | Luxury Collection**  
lasvegasfinehomes.com

---

**From:** Ashley Oakes-Lazosky <ashley@vhfelv.com>  
**Sent:** Tuesday, December 5, 2017 8:54:51 AM  
**To:** Austin Sherwood; Ivan Sher  
**Subject:** 42 Meadowhawk

Austin and Ivan,

Good morning. I am reaching out to you today in hopes to get a resolution to the issues we are still having at 42 Meadowhawk.

The seller vacated the property and left a rug under the upstairs desk that the buyers purchased. This wouldn't normally be an issue...but the desk probably weighs over 800 lbs and the rug is not wanted nor needed. Now the desk will scratch the wood floors if it isn't moved by an professional.

He also left a glass table in the property which the buyer needs removed.

One of the biggest issues is that the sliding door doesn't work and it did at the time of closing and walk through. So, the property was left in a different condition than it was at walk.

Also, the movers made huge scratches on the stairwell when moving his furniture.

The buyer is taking care of that, but we need an accurate contact for the door repair and the rug removed asap.

We also need to know where the keys are for the home. I know Austin said they are all electronic pads, but there are key holes in every door, where are the keys for the doors?

We are trying to work with Nicky but we are not getting anywhere.

Would you please reach out to Todd Swanson regarding the issues we are having. We are trying to handle this amicably, however, this is becoming a huge issue for both me and the buyers.

The buyer will not pay for the furnishings until the rug and table are removed.  
Which, they shouldn't have to since the seller is in breach of the personal property addendum.

Please help up reach a resolution so this can be settled once and for all.

I thank you in advance.



## **EXHIBIT 5**



1 CHRISTOPHER M. YOUNG, ESQ.  
Nevada Bar No. 7961  
2 JAY T. HOPKINS, ESQ.  
Nevada Bar No. 3223  
3 CHRISTOPHER M. YOUNG, PC  
2460 Professional Court, #200  
4 Las Vegas, Nevada 89128  
Tel: (702) 240-2499  
5 Fax: (702) 240-2489  
[cyoung@cotomlaw.com](mailto:cyoung@cotomlaw.com)  
6 [jaythopkins@gmail.com](mailto:jaythopkins@gmail.com)

7 JEFFREY L. GALLIHER, ESQ.  
Nevada Bar No. 8078  
8 GALLIHER LEGAL P.C.  
1850 East Sahara Avenue, Suite 107  
9 Las Vegas, Nevada 89104  
Telephone: (702) 735-0049  
10 Facsimile: (702) 735-0204  
[jgalliher@galliherlawfirm.com](mailto:jgalliher@galliherlawfirm.com)

11 Attorneys for Todd Swanson, et al.  
12

13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 JOSEPH FOLINO, an individual and NICOLE CASE NO.: A-18-782494-C  
FOLINO, an individual, DEPT. NO.: XXIV

16 Plaintiff(s),

17 v.

18 TODD SWANSON, an individual; TODD  
19 SWANSON, Trustee of the SHIRAZ TRUST;  
SHIRAZ TRUST, a Trust of unknown origin;  
20 LYON DEVELOPMENT, LLC, a Nevada  
limited liability company; DOES I through X;  
21 and ROES I through X,

22 Defendant(s).  
23

24 **DEFENDANTS TODD SWANSON; TODD SWANSON AS, TRUSTEE OF THE SHIRAZ**  
25 **TRUST; SHIRAZ TRUST; AND LYON DEVELOPMENT, LLC'S SECOND**  
**SUPPLEMENTAL LIST OF WITNESSES AND PRODUCTION OF DOCUMENTS**  
26 **PURSUANT TO N.R.C.P. 16.1**

27 Pursuant to N.R.C.P. 16.1, Defendants, TODD SWANSON, an individual; TODD  
28 SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin;

1 LYON DEVELOPMENT, LLC, (hereinafter referred to as "Defendants") by and through their  
2 counsel of record CHRISTOPHER M. YOUNG, ESQ., and JAY T. HOPKINS, ESQ., of the law  
3 firm of CHRISTOPHER M. YOUNG, PC, and JEFFREY L. GALLIHER, ESQ., of the law firm  
4 of GALLIHER LEGAL P.C., hereby submit their Second Supplemental List of Witnesses and  
5 Production of Documents Pursuant to N.R.C.P. 16.1 as follows with new information in **bold**:

6  
7 **I.**

8 **WITNESSES**

- 9 1. Joseph Folino and Nicole Folino  
10 c/o Rusty Graf, Esq.  
11 Shannon M. Wilson, Esq.  
12 10777 West Twain Avenue, 3<sup>rd</sup> Floor  
13 Las Vegas, Nevada 89135  
14 [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
15 [swilson@blacklobello.law](mailto:swilson@blacklobello.law)  
16 Attorney for Plaintiffs

17 Joseph Folino and Nicole Folino are expected to testify regarding the facts and  
18 circumstances surrounding the alleged incident that occurred on or about October 22, 2017.

- 19 2. Todd Swanson, M.D.  
20 c/o Christopher M. Young, Esq.  
21 Christopher M. Young, PC  
22 2460 Professional Court, #200  
23 Las Vegas, Nevada 89128  
24 Tel: (702) 240-2499  
25 Fax: (702) 240-2489

26 Dr. Swanson is expected to testify regarding the facts and circumstances surrounding the  
27 alleged incident that occurred on or about October 22, 2017.

- 28 3. Custodian of Records/Person Most Knowledgeable for  
Lyon Development, LLC  
c/o Christopher M. Young, Esq.  
Christopher M. Young, PC  
2460 Professional Court, #200  
Las Vegas, Nevada 89128  
Tel: (702) 240-2499  
Fax: (702) 240-2489

The Custodian of Records/Person Most Knowledgeable will testify as to the facts and  
circumstances of the subject incident, authentication of any reports, and photographs.

1           4.     Todd Swanson, Trustee of The Shiraz Trust  
2                c/o Christopher M. Young, Esq.  
3                Christopher M. Young, PC  
4                2460 Professional Court, #200  
              Las Vegas, Nevada 89128  
              Tel: (702) 240-2499  
              Fax: (702) 240-2489

5           Dr. Swanson is expected to testify regarding the facts and circumstances surrounding the  
6     alleged incident that occurred on or about October 22, 2017.

7           5.     Nicky Whitfield  
8                c/o Christopher M. Young, Esq.  
9                Christopher M. Young, PC  
10              2460 Professional Court, #200  
              Las Vegas, Nevada 89128  
              Tel: (702) 240-2499  
              Fax: (702) 240-2489

11          Ms. Whitfield is Dr. Swanson's assistant and is expected to testify regarding the facts and  
12     circumstances surrounding the alleged incident that occurred on or about October 22, 2017 and  
13     other issues related to the sale of 42 Meadowhawk.

14          6.     Aaron Hawley  
15                c/o Rakeman Plumbing, Inc.  
16                4075 Losee Road  
17                North Las Vegas, Nevada 89030  
              Tel: (702) 642-8553  
              Fax: (702) 399-1410

18          Mr. Hawley is expected to testify regarding the work performed on 42 Meadowhawk  
19     Lane, Las Vegas, Nevada 89135.

20          7.     William "Rocky" Gerber  
21                c/o Rakeman Plumbing, Inc.  
22                4075 Losee Road  
23                North Las Vegas, Nevada 89030  
              Tel: (702) 642-8553  
              Fax: (702) 399-1410

24          Mr. Gerber is expected to testify regarding the work performed on 42 Meadowhawk  
25     Lane, Las Vegas, Nevada 89135.

26          Defendant also names as witnesses all witnesses designated by all parties.

27          Defendant reserves the right to call any and all other witnesses who may have relevant  
28     knowledge of the facts and circumstances surrounding the subject incident.



1 Defendant reserves the right to supplement their list of witnesses as new witnesses  
2 become known, including expert witnesses and as Plaintiff's testimony at trial may make  
3 necessary.

4 Defendant reserves the right to call rebuttal and/or impeachment witnesses; to call the  
5 records custodian of any person(s) or institution(s) to which there is an objection concerning  
6 authenticity; and to call any and all witnesses of any other party in this matter.

7 Defendant intends to retain a construction and landscaping experts related to the various  
8 alleged property damages. Defendant will designate experts pursuant to the Court's Discovery  
9 Scheduling Order. It is anticipated that these experts will testify regarding their review and  
10 examination of Plaintiff's property damages.

11 Defendant hereby reserves the right to supplement this proposed list of witnesses and  
12 documents as discovery continues. Defendant also reserves the right to utilize any witnesses and  
13 documents identified by the Plaintiff and/or other Defendants.

## 14 II.

### 15 DOCUMENTS

- 16 1. BHHS Nevada Properties Listing Packet (Bate Nos. DEF000001 –  
17 DEF000015).
- 18 2. Counter Offer No. 1 (Bate No. DEF000016).
- 19 3. Residential Purchase Agreement (Bate Nos. DEF000017 – DEF000027).
- 20 4. Seller's Real Property Disclosure Form (Bate Nos. DEF000028 –  
21 DEF000032).
- 22 5. Addendum No. 1 to Purchase Agreement (Bate No. DEF000033).
- 23 6. Request for Repair No. 1 (Bate Nos. DEF000034 – DEF000035).
- 24 7. Addendum No. 2 to Purchase Agreement (Bate No. DEF000036).
- 25 8. Addendum No. 3 to Purchase Agreement (Bate No. DEF000037).
- 26 9. Addendum Final to Purchase Agreement (Bate No. DEF000038).
- 27 10. Addendum No. 4A To Purchase Agreement (Bate No. DEF000039).
- 28 11. Caveat Emptor Inspection Report (Bate Nos. DEF000049 - DEF000049).
12. Photos of Pool Deck and Roof Stucco (Bate Nos. DEF000050 – DEF000051).



13. Agreement to Occupy After the Close of Escrow (Bate Nos. DEF000052 – DEF000053).
14. Rakeman Plumbing correspondence dated November 16, 2017 (Bate Nos. DEF000054).
15. Equity Title of Nevada – Closing Packet (Bates Nos. DEF000055 – DEF000068).
16. E-mails between Todd Swanson, Austin Sherwood and Ivan Sher dated December 6-7, 2017 (Bates Nos. DEF000069-DEF000072.)
17. Inspection Report 5-11-15 (Bate Nos. DEF000073 – DEF000141)
18. Henry Regnault Punch List 05-16-15 (Bate Nos. DEF000142 – DEF000162).
19. Henry Regnault Punch List 05-20-15 (Bate Nos. DEF000163 – DEF000190).
20. Henry Regnault Punch List 05-29-15 (Bate Nos. DEF000191 –DEF000210).
21. Henry Regnault Punch List 06-08-15 (Bate Nos. DEF000211 – DEF000230).
22. Invoices (Bate Nos. DEF000231 – DEF000243).
23. Bids/Estimates (Bate Nos. DEF000244 – DEF000252).
24. Design Drawings for Todd Swanson's Office (Bate Nos. DEF000253 – DEF000282).
25. Design Drawings for Todd Swanson's Closet (Bate Nos. DEF000283 – DEF000289)
26. Design Drawings for Todd Swanson's Fireplace/TV (Bate Nos. DEF000290 – DEF000295).
27. Patio Design Drawing (Bate No. DEF000296).
28. Construction Photos (Bate Nos. DEF000297 – DEF000305).
29. Landscaping Photos (Bate Nos. DEF000306 – DEF000312).
30. Hardwood Floor picture (Bate No. DEF000313).
31. Absolute Closets Add Insured-Shiraz Trust (Bate Nos. DEF0000314 – DEF000315).
32. Ed's List (Bate Nos. DEF0000316 – DEF000319).
33. 42 Meadowhawk Ridges Pool Approval 01-07-15 (Bate No. DEF000320).
34. Email Correspondence between Swanson and Blue Heron Re: Swanson Customer Service (Bate Nos. DEF000321 – DEF000328).
35. Email Correspondence RE: Touch Screens (Bate Nos. DEF000329 – DEF000334).

- 1 36. 42 Meadowhawk Northern Trust Loan Statement 07-07-17 (Bate Nos.  
2 DEF000335 – DEF000336).  
3 37. 42 Meadowhawk Equity Tile Seller Info (Bate No. DEF000337).  
4 38. Email Correspondence between Swanson and Julie Torchin (Bate Nos.  
5 DEF000338 – DEF000341).  
6 39. Email Correspondence between Swanson and Alexxa Warren (Bate Nos.  
7 DEF000342 – DEF000380).  
8 40. Email Correspondence between Swanson and Nicky Whitfield (Bate Nos.  
9 DEF000381 – DEF000393).  
10 41. Email Correspondence between Swanson and Kelly Contenta (Bate Nos.  
11 DEF000394 – DEF000399).  
12 42. Folino Earnest Money Wire Confirmation 10-24-17 (Bate No. DEF000400).  
13 43. Nevada Title Wiring Instructions (Bate No. DEF000401).  
14 44. Henry Text (Bate No. DEF000402).

15 DATED this 31<sup>st</sup> day of January 2020.

16 Respectfully Submitted,

17 /s/ Jeffrey L. Galliher, Esq.

18 CHRISTOPHER M. YOUNG, ESQ.  
19 Nevada Bar No. 7961  
20 JAY T. HOPKINS, ESQ.  
21 Nevada Bar No. 3223  
22 CHRISTOPHER M. YOUNG, PC  
23 2460 Professional Court, #200  
24 Las Vegas, Nevada 89128  
25 Tel: (702) 240-2499  
26 Fax: (702) 240-2489  
27 [cyoung@cotomlaw.com](mailto:cyoung@cotomlaw.com)  
28 [jaythopkins@gmail.com](mailto:jaythopkins@gmail.com)

Jeffrey L. Galliher, Esq.  
Nevada Bar No. 8078  
GALLIHER LEGAL P.C.  
1850 East Sahara Avenue, Suite 107  
Las Vegas, Nevada 89104  
Telephone: (702) 735-0049  
Facsimile: (702) 735-0204  
[jgalliher@galliherlawfirm.com](mailto:jgalliher@galliherlawfirm.com)  
Attorneys for Todd Swanson, et al.

1 **CERTIFICATE OF E-SERVICE**

2 Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and  
3 N.E.F.C.R. 9, I hereby certify that on the 31<sup>st</sup> day of January, 2020 I caused the foregoing  
4 **DEFENDANTS TODD SWANSON, TODD SWANSON, TRUSTEE OF THE SHIRAZ**  
5 **TRUST; SHIRAZ TRUST, LYON DEVELOPMENT, LLC'S SECOND**  
6 **SUPPLEMENTAL LIST OF WITNESSES AND PRODUCTION OF DOCUMENTS**  
7 **PURSUANT TO N.R.C.P. 16.1** to be electronically e-served and by placing same to be  
8 deposited for mailing in the United States [CD CONTAINING PRODUCTION], in a sealed  
9 envelope upon which first class postage was prepaid in Las Vegas, Nevada on counsel as  
10 follows:

11 Rusty Graf, Esq.  
12 Shannon M. Wilson, Esq.  
13 10777 West Twain Avenue, 3<sup>rd</sup> Floor  
14 Las Vegas, Nevada 89135  
15 [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
16 [swilson@blacklobello.law](mailto:swilson@blacklobello.law)

17 **.s. Kimalee Goldstein**  
18 An Employee of  
19 GALLIHER LEGAL, PC  
20  
21  
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28

FOLINO v. SWANSON

A-18-782494-C

1/31/2020

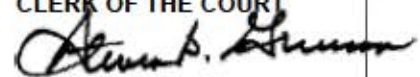
DEFENDANT'S SECOND SUPPLEMENTAL LIST OF WITNESSES AND

PRODUCTION OF DOCUMENTS PURSUANT TO NRCP 16.1

[CD CONTAINING PRODUCTION]







1 **ERR**

2 Rusty Graf, Esq.

3 Nevada Bar No. 6322

4 **BLACK & LOBELLO**

5 10777 West Twain Avenue, 3<sup>rd</sup> Floor

6 Las Vegas, Nevada 89135

7 Telephone: (702) 869-8801

8 Facsimile: (702) 869-2669

9 E-mail: [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)

10 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 JOSEPH FOLINO, an individual and NICOLE  
14 FOLINO, an individual,

15 Plaintiff,

16 v.

17 TODD SWANSON, an individual; TODD  
18 SWANSON, Trustee of the SHIRAZ TRUST;  
19 SHIRAZ TRUST, a Trust of unknown origin;  
20 LYONS DEVELOPMENT, LLC, a Nevada  
21 limited liability company; DOES I through X;  
22 and ROES I through X,

23 Defendants.

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

**ERRATA TO OPPOSITION TO  
DEFENDANTS' MOTION FOR  
ATTORNEY'S FEES AND COSTS**

24 COMES NOW, Plaintiffs JOSEPH FOLINO and NICOLE FOLINO, by and through  
25 their attorney of record Rusty Graf, Esq., of Black & LoBello, hereby submit their Errata to  
26 Opposition to Defendants' Motion for Attorney Fees and Costs, wherein the Affidavit of  
27 Plaintiffs' Counsel in Support of the Opposition to Defendants' Motion for Attorney's Fees and  
28 Costs was submitted unsigned as a result of remote working due to the Emergency Order of the  
Governor of Nevada.

Plaintiffs submit the instant Errata, therefore, for the purpose of providing the Court and  
opposing counsel with a signed and notarized copy of the Affidavit of Plaintiffs' Counsel in

///

///

support of the Opposition to Defendants' Motion for Attorney's Fees and Costs.

DATED this 13<sup>th</sup> day of May 2020.

**BLACK & LOBELLO**

Rusty Graf, Esq.  
Nevada Bar No. 6322  
10777 W. Twain Ave., Suite 300  
Las Vegas, NV 89135  
[rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
*Attorney for Plaintiffs*

**CERTIFICATE OF MAILING**

Pursuant to NRCp 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 13 day of May 2020, I caused the above and foregoing document **ERRATA TO PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.

Nevada Bar No. 7961

Jay T. Hopkins, Esq.

Nevada Bar No. 3223

Christopher M. Young, PC

2640 Professional Court, #200

Las Vegas, Nevada 89128

Jeffrey L. Galliher, Esq.

Galliher Legal, P.C.

Nevada Bar No. 8078

1850 E. Sahara Ave., #107

Las Vegas, NV 89104

Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & LoBello

**AFFIDAVIT OF PLAINTIFFS' COUNSEL IN SUPPORT OF THE OPPOSITION TO  
DEFENDANTS' MOTION FOR ATTORNEY'S FEES AND COSTS**

STATE OF NEVADA       )  
  )       ss.  
COUNTY OF CLARK       )

I, J. RUSTY GRAF, ESQ., state under penalty of perjury that the assertions of this affidavit are true:

1. I am an attorney duly licensed to practice law in the State of Nevada. I am an attorney with the law firm of Black & LoBello.

2. This Affidavit is offered in support of Plaintiffs' Opposition to Defendants' Motion for Attorney's Fees and Costs

3. That Plaintiffs had a reasonable, good faith belief that the claims they brought and maintained in this matter were valid and actionable under relevant State statutes.

4. That Plaintiffs had a reasonable, good faith belief that their claims were distinguishable from the holding of *Nelson v. Heer*.

5. That Plaintiffs had credible evidence that they intended to introduce at trial to support the claims they asserted.

6. That Plaintiffs rejected Defendants' Offer of Judgment because they had a reasonable, good faith belief that the claims they asserted were valid and supported by evidence such that Defendants' Offer was not reasonable in amount or timing.

7. That Plaintiffs did not have any bad faith motivations in bringing or maintaining any of the claims asserted in this case and never intended to harass Defendants in any manner.

8. That Plaintiffs did not have any bad faith motivation in filing the Motion for Sanctions.

9. That analysis of the Beattie Factors indicates it would not be reasonable to award Defendants' fees or costs in this matter.

10. That analysis of the Brunzell Factors indicates that, if it is determined that an



award of fees and costs is reasonable, it would still be reasonable to reduce the amount requested by Defendants in this matter.

11. That I have reviewed the attorney's fees and costs attached to Defendants' Motion and it appears there were numerous times the two law firms engaged by Defendants engaged in needlessly duplicative work.

12. That Defendants did not receive either a money judgment or a settlement in this matter, and thus cannot be a prevailing party under NRS 18.010 or NRS 18.020.

13. That Affiant prepared the Opposition to which this Affidavit is attached, and Affiant affirms that the facts and arguments as true and accurate to best of Affiant's information and belief.

DATED this 13<sup>th</sup> day of May 2020.

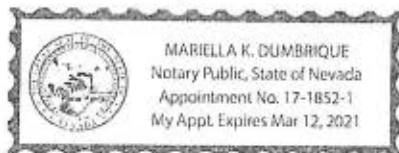
J. RUSTY GRAF, ESQ.

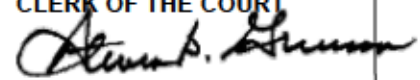
SWORN and SUBSCRIBED to before me on

This 13<sup>th</sup> day of May 2020.



NOTARY PUBLIC in and for said  
COUNTY and STATE





Christopher M. Young, Esq.  
Nevada Bar No. 7961  
Jay T. Hopkins, Esq.  
Nevada Bar No. 3223  
CHRISTOPHER M. YOUNG, PC  
2460 Professional Court, #200  
Las Vegas, Nevada 89128  
Tel: (702) 240-2499  
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[cyoung@cotomlaw.com](mailto:cyoung@cotomlaw.com)  
[jaythopkins@gmail.com](mailto:jaythopkins@gmail.com)

Jeffrey L. Galliher, Esq.  
Nevada Bar No. 8078  
GALLIHER LEGAL P.C.  
1850 East Sahara Avenue, Suite 107  
Las Vegas, Nevada 89104  
Telephone: (702) 735-0049  
Facsimile: (702) 735-0204  
[jgalliher@galliherlawfirm.com](mailto:jgalliher@galliherlawfirm.com)

*Attorneys for Defendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JOSEPH FOLINO, an individual and NICOLE  
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD  
SWANSON, Trustee of the SHIRAZ TRUST;  
SHIRAZ TRUST, a Trust of unknown origin;  
LYON DEVELOPMENT, LLC, a Nevada limited  
liability company; DOES I through X; and ROES  
I through X,

Defendant(s).

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 11<sup>th</sup>  
day of May, 2020.

1 A copy of said Order is attached hereto.

2  
3 Dated this 13<sup>th</sup> day of May 2020.

4  
5  
6 GALLIHER LEGAL P.C.

7 /s/ Jeffrey L. Galliher  
8 Jeffrey Galliher, Esq.  
9 Nevada Bar No. 8078  
10 1850 E. Sahara Ave., Suite 107  
11 Las Vegas, NV 89104

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28  
THE GALLIHER LAW FIRM  
1850 E. Sahara Avenue, Suite 107  
Las Vegas, Nevada 89104  
702-735-0049 Fax: 702-735-0204

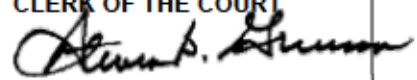
**CERTIFICATE OF E-SERVICE**

Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 13<sup>th</sup> of May I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

Rusty Graf, Esq.  
Shannon M. Wilson, Esq.  
10777 West Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
[rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
[swilson@blacklobello.law](mailto:swilson@blacklobello.law)

/s/Kimalee Goldstein  
An Employee of GALLIHER LEGAL, PC





Christopher M. Young, Esq.  
Nevada Bar No. 7961  
Jay T. Hopkins, Esq.  
Nevada Bar No. 3223  
CHRISTOPHER M. YOUNG, PC  
2460 Professional Court, #200  
Las Vegas, Nevada 89128  
Tel: (702) 240-2499  
Fax: (702) 240-2489  
[cyoung@cotomlaw.com](mailto:cyoung@cotomlaw.com)  
[jaythopkins@gmail.com](mailto:jaythopkins@gmail.com)

Jeffrey L. Galliher, Esq.  
Nevada Bar No. 8078  
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Las Vegas, Nevada 89104  
Telephone: (702) 735-0049  
Facsimile: (702) 735-0204  
[jgalliher@galliherlawfirm.com](mailto:jgalliher@galliherlawfirm.com)

*Attorneys for Defendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JOSEPH FOLINO, an individual and NICOLE  
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD  
SWANSON, Trustee of the SHIRAZ TRUST;  
SHIRAZ TRUST, a Trust of unknown origin;  
LYON DEVELOPMENT, LLC, a Nevada limited  
liability company; DOES I through X; and ROES  
I through X,

Defendant(s).

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

**I.**

**PREAMBLE**

On April 7, 2020, this Court held a hearing to address the Defendants' Motion to Dismiss

<input type="checkbox"/>	Voluntary Dismissal	<input type="checkbox"/>	Summary Judgment
<input type="checkbox"/>	Involuntary Dismissal	<input type="checkbox"/>	Stipulated Judgment <sup>1</sup>
<input type="checkbox"/>	Stipulated Dismissal	<input type="checkbox"/>	Default Judgment
<input checked="" type="checkbox"/>	Motion to Dismiss by Deft(s)	<input type="checkbox"/>	Judgment of Arbitration

JA002215

1 Plaintiffs' Second Amended Complaint, which Defendants filed on September 24, 2019.<sup>1</sup> Rusty J.  
2 Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. and Jay T. Hopkins, Esq.  
3 appeared on behalf of the Defendants.<sup>2</sup>

4 This Court considered the parties' motions and supplements, together with the exhibits and  
5 arguments of counsel. Viewing the evidence in the light most favorable to the Plaintiffs, this Court  
6 finds that the Plaintiffs failed to establish the existence of any genuine dispute as to a material issue  
7 of fact to preclude summary judgment. Accordingly, this Court makes the following Findings of Fact  
8 and Conclusions of Law under the standards set forth below.

10 II.

11 **PROCEDURAL HISTORY**

12 This is a case involving the purchase and sale of a \$3,000,000 luxury home located at 42  
13 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from an October 27, 2017  
14 Residential Purchase Agreement in which the Plaintiffs were the Buyers and Lyons Development,  
15 LLC was the Seller. The gist of the Plaintiffs' lawsuit is that "the Defendants" concealed a water leak  
16 in the plumbing system.

17 *Plaintiffs' Complaint*

18 On October 19, 2018, the Plaintiffs filed their initial Complaint seeking damages for  
19 Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a  
20 "systemic defect" in the plumbing system. The Plaintiffs asserted six causes of action for: (1)  
21 Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010  
22

---

23 <sup>1</sup> While the Defendants styled their instant motion as a motion to dismiss, Defendants acknowledged in their motion that  
24 because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the  
25 summary judgment standards in NRCP 56. *Kopicko v. Young*, 114 Nev. 1333, 1335-1336, 971 P.2d 789, 790 (1998).

26 <sup>2</sup> The parties named the following parties: Plaintiffs, Nicole and Joseph Folino (hereinafter the "Plaintiffs" or the  
27 "Folinos"); and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust;  
28 and Lyons Development, LLC (hereinafter "Defendants" or "Dr. Swanson.").

et seq. (Deceptive Trade Practices); (4) Violation of NRS 113.100 et seq. (Failure to Disclose Known Defects); (5) Civil RICO; and (6) Respondeat Superior.<sup>3</sup>

*Defendants' February 4, 2019 Motion to Dismiss*

On February 4, 2019, the Defendants moved to dismiss the Plaintiffs' Complaint pursuant to NRCP 12(b)(5). At the April 8, 2019 hearing, the Court did not rule on the substance of the Defendants' motion but granted the Plaintiffs' request for leave to amend to cure the pleading deficiencies.

*Plaintiffs' First Amended Complaint*

On April 18, 2019, the Plaintiffs filed their First Amended Complaint, asserting the same claims as in the initial Complaint. The Plaintiffs also asserted a Seventh Cause of Action for Piercing the Corporate Veil/Alter Ego.

*Defendants' May 20, 2019 Motion to Dismiss*

On May 20, 2019, the Defendants moved to dismiss the Plaintiffs' First Amended Complaint, seeking dismissal of each of the Plaintiffs' seven claims. On July 18, 2019, this Court held a hearing on Defendants' Motion to Dismiss. At the hearing, the Court dismissed the Plaintiffs Negligent Misrepresentation, Deceptive Trade Practices, Civil RICO, Respondeat Superior and Piercing the Corporate Veil claims. The Court ruled the Plaintiffs' fraud or NRS Chapter 113 concealment claims survived and ordered the Plaintiffs to file a Second Amended Complaint.

*Plaintiffs' Second Amended Complaint*

On September 4, 2019, the Plaintiffs filed their Second Amended Complaint, alleging concealment in violation of NRS 113 et seq. and fraud/intentional misrepresentation. The Plaintiffs

---

<sup>3</sup> The Plaintiffs attached several documents to their Complaint, First Amended Complaint and Second Amended Complaint which, under NRCP 12(b)(5)'s standards, are incorporated into the pleadings. *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1 also sought punitive damages.

2 *Defendants' September 24, 2019 Motion to Dismiss*

3 Defendants moved for dismissal/summary judgment on September 24, 2019. Defendants  
4 provided evidence in the form of an affidavit from the licensed plumbing company that the February  
5 2017 leak had been repaired, thus negating the Defendants duty to disclose under NRS Chapter 113  
6 and *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).

7  
8 In their Opposition, the Plaintiffs did not present any facts to rebut the Defendants' evidence  
9 that the February 2017 leak had been repaired, but instead sought sanctions for Defendants filing the  
10 motion.

11 At the November 7, 2019 hearing, because the Plaintiffs failed to rebut the facts in the  
12 Defendants' motion, this Court stated its inclination to grant the Defendants' motion. Instead, to  
13 permit the Plaintiffs to fully present their case, this Court gave Plaintiffs 90 days to conduct discovery  
14 and permitted the Plaintiffs to file a supplemental brief demonstrating a genuine issue of material fact.  
15 Defendants were also permitted to file a supplemental brief in response to the Plaintiffs' supplement.

16 *The Plaintiffs' Discovery*

17  
18 Between November 7, 2019 and February 13, 2020, the Plaintiffs conducted extensive  
19 discovery, which included serving numerous subpoenas for documents, serving interrogatories,  
20 requests for production of documents and requests for admissions. Plaintiffs took the depositions of  
21 six witnesses.<sup>4</sup> The Defendants produced nearly 1000 pages of documents as supplemental disclosures  
22 and responses to the Plaintiffs' interrogatories and requests for production. The Plaintiffs also  
23 produced over 5000 pages of documents.  
24

25  
26 

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 <sup>4</sup> The Plaintiffs deposed Rakeman principal Aaron Hawley and employee William "Rocky" Gerber, Dr. Swanson (two  
27 separate depositions), Dr. Swanson's assistant Nicky Whitfield, and Defendants'/Sellers' real estate agents, Ivan Sher and  
28 Kelly Contenda.



On February 13, 2020, the Plaintiffs filed their Supplemental Brief. On February 27, 2020, the Defendants filed their Supplemental Reply in Support of Motion for Summary Judgment. Each party attached voluminous exhibits.

On April 7, 2020, this Court held a hearing regarding the Defendants' motion, and makes the following findings of fact and conclusions of law.

### III.

#### LEGAL STANDARDS

The following legal standards are applicable to this case:

##### A. Summary Judgment Standards

Because the parties presented matters outside the pleadings, this Court treats the Defendants' motion "as one for summary judgment and disposed of as provided in Rule 56." *See* NRCP 12(c) and *Kopicko*, 114 Nev. at 1336, 971 P.2d at 790 (1998).

Since *Wood v. Safeway*,<sup>5</sup> the Nevada Supreme Court has followed a gradual trend toward favoring summary judgment as a "valuable tool to weed out meritless cases [which is] no longer a 'disfavored procedural shortcut.'" *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 438-439, 2019 Nev. LEXIS 39, \*4-5 (July 3, 2019) ("[s]ummary judgment is an important procedural tool by which factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources"). *See also Wood*, 121 Nev. at 730, 121 P.3d at 1030 (summary judgment "is an integral part of the [rules of civil procedure] as a whole, which are designed to secure the just, speedy and inexpensive determination of every action.")

"Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact

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<sup>5</sup> *Wood v. Safeway*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).

remains in dispute and that the moving party is entitled to judgment as a matter of law.” *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 117, 134 Nev. Adv. Rep. 72 (September 13, 2018). “A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party.” *Id.*

**B. NRS Chapter 113 Standards Regarding Pre-Closing Disclosures in Real Estate Transactions**

Plaintiffs’ claims are premised on the Defendants’ purported failure to disclose a February 16, 2017 water leak which, according to the Plaintiffs, was indicative of a systemic plumbing defect. The Plaintiffs’ claims are based on violation of NRS Chapter 113.

NRS §113.140 provides:

Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

1. NRS §113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware.
2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.
3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

In *Nelson v. Heer*, the Nevada Supreme Court defined a seller’s disclosure obligations under NRS 113.130 and NRS 113.140. The Nevada Supreme Court ruled that repairing damage negates a seller’s duty to disclose damage because repaired damage “no longer constitute[s] a condition that materially lessen[s] the value of the property.” *Nelson*, 123 Nev. at 224, 163 P.3d at 425. *Id.* According to the Court, “the seller of residential real property does not have a duty to disclose a defect or condition that ‘materially affects the value or use of residential property in an adverse manner,’ if the seller does not realize, perceive, or have knowledge of that defect or condition.”<sup>6</sup>

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<sup>6</sup> Further, pursuant to statute, recovery is completely barred “on the basis of an error or omission in the disclosure form that was caused by the seller’s reliance upon information provided to the seller by:… (b) A contractor, engineer, land

NRS §113.150(2) provides:

Remedies for seller's delayed disclosure or nondisclosure of defects in property; waiver.

2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent informs the purchaser or the purchaser's agent, through the disclosure form or another written notice, of a defect in the property of which the cost of repair or replacement was not limited by provisions in the agreement to purchase the property, the purchaser may:

(a) Rescind the agreement to purchase the property at any time before the conveyance of the property to the purchaser; or

(b) Close escrow and accept the property with the defect as revealed by the seller or the seller's agent without further recourse.

#### IV.

#### SUMMARY OF FINDINGS OF FACT

The Court finds the following facts are undisputed and supported by the evidence presented by the parties:

- In 2015, Rakeman Plumbing installed the plumbing system manufactured by Uponor at property located at 42 Meadowhawk Lane, Las Vegas, Nevada.
- The 42 Meadowhawk Lane property is the subject of the Plaintiffs' lawsuit.
- There was a leak in the Uponor plumbing system on February 16, 2017;
- Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak;
- A licensed plumbing contractor, Rakeman Plumbing, completely repaired the February 16, 2017 leak;<sup>7</sup>
- Because Rakeman repaired the February 16, 2017 leak, Defendants did not disclose it on the

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surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that profession in this State at the time the information was provided." NRS 113.150(5).

<sup>7</sup> The Court notes that the Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. However, the undisputed evidence shows that the invoice was created after the fact when Rakeman submitted its warranty claim to Uponor. The evidence is undisputed that invoice with the May 23, 2017 date is for the February 16, 2017 leak and documents that Rakeman completely repaired that leak.



October 24, 2017 Sellers' Real Property Disclosure form;

- There was a second leak in the Uponor system on November 7, 2017 during the escrow period of the sale;
- On November 15, 2017, prior to the November 17, 2017 closing date, Defendants disclosed the leak in an addendum;
- Defendants' agent emailed the disclosure to Plaintiffs' agent on November 16, 2017;
- Plaintiffs did a walk-through before closing and knew about the November 7, 2017 leak;
- With knowledge of the November 7, 2017 leak, the Plaintiffs' agent emailed Defendants' agent with proposed options, including an acknowledgment that Plaintiffs could walk away and elect to terminate the contract and not close on the property;
- With knowledge of the November 7, 2017 leak, the Plaintiffs elected to close on the property on November 17, 2017;
- In 2015, an inspection revealed that two recirculating pumps were leaking and the recirculating pumps were replaced. The recirculating pumps failure occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint;
- The same inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a "drip." The leak/drip occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint. Neither Rakeman nor the Defendants could identify a source of the drip, and there is no evidence that the leak/drip persisted after the date of the report, May 11, 2015;
- On November 17, 2017, the day of the closing, Infinity Environmental Services conducted



mold tests at the property;

- Infinity tested for possible fungal levels in the master bathroom and master closet, which is the area where the February 2017 and November 7, 2017 leaks occurred;
- Infinity provided results of their mold testing on November 24, 2017, seven (7) days after the Plaintiffs closed on the property;
- Plaintiffs knew Infinity was conducting the tests on November 17, 2017.
- Plaintiffs closed on the property on November 17, 2017 before the Infinity results were reported;
- After closing, the mold was fully remediated and a subsequent mold test conducted on December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017 Infinity Report;
- The results of the mold test were not provided by Infinity to Defendants because the Defendants no longer owned the property and there is no evidence showing that the Defendants knew of the results of the mold test on or before the closing date.

V.

**CONCLUSIONS OF LAW**

This case centers around the Plaintiffs' claim that the Defendants concealed a February 2017 water leak. Throughout these proceedings, the Defendants have asserted, together with providing undisputed proof, that the February 2017 water leak was completely repaired by a licensed plumbing contractor, Rakeman Plumbing. Defendants have always asserted that under *Nelson v. Heer* and NRS Chapter 113, the repair negated Defendants' duty to disclose.

In responding to the Defendants' motion on the Plaintiffs' Second Amended Complaint, the Plaintiffs did not refute the Defendants' proof that the leak had been repaired. However, rather than dismiss the action at that time, this Court granted the Plaintiffs' request for discovery to establish facts

1 showing the February 2017 leak was not repaired and that the Defendants knew the leak had not been  
2 repaired, two facts required by *Nelson*.

3       The Defendants cooperated fully with the discovery undertaken by the Plaintiffs. While the  
4 discovery revealed additional facts, none of those additional facts are material to the claims made in  
5 the Plaintiffs' Second Amended Complaint. Rather, the end-result of Plaintiffs' discovery efforts is  
6 that, despite the testimony and the plethora of documents produced, and despite the Plaintiffs' efforts  
7 to cast the evidence in their Supplement as creating genuine issues of material fact, the Plaintiffs' case  
8 still fails as a matter of law.  
9

10       Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs'  
11 Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were "at  
12 least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants]  
13 owned the home." However, the evidence shows that the only relevant "water losses" relate to two  
14 failures in the Uponor plumbing system, one which occurred in February 2017, which the Defendants'  
15 repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the  
16 Plaintiffs' closing on the property.  
17

18       The Plaintiffs have failed to present evidence to establish the one fact that could possibly make  
19 their claims viable: that the February 2017 leak was not repaired. To the contrary, the undisputed facts  
20 establish that the February 2017 leak was repaired, thus abrogating any requirement that it be  
21 disclosed, as fully explained in *Nelson*. The other purported "water losses" complained of by the  
22 Plaintiffs are unrelated to their claims and, further, do not materially affect the value of the property.  
23

24       **A. The Undisputed Evidence Shows that the Allegedly Concealed Leak Was**  
25       **Repaired and that Pursuant to NRS Chapter 113 the Defendants Did Not Conceal**  
26       **the Leak**

27       Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose a  
28

February 16, 2017 water leak in the Uponor plumbing system. The Plaintiffs allege the leak indicated a “systemic” defect “known to the defendants prior to the closing of the transaction.” The Plaintiffs allege that:

Shortly after the closing occurred, the Plaintiffs were made aware of [a] water loss that had occurred at the Subject Property in approximately February of 2017 by the plumbing system manufacturer, Uponor.

The Defendants have always maintained that the February 2017 leak was repaired, and the undisputed evidence shows that indeed it was repaired. The Defendants presented an invoice from Rakeman Plumbing showing that Rakeman repaired the leak in question.

The Rakeman invoice is dated May 23, 2017, thus causing some confusion regarding the date the leak occurred. The documents and testimony, considered in conjunction with one another, clarify any potential confusion.<sup>8</sup> The undisputed evidence shows the following: (1) The Uponor system had two leaks in 2017, one occurring on February 16, 2017 and one occurring on November 7, 2017; (2) the February 16, 2017 leak was completely repaired by Rakeman, and the details of the repair are outlined in the May 23, 2017 Rakeman invoice; and (3) the November 7, 2017 leak was disclosed by the Defendants on November 15, 2017, prior to closing.

The Defendants presented the following testimony showing the leak occurred on February 16, 2017, and that Rakeman repaired that leak:

*Dr. Swanson’s Testimony*

The undisputed evidence shows that early in the case, just prior to the August 2018 mediation, Dr. Swanson recalled a “small pinhole leak” which, to his recollection, occurred in January 2017.

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<sup>8</sup> The affidavit of Rakeman owner Aaron Hawley, which accompanied the Defendants’ motion for judgment on the Plaintiffs’ Second Amended Complaint, references work done on May 23, 2017. The affidavit was prepared with reference to the May 23, 2017 invoice. The May 23, 2017 document has confused everyone - because there is *no evidence* of a May 23, 2017 leak. However, as discussed herein, the May 23, 2017 date reflects Rakeman’s documentation for seeking payment under the Uponor warranty. The documents and testimony, reviewed together, establish that the leak occurred in February 16, 2017, not May 23, 2017.



1 During his deposition, Dr. Swanson testified that the leak actually occurred in February:

2 Q: So there was another leak in January, 2017?

3 A: No. I think there was a lot of trouble pinning down the date of the February leak,  
4 but the date was February 17<sup>th</sup> or 18<sup>th</sup> or something like that, I think. Or 7<sup>th</sup> or 8<sup>th</sup>.

5 The Defendants' responses to Plaintiffs' interrogatories confirmed the February 16, 2017 date.  
6

7 Dr. Swanson testified in his deposition and when questioned about the May 23, 2017 date on  
8 the Rakeman invoice, cleared up the confusion regarding the date of the leak:

9 Q: [The May 23, 2017 date is] not accurate, is it, Doctor?

10 A: I don't believe so, unless my dates are off. Because I keep seeing this date, but I  
11 think that was the date of the [Rakeman] invoice.

12 Q: Okay. And the actual leak occurred sometime in February of 2017, didn't it Doctor?

13 A: Yeah, to the best of my knowledge.

14 Dr. Swanson also testified as follows:  
15

16 Q: Doctor, were there two leaks in early part of '17? Did it occur in January or February  
17 of 2017 and then there was a subsequent leak in May of 2017.

18 A: No. . . . There was only one leak.

19 Plaintiffs' counsel cleared up the confusion by his own questions:

20 Q: Okay. I — and that's what we don't want to be, is confused about the dates of any  
21 of these leaks occurring. So it's your understanding that the leak occurred somewhere  
22 in the time period of January or February of 2017, correct?

23 A: Yes, I — I saw those dates and I found some documents that were pretty persuasive  
24 that the date was in February, whatever the date was, February 8<sup>th</sup> or whatever.

25 \*\*\*

26 A: All I know is that I kept seeing [the May 23, 2017] date and it didn't make sense,  
27 so I tried to find the correct date. . . . And that's what I came up with.  
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1                   *Rakeman Plumbing Testimony*

2  
3           The Rakeman Plumbing documents and testimony showed that the leak in question occurred  
4 in February 2017 and that Rakeman plumbing repaired the leak. The Defendants submitted the  
5 affidavit of Aaron Hawley, which establishes that the leak in question was repaired. Clearing up the  
6 date “confusion,” Mr. Hawley testified that Rakeman does not always prepare invoices for Rakeman  
7 warranty work. According to Mr. Hawley,

8  
9           if there’s warranty work done behind our new construction, there may not be any papers  
10 behind it. It’s not like it’s an invoiceable call to where somebody calls up. . . . If this was  
11 done under warranty, which I don’t know if it was or wasn’t, there may not be any  
12 papers involved.

13           Mr. Hawley testified that he was very familiar with the 42 Meadowhawk Lane property and  
14 that he and his employee, Rocky Gerber, discussed the property on many occasions. Mr. Hawley  
15 recalled that there were only two leaks in 2017. He recalled one leak during closing (November) and  
16 testified that the other leak occurred in either February or May, but not both.

17           Rocky Gerber testified that for warranty work covered by the manufacturer, as opposed to  
18 work covered under Rakeman’s own warranty, a summary is always prepared “after the fact.”  
19 According to Mr. Gerber, a summary to the manufacturer “has to be done after the fact.”<sup>9</sup>

20                   *Uponor Documents*

21           The Uponor documents are perhaps the most revealing. Uponor records show the “initial claim  
22 [was] submitted [by Rakeman Plumbing] to Uponor in February 2017. Uponor documents reference  
23 a failure date of February 16, 2017. Uponor sent a check to Rakeman for \$2,496.00 on June 9, 2017  
24 in satisfaction the February 16, 2017 leak. The check and letter reference the \$2,496.00 amount, which  
25

26  
27 <sup>9</sup> Consistent with the testimony from Hawley and Gerber, the May 23, 2017 invoice had to be prepared after the fact.  
28 Indeed, the attached Rakeman document references April 5, 2017 as “Wanted” and “Promised” which predates the May  
23, 2017 invoice date. So, it is impossible that the leak occurred in May.

corresponds with the May 23, 2017 Rakeman invoice which was also for \$2,496.00.

These documents clearly establish a nexus between the February 16, 2017 “failure date” documented by Uponor and the Rakeman repair invoice dated May 23, 2017, thereby establishing the fact that there was only one leak in the first half of 2017, on February 16<sup>th</sup>.

*Nicky Whitfield’s Testimony*

At the time Dr. Swanson’s assistant, Nicky Whitfield, began working for Dr. Swanson in March 2017, Rakeman was in the process of finalizing repairs on the February 16, 2017 leak. According to Ms. Whitfield’s sworn testimony, “when I started [working for Dr. Swanson] they were just finishing repairs of the carpet.” Based on this testimony, the repairs could not have been underway in March if the leak did not occur until May.

Viewing the evidence in the light most favorable to the Plaintiffs, it cannot be reasonably disputed that the first leak in 2017 was in February. Further, the Plaintiff presented no evidence that more than one leak occurred in the first half of 2017. It cannot be reasonably disputed that the leak occurring in the first half of 2017, regardless of whether it happened in February or May, was fully repaired, thus abrogating its disclosure under *Nelson*.

This Court finds that the undisputed evidence establishes that the leak which is the subject of the Plaintiffs’ action occurred on February 16, 2017, not May 23, 2017, which is the date on the Rakeman invoice.

Further, this Court finds that the Rakeman invoice, testimony and Hawley affidavit provide uncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the Defendants’ duty of disclosure. This Court finds that the Plaintiffs’ allegation the Defendants failed to disclose a water leak in their October 24, 2017 disclosures is not supported by the evidence and fails as a matter of law. Thus, summary judgment is warranted under the standards set forth in NRCP 56(a), NRS Chapter 113 and *Nelson v. Heer*.

**B. The Undisputed Evidence Shows that the Plaintiffs Knew About the November 7, 2017 Leak, But Nonetheless Elected to Close**

Plaintiffs Supplement asserted for the first time that Plaintiffs did not know about the November 7, 2017 leak until after the closing. Referencing “Affidavit of Joe Folino and Affidavit of Nicole Folino,” the Plaintiffs’ Supplement asserts they executed the closing documents on November 16, 2017 and “were not notified of any plumbing problems with the Subject Property prior to November 17, 2017.” Plaintiffs’ filed Supplement, however, did not actually include either affidavit.<sup>10</sup>

On February 25, 2020, 12 days after filing their Supplement and 5 days after Defendants’ counsel requested that Plaintiffs provide the affidavits, Plaintiffs’ counsel emailed two un-signed “affidavits,” purportedly made by Joseph Folino and Nicole Folino, to defense counsel. However, the un-signed and unsworn Folino “affidavits” do not support Plaintiffs’ claim that they were unaware of the November 7, 2017 leak prior to closing. Even if they did, under NRCP 56, the “affidavits” are not admissible “facts” for purposes of challenging summary judgment since neither is signed.

The admissible facts, however, refute the Plaintiffs’ claim they did not know about the November 7, 2017 leak before they closed. First, this new allegation *directly* contradicts the allegations in the Plaintiffs’ own pleadings. Plaintiffs asserted the following allegations in their Second Amended Complaint:

24. Prior to the closing of this transaction, the Plaintiffs requested and were given the opportunity to perform their own site inspection of the Subject Property;
25. This pre-closing inspection occurred on or before November 17, 2017;
26. During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants;

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<sup>10</sup> The unsigned and unsworn “affidavits” further allege that Defendants requested a lease-back of the property “for the purpose of concealing repairs taking place on a leak that had occurred on or about the first week of 2017.” This contention ignores the undisputed evidence that the lease-back agreement is dated November 6, 2017, which was the day before the November 7, 2017 leak.



28. The Plaintiffs' real estate agent, Ashley Lazosky . . . had specific conversations with the Defendants and the subcontractor hired to make the repairs.

These allegations directly contradict the unsupported argument that they did not know about the November 7, 2017 leak.

Second, Plaintiffs' assertion is also contradicted by evidence showing the Defendants specifically disclosed the leak via Addendum 4-A, emailed to Plaintiffs' agent early in the day, at 8:31 a.m., on November 16, 2017.<sup>11</sup> Addendum 4-A, stated:

Seller is disclosing that there was a water leak in the master closet from a water pipe that broke. The Seller is fully remediating the issue to include new baseboards, carpet, etc. and all repair items regarding this leak will be handled prior to closing.

The same day, at 1:48 p.m., the parties' agents exchanged texts discussing a \$20,000 hold back because the buyers "don't want to rely on the plumber and their warranty." This shows that on November 16, the day prior to closing, the parties' agents were discussing potential remedies for dealing with the disclosed leak.

Again, later that same day, but prior to closing, at 9:00 p.m. on November 16, 2017, the Plaintiffs' agent, Ashley Oakes-Lazosky, sent a detailed email to Defendants' agent wherein she acknowledges that "at this point due to the change in circumstances with the last minute issue with the leak, the buyer's recourse is to walk at this point if they are not comfortable with the repairs/credits."

Finally, Plaintiffs' knowledge of the November 7, 2017 leak is further confirmed by the

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<sup>11</sup> An agent's knowledge is imputed to the principal. *ARCPE 1, LLC v. Paradise Harbor Place Trust*, 2019 Nev. Unpub. LEXIS 1017, \*2, 448 P.3d 553 (2019); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d 1076, 1077 (1934). Under this maxim, the Plaintiffs had at least constructive knowledge of the November 7, 2017 leak. See e.g. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).



1 testimony of Nicky Whitfield. Ms. Whitfield testified by affidavit that “[o]n November 16, Mr. &  
2 Mrs. Folino conducted a walk-through of the entire house” and Ms. Whitfield “showed [Ms. Folino]  
3 exactly where the leak had occurred. Ms. Whitfield’s testimony is consistent with the Plaintiffs’ own  
4 allegations and the other evidence.  
5

6 **C. The Plaintiffs’ Election to Close Bars Their Concealment Action**

7  
8 The Plaintiffs’ election to close escrow bars their claims under general waiver principles. *See*  
9 *e.g. Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of  
10 waiver as: (1) voluntary and intentional relinquishment of a known right; and (2) made with  
11 knowledge of all material facts.) Waiver of a known right can be implied by conduct. *Id.* The  
12 Plaintiffs’ conduct shows that they relinquished their rights to refuse to close.

13 NRS 113.150(2) incorporates these waiver principles. Under NRS §113.150(2), the Plaintiffs’  
14 options were to either “rescind the agreement to purchase the property at any time before the  
15 conveyance of the property to the purchaser; or close escrow and accept the property with the defect  
16 as revealed by the seller or the seller’s agent without further recourse.”  
17

18 The evidence is undisputed that prior to closing, the Defendants provided notice to the  
19 Plaintiffs regarding the November 2017 Uponor system leak. The evidence is undisputed that the  
20 Plaintiffs’ agent sent a detailed email to Defendants’ agent acknowledging that the Plaintiffs’ recourse  
21 was to elect to not close. The evidence is undisputed that with knowledge of all the material facts,  
22 Plaintiffs relinquished their right to walk by closing on the property on November 17, 2017.  
23

24 This Court finds that the Plaintiffs’ election to close escrow bars “further recourse,” as a matter  
25 of law.

26 ///

27 ///

**D. The 2015 “Water Losses” are Unrelated to the Plaintiffs’ Allegations that the Defendants Failed to Disclose a Systemic Plumbing Defect**

For the first time in their Supplement, Plaintiffs assert that Defendants wrongfully failed to disclose “water losses” that occurred in 2015. But the Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which is the basis of their Second Amended Complaint. In contrast, the undisputed evidence shows that these issues have nothing to do with the Uponor system. Rocky Gerber of Rakeman Plumbing testified that the recirculating pumps and the Uponor piping system are two different systems.

The parties do not dispute that construction of the 42 Meadowhawk property was completed in April 2015. Shortly thereafter, on May 11, 2015, Defendants contracted for a post-construction Home Inspection Report. The evidence shows that Dr. Swanson made notes on the report as the items in the report were repaired, to document the progress of the repairs,<sup>12</sup> rather than to conceal a defect.

Dr. Swanson testified:

Q. What was the reason why you had this report prepared?

A. Because the house was essentially finished being built. I had moved in already, and I wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction.

This Court finds that the Plaintiffs’ failed to present any facts that the 2015 leaks are in any way related to their claims that the Defendants concealed a water leak indicative of a “systemic defect” in the plumbing system, as alleged in their Second Amended Complaint and as such, cannot defeat summary judgment.

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<sup>12</sup> The notes are admissible as “present sense impressions” and thus are not hearsay under NRS 51.085. NRS 51.085 provides that a “present sense impression” is “[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule.”

**E. The Plaintiffs' Fraud Claim is Derivative of Plaintiffs' Concealment Claim and Fails by Operation of Law**

This Court also finds that the Plaintiffs' fraud claim fails as a matter of law. The Plaintiffs' Second Amended Complaint alleges one wrong: Defendants' failure to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect. The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim.<sup>13</sup>

Because this court finds that summary judgment is warranted regarding the Plaintiffs' concealment claim, the Plaintiffs' fraud claim fails as a matter of law.

**VI.**

**ORDER**

Pursuant to the findings of fact and conclusions of law detailed herein, this Court finds that summary judgment is warranted regarding the Plaintiffs' Second Amended Complaint because the Plaintiffs failed to present facts showing disputed issues of material fact which preclude summary judgment under NRCP 56.

The evidence shows that the Defendants' purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing. The evidence shows that under *Nelson v. Heer* and NRS §113.130 & 140, the repair and Defendants' knowledge of the repair negated the Defendants' duty to disclose the leak in the October 24, 2017 Sellers Real Property Disclosure Form. Further, the undisputed evidence shows the Plaintiffs knew about the November 2017 leak, but nonetheless elected to close on the property. The Plaintiffs' election to close bars further recourse under NRS §113.150(2).

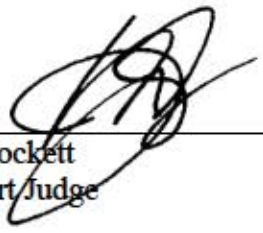
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<sup>13</sup> NRS Chapter 113 provides plaintiffs with a statutory remedy to redress a seller's failure to disclose a defect or condition in a real estate transaction. The statute preempts the Plaintiffs' fraud claim. *See Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000), citing *Casa Clara v. Charley Toppino and Sons*, 620 So.2d 1244, 1247 (Fla 1993) (noting that home buyers are protected by "statutory remedies, the general warranty of habitability and the duty of sellers to disclose defects, as well as the ability of purchasers to inspect houses for defects.")



1 Accordingly, this Court hereby GRANTS the Defendants' motion regarding Plaintiffs' Second  
2 Amended Complaint, and ORDERS that the Plaintiffs' Second Amended Complaint is hereby  
3 DISMISSED, with prejudice.

4 DATED this 11th day of May 2020.

6  
7   
8 Hon. Jim Crockett  
District Court Judge

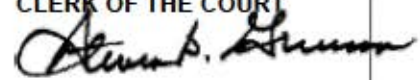
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7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 JOSEPH FOLINO, an individual and NICOLE  
10 FOLINO, an individual,

11 Plaintiff,

12 v.

13 TODD SWANSON, an individual; TODD  
14 SWANSON, Trustee of the SHIRAZ TRUST;  
15 SHIRAZ TRUST, a Trust of unknown origin;  
16 LYONS DEVELOPMENT, LLC, a Nevada  
17 limited liability company; DOES I through X;  
18 and ROES I through X,

19 Defendants.

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

**NOTICE OF APPEAL**

20 **NOTICE IS HEREBY GIVEN** that Plaintiffs Joseph Folino and Nicole Folino, by and  
21 through their attorney of record, Rusty Graf, Esq. of the law firm Black & LoBello, appeals to  
22 the Supreme Court of the State of Nevada from the Decision and Order granting Defendants'

23 ///

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///

1 Motion to Dismiss entered in the above-captioned matter on May 13, 2020.

2 Dated this 26<sup>th</sup> day of May 2020.

3  
4 **BLACK & LOBELLO**

5  
6   
7 RUSTY GRAF, ESQ.  
8 Nevada Bar No. 6322  
9 10777 W. Twain Ave., 3<sup>rd</sup> Fl.  
10 Las Vegas, Nevada 89135  
11 (702) 869-8801  
12 (702) 869-2669 (fax)  
13 [rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
14 *Attorney for Appellants*  
15  
16  
17  
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**CERTIFICATE OF MAILING**

Pursuant to NRCP 5(b), I certify that I am an employee of BLACK & LOBELLO and that on the 26<sup>th</sup> day of May 2020, I caused the above and foregoing document entitled **NOTICE OF APPEAL** to be served as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and

☒ by electronic service through Odyssey, Clark County Eighth Judicial District Court's electronic filing/service system;

☐ pursuant to EDCR 7.26, to be sent via facsimile;

☐ hand delivered

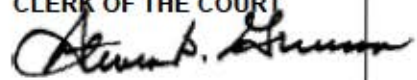
to the party or their attorney(s) listed below at the address and/or facsimile number indicated below:

Christopher M. Young, Esq.  
Nevada Bar No. 7961  
Jay T. Hopkins, Esq.  
Nevada Bar No. 3223  
Christopher M. Young, PC  
2640 Professional Court, #200  
Las Vegas, Nevada 89128  
Attorneys for Defendants

Jeffrey L. Galliher, Esq.  
Galliher Legal, P.C.  
Nevada Bar No. 8078  
1850 E. Sahara Ave., #107  
Las Vegas, NV 89104  
Attorneys for Defendants

and that there is regular communication by mail between the place of mailing and the place(s) so addressed.

  
An Employee of Black & LoBello



1 **ASTA**  
2 J. RUSTY GRAF, ESQ.  
3 Nevada Bar No. 6322  
4 **BLACK & LOBELLO**  
5 10777 W. Twain Ave., 3<sup>rd</sup> Fl.  
6 Las Vegas, Nevada 89135  
(702) 869-8801  
(702) 869-2669 (fax)  
*Attorney for Appellants*

7 **DISTRICT COURT**  
8 **CLARK COUNTY, NEVADA**

9  
10 JOSEPH FOLINO, an individual and  
11 NICOLE FOLINO, an individual,

12 Plaintiffs,

13 v.

14 TODD SWANSON, an individual; TODD  
15 SWANSON, Trustee of the SHIRAZ  
16 TRUST; SHIRAZ TRUST, a Trust of  
17 unknown origin; LYONS DEVELOPMENT,  
18 LLC, a Nevada limited liability company;  
19 DOES I through X; and ROES I through X,

20 Defendants.

CASE NO.: A-18-782494-C

DEPT. NO.: XXIV

**CASE APPEAL STATEMENT**

21 Plaintiffs Joseph Folino and Kelly Folino ("Plaintiffs"), by and through their attorney of  
22 record, Rusty Graf, Esq. of the law firm Black & LoBello, hereby submits their Case Appeal  
23 Statement pursuant to Nevada Rule of Appellate Procedure 3(f) as follows:

24 ///

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26 ///

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28 ///



**CASE APPEAL STATEMENT**

**(A) The district court case number and caption showing the names of all parties to the proceedings below:**

The district court case number is A-18-782494-C and caption is correctly stated above. The parties to the proceedings below are Plaintiffs and Defendants Todd Swanson, an individual, Todd Swanson, as Trustee of the Shiraz Trust, and Lyons Development LLC. ("Defendants").

**(B) The name of the judge who entered the order or judgment being appealed:**

The Honorable Jim Crockett, Department XXIV of the Eighth Judicial District Court of the State of Nevada issued all Orders referenced above.

**(C) The name of each appellant and the name and address of counsel for each appellant:**

Plaintiff/Appellant:

Nicole Folino

Counsel for the Plaintiff:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., 3<sup>rd</sup> Fl.  
Las Vegas, Nevada 89135  
*Attorney for Appellant*

Plaintiff/Appellant:

Joseph Folino

Counsel for the Plaintiff:

Rusty Graf, Esq.  
BLACK & LOBELLO  
10777 W. Twain Ave., 3<sup>rd</sup> Fl.  
Las Vegas, Nevada 89135  
*Attorney for Appellant*

**(D) The name of each respondent and the name and address of appellate counsel, if known, for each respondent, but if the name of a respondent's appellate counsel is not known, then the name and address of that respondent's trial counsel:**

Defendant/Respondent:

Todd Swanson

1 Counsel for the Respondent:

2 Christopher M. Young, Esq.  
3 Nevada Bar No. 7961  
4 Jay T. Hopkins, Esq.  
5 Nevada Bar No. 3223  
6 **Christopher M. Young, PC**  
7 2640 Professional Court, #200  
8 Las Vegas, Nevada 89128  
9 Jeffrey L. Galliher, Esq.  
10 **Galliher Legal, P.C.**  
11 Nevada Bar No. 8078  
12 1850 E. Sahara Ave., #107  
13 Las Vegas, NV 89104  
14 Attorneys for Respondent

15 Defendant/Respondent:

16 Todd Swanson as Trustee of the Shiraz Trust

17 Counsel for the Respondent:

18 Christopher M. Young, Esq.  
19 Nevada Bar No. 7961  
20 Jay T. Hopkins, Esq.  
21 Nevada Bar No. 3223  
22 **Christopher M. Young, PC**  
23 2640 Professional Court, #200  
24 Las Vegas, Nevada 89128  
25 Jeffrey L. Galliher, Esq.  
26 **Galliher Legal, P.C.**  
27 Nevada Bar No. 8078  
28 1850 E. Sahara Ave., #107  
Las Vegas, NV 89104  
Attorneys for Respondent

29 Defendant/Respondent:

30 Lyons Development, LLC.

31 Counsel for the Respondent:

32 Christopher M. Young, Esq.  
33 Nevada Bar No. 7961  
34 Jay T. Hopkins, Esq.  
35 Nevada Bar No. 3223  
36 **Christopher M. Young, PC**  
37 2640 Professional Court, #200  
38 Las Vegas, Nevada 89128  
Jeffrey L. Galliher, Esq.

**Gallihier Legal, P.C.**  
Nevada Bar No. 8078  
1850 E. Sahara Ave., #107  
Las Vegas, NV 89104  
Attorneys for Respondent

**(E) Whether an attorney identified in response to subparagraph (D) is not licensed to practice law in Nevada, and if so, whether the district court granted that attorney permission to appear under SCR 42, including a copy of any district court order granting that permission:**

N/A

**(F) Whether the appellant was represented by appointed counsel in the district court, and whether the appellant is represented by appointed counsel on appeal:**

N/A

**(G) Whether the district court granted the appellant leave to proceed in forma pauperis, and if so, the date of the district court's order granting that leave:**

N/A

**(H) The date that the proceedings commenced in the district court:**

Plaintiffs initiated the proceedings when they filed their Complaint on October 19, 2018.

**(I) A brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:**

This is a tort action related to the purchase and sale of a home located at 42 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from the discovery of systemic plumbing issues after the close of the sale, and the failure of the Defendants to disclose their knowledge of water loss occurrences on the Residential Purchase Agreement. The Plaintiffs' Second Amended Complaint had two causes of action, Violation of NRS 113.100 et seq. and Fraud/Intentional Misrepresentation. This appeal concerns errors by the trial court in the May 11, 2020 Order granting Defendants' Motion to Dismiss and the Findings of Fact and Conclusions of Law contained therein.



1 The issues on appeal, in short, include (1) the trial court's application of the holding of  
2 *Nelson v. Heer* to this dispute;<sup>1</sup> (2) the Finding of Fact that Plaintiffs' action was premised on the  
3 Defendants' failure to disclose a specific leak which occurred on February 16, 2017; (3) the  
4 Conclusion of Law that "Plaintiffs lawsuit is predicated on their allegations that the Defendants  
5 failed to disclose a February 16, 2017 water leak in the Uponor plumbing system";<sup>2</sup> (4) the  
6 Finding of Fact that only the February water loss was relevant, and all other water losses  
7 complained of by the Plaintiffs "are unrelated to their claims and, further, do not materially affect  
8 the value of the property"; and (5) the Conclusion of Law that Plaintiffs' Fraud claim fails as a  
9 matter of law because the "Second Amended Complaint alleges one wrong: Defendants' failure  
10 to disclose a February 2017 water leak, which purportedly concealed a systemic plumbing defect.  
11 The Plaintiffs fraud claim is derivative of their NRS Chapter 113 concealment claim."

12 The application of *Nelson v. Heer* to this case was improper for two reasons. First, because  
13 the holding of *Nelson v. Heer* regards whether conducting a repair removes the general duty to  
14 disclose the existence of a material issue, while here, Plaintiffs' argued that even if the duty to  
15 disclose is removed by repair it is still fraud and/or concealment to respond incorrectly to a direct  
16 inquiry (stating "no" in response to a question asking if any previous incidents of water loss **had**  
17 **ever occurred**). These are not the same issue. Second, because even if the holding of *Nelson v.*  
18 *Heer* did allow Defendants to state that no previous water losses had ever occurred (due to repair),  
19 Plaintiffs provided evidence of other unrepaired and undisclosed water losses which were not  
20 considered by the trial court.

21 The other issues on appeal all involve Findings of Fact and Conclusions of Law relating  
22 to the incorrect statement, and subsequent analysis, of the scope and content of Plaintiffs' claims.  
23 The May 13, 2020 Notice of Entry of Order and Order make it clear that granting the Motion to  
24

---

25 <sup>1</sup> In the May 11, 2020 Order granting the Motion to Dismiss, the trial court directly stated that it was relying upon  
26 the holding of *Nelson v. Heer*, and asserted that "repairing damage negates a seller's duty to disclose damage  
because repaired damage "no longer constitute[s] a condition that materially lessen[s] the value of the property.""

27 <sup>2</sup> Additional Findings of Fact in the May 11, 2020 Order state that (1) previous leaks in other areas of the house  
28 were not related to Plaintiffs' Claims; and (2) that another separate water loss in a basement bathroom was not  
related to Plaintiffs' Claims, making it clear that the trial court exclusively considered the February and November  
leaks in granting the Motion to Dismiss.



1 Dismiss was based entirely upon the incorrect assessment that “Plaintiffs have failed to present  
2 evidence to establish the one fact that could possibly make their claims viable: that the February  
3 2017 leak was not repaired.” The problem with this assessment is that it has no basis in the  
4 substance and allegations actually contained in Plaintiffs’ Second Amended Complaint.

5 Plaintiffs’ initial Complaint and First Amended Complaint were focused on the February  
6 2017 leak, but these Complaints were not the subject of the Motion to Dismiss. Plaintiffs’ Second  
7 Amended Complaint asserts in pertinent part that (1) the Seller’s Real Property Disclosure did  
8 not notify Plaintiffs’ of “any water event”; (2) that other water losses occurred which either  
9 required disclosure themselves or made Defendants aware of “systemic defects” in the plumbing  
10 system; and (3) that Defendants acted with intent to deceive when they failed to notify Plaintiffs  
11 of the prior water losses (which include at least one water loss that Defendants did not even claim  
12 was repaired and, therefore, cannot logically be covered by the *Nelson v. Heer* removal of duty  
13 to disclose).

14 It was improper of the trial court to determine that it would only analyze Plaintiffs’ claims  
15 in relation to the February 2017 leak, when this clearly did not align with the actual contents of  
16 Plaintiffs’ Second Amended Complaint. Thus, the trial court’s subsequent May 13, 2020 Notice  
17 of Entry of Order and Order is also improper, as it was not based upon the pleading that was  
18 actually the subject of the Motion to Dismiss (the Second Amended Complaint) and instead  
19 analyzed the Motion to Dismiss in relation to the content of the initial Complaint and First  
20 Amended Complaint. These disparities, among others, necessitate appellate relief.

21 **(J) Whether the case has previously been the subject of an appeal to or original writ**  
22 **proceeding in the Supreme Court or Court of Appeals and, if so, the caption and**  
23 **docket number of the prior proceeding:**

24 N/A

25 **(K) Whether the appeal involves child custody or visitation:**

26 N/A

27 ///

28 ///

1 (L) **Whether the appeal involves the possibility of settlement:**

2 Plaintiffs do not believe that there is a possibility of settlement with Defendants.

3 Dated this 26 day of May, 2020.

**BLACK & LOBELLO**

4  
5  
6 RUSTY GRAF, ESQ.  
7 Nevada Bar No. 6322  
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12 rgraf@blacklobello.law  
13 *Attorney for Appellants*  
14  
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1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Black & LoBello and that on  
3 the 26 day of May 2020, I caused the above and foregoing document entitled **CASE**  
4 **APPEAL STATEMENT** to be served as follows:

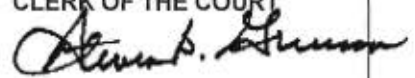
- 5 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed  
6 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and  
7 ☒ by electronic service through Wiznet, Clark County Eighth Judicial District Court's  
8 electronic filing/service system;  
9 ☐ pursuant to EDCR 7.26, to be sent via facsimile;  
10 ☐ hand delivered.

11 to the party or their attorney(s) listed below at the address and/or facsimile number indicated  
12 below:

13 Christopher M. Young, Esq.  
14 Nevada Bar No. 7961  
15 Jay T. Hopkins, Esq.  
16 Nevada Bar No. 3223  
17 Christopher M. Young, PC  
18 2640 Professional Court, #200  
19 Las Vegas, Nevada 89128  
20 Attorneys for Defendants

21 Jeffrey L. Galliher, Esq.  
22 Galliher Legal, P.C.  
23 Nevada Bar No. 8078  
24 1850 E. Sahara Ave., #107  
25 Las Vegas, NV 89104  
26 Attorneys for Defendants

27   
28 \_\_\_\_\_  
An Employee of Black & LoBello



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*Attorneys for Defendants*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JOSEPH FOLINO, an individual and NICOLE  
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD  
SWANSON, Trustee of the SHIRAZ TRUST;  
SHIRAZ TRUST, a Trust of unknown origin;  
LYON DEVELOPMENT, LLC, a Nevada limited  
liability company; DOES I through X; and ROES  
I through X,

Defendant(s).

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that the above-entitled Court entered its Order on the 11<sup>th</sup>  
day of May, 2020.



1 A copy of said Order is attached hereto.

2  
3 Dated this 13<sup>th</sup> day of May 2020.

4  
5 GALLIHER LEGAL P.C.

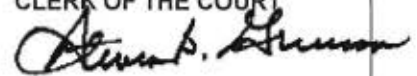
6  
7 /s/ Jeffrey L. Galliher  
8 Jeffrey Galliher, Esq.  
9 Nevada Bar No. 8078  
10 1850 E. Sahara Ave., Suite 107  
11 Las Vegas, NV 89104

**CERTIFICATE OF E-SERVICE**

Pursuant to Nevada Rules of Civil Procedure 5(b), Administrative Order 14-2, and N.E.F.C.R. 9, I hereby certify that on the 13<sup>th</sup> of May I caused the foregoing **NOTICE OF ENTRY OF ORDER** to be electronically e-served on counsel as follows:

Rusty Graf, Esq.  
Shannon M. Wilson, Esq.  
10777 West Twain Avenue, 3<sup>rd</sup> Floor  
Las Vegas, Nevada 89135  
[rgraf@blacklobello.law](mailto:rgraf@blacklobello.law)  
[swilson@blacklobello.law](mailto:swilson@blacklobello.law)

/s/Kimalee Goldstein  
An Employee of GALLIHER LEGAL, PC



Christopher M. Young, Esq.  
Nevada Bar No. 7961  
Jay T. Hopkins, Esq.  
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[jgalliher@galliherlawfirm.com](mailto:jgalliher@galliherlawfirm.com)

*Attorneys for Defendants*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

JOSEPH FOLINO, an individual and NICOLE  
FOLINO, an individual,

Plaintiff(s),

v.

TODD SWANSON, an individual; TODD  
SWANSON, Trustee of the SHIRAZ TRUST;  
SHIRAZ TRUST, a Trust of unknown origin;  
LYON DEVELOPMENT, LLC, a Nevada limited  
liability company; DOES I through X; and ROES  
I through X,

Defendant(s).

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

**I.**

**PREAMBLE**

On April 7, 2020, this Court held a hearing to address the Defendants' Motion to Dismiss

<input type="checkbox"/>	Voluntary Dismissal	<input type="checkbox"/>	Summary Judgment
<input type="checkbox"/>	Involuntary Dismissal	<input type="checkbox"/>	Stipulated Judgment <sup>1</sup>
<input type="checkbox"/>	Stipulated Dismissal	<input type="checkbox"/>	Default Judgment
<input checked="" type="checkbox"/>	Motion to Dismiss by Deft(s)	<input type="checkbox"/>	Judgment of Arbitration

JA002249

1 Plaintiffs' Second Amended Complaint, which Defendants filed on September 24, 2019.<sup>1</sup> Rusty J.  
2 Graf, Esq. appeared on behalf of the Plaintiffs; Jeffrey L. Galliher, Esq. and Jay T. Hopkins, Esq.  
3 appeared on behalf of the Defendants.<sup>2</sup>

4 This Court considered the parties' motions and supplements, together with the exhibits and  
5 arguments of counsel. Viewing the evidence in the light most favorable to the Plaintiffs, this Court  
6 finds that the Plaintiffs failed to establish the existence of any genuine dispute as to a material issue  
7 of fact to preclude summary judgment. Accordingly, this Court makes the following Findings of Fact  
8 and Conclusions of Law under the standards set forth below.

## 10 II.

### 11 PROCEDURAL HISTORY

12 This is a case involving the purchase and sale of a \$3,000,000 luxury home located at 42  
13 Meadowhawk Lane in Las Vegas, Nevada. The dispute emanates from an October 27, 2017  
14 Residential Purchase Agreement in which the Plaintiffs were the Buyers and Lyons Development,  
15 LLC was the Seller. The gist of the Plaintiffs' lawsuit is that "the Defendants" concealed a water leak  
16 in the plumbing system.

#### 18 *Plaintiffs' Complaint*

19 On October 19, 2018, the Plaintiffs filed their initial Complaint seeking damages for  
20 Defendants' alleged concealment of a February 2017 water leak which Plaintiffs alleged indicated a  
21 "systemic defect" in the plumbing system. The Plaintiffs asserted six causes of action for: (1)  
22 Fraud/Intentional Misrepresentation; (2) Negligent Misrepresentation; (3) Violation of NRS 598.010  
23

---

25 <sup>1</sup> While the Defendants styled their instant motion as a motion to dismiss, Defendants acknowledged in their motion that  
26 because the motion and supplements referenced and attached documents outside the pleadings, this Court must invoke the  
summary judgment standards in NRCP 56. *Kopicko v. Young*, 114 Nev. 1333, 1335-1336, 971 P.2d 789, 790 (1998).

27 <sup>2</sup> The parties named the following parties: Plaintiffs, Nicole and Joseph Folino (hereinafter the "Plaintiffs" or the  
28 "Folinos"); and Defendants: Dr. Todd Swanson, an individual; Todd Swanson, Trustee of the Shiraz Trust; Shiraz Trust;  
and Lyons Development, LLC (hereinafter "Defendants" or "Dr. Swanson.").



1 et seq. (Deceptive Trade Practices); (4) Violation of NRS 113.100 et seq. (Failure to Disclose Known  
2 Defects); (5) Civil RICO; and (6) Respondeat Superior.<sup>3</sup>

3 ***Defendants' February 4, 2019 Motion to Dismiss***

4 On February 4, 2019, the Defendants moved to dismiss the Plaintiffs' Complaint pursuant to  
5 NRCP 12(b)(5). At the April 8, 2019 hearing, the Court did not rule on the substance of the  
6 Defendants' motion but granted the Plaintiffs' request for leave to amend to cure the pleading  
7 deficiencies.  
8

9 ***Plaintiffs' First Amended Complaint***

10 On April 18, 2019, the Plaintiffs filed their First Amended Complaint, asserting the same  
11 claims as in the initial Complaint. The Plaintiffs also asserted a Seventh Cause of Action for Piercing  
12 the Corporate Veil/Alter Ego.  
13

14 ***Defendants' May 20, 2019 Motion to Dismiss***

15 On May 20, 2019, the Defendants moved to dismiss the Plaintiffs' First Amended Complaint,  
16 seeking dismissal of each of the Plaintiffs' seven claims. On July 18, 2019, this Court held a hearing  
17 on Defendants' Motion to Dismiss. At the hearing, the Court dismissed the Plaintiffs Negligent  
18 Misrepresentation, Deceptive Trade Practices, Civil RICO; Respondeat Superior and Piercing the  
19 Corporate Veil claims. The Court ruled the Plaintiffs' fraud or NRS Chapter 113 concealment claims  
20 survived and ordered the Plaintiffs to file a Second Amended Complaint.  
21

22 ***Plaintiffs' Second Amended Complaint***

23 On September 4, 2019, the Plaintiffs filed their Second Amended Complaint, alleging  
24 concealment in violation of NRS 113 *et seq.* and fraud/intentional misrepresentation. The Plaintiffs  
25

26  
27 <sup>3</sup> The Plaintiffs attached several documents to their Complaint, First Amended Complaint and Second Amended Complaint  
28 which, under NRCP 12(b)(5)'s standards, are incorporated into the pleadings. *Brelant v. Preferred Equities Corp.*, 109  
Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

1 also sought punitive damages.

2 ***Defendants' September 24, 2019 Motion to Dismiss***

3 Defendants moved for dismissal/summary judgment on September 24, 2019. Defendants  
4 provided evidence in the form of an affidavit from the licensed plumbing company that the February  
5 2017 leak had been repaired, thus negating the Defendants duty to disclose under NRS Chapter 113  
6 and *Nelson v. Heer*, 123 Nev. 217, 163 P.3d 420 (2007).

7  
8 In their Opposition, the Plaintiffs did not present any facts to rebut the Defendants' evidence  
9 that the February 2017 leak had been repaired, but instead sought sanctions for Defendants filing the  
10 motion.

11 At the November 7, 2019 hearing, because the Plaintiffs failed to rebut the facts in the  
12 Defendants' motion, this Court stated its inclination to grant the Defendants' motion. Instead, to  
13 permit the Plaintiffs to fully present their case, this Court gave Plaintiffs 90 days to conduct discovery  
14 and permitted the Plaintiffs to file a supplemental brief demonstrating a genuine issue of material fact.  
15 Defendants were also permitted to file a supplemental brief in response to the Plaintiffs' supplement.

16  
17 ***The Plaintiffs' Discovery***

18 Between November 7, 2019 and February 13, 2020, the Plaintiffs conducted extensive  
19 discovery, which included serving numerous subpoenas for documents, serving interrogatories,  
20 requests for production of documents and requests for admissions. Plaintiffs took the depositions of  
21 six witnesses.<sup>4</sup> The Defendants produced nearly 1000 pages of documents as supplemental disclosures  
22 and responses to the Plaintiffs' interrogatories and requests for production. The Plaintiffs also  
23 produced over 5000 pages of documents.  
24

25  
26  
27 <sup>4</sup> The Plaintiffs deposed Rakeman principal Aaron Hawley and employee William "Rocky" Gerber, Dr. Swanson (two  
28 separate depositions), Dr. Swanson's assistant Nicky Whitfield, and Defendants'/Sellers' real estate agents, Ivan Sher and  
Kelly Contenda.

1 On February 13, 2020, the Plaintiffs filed their Supplemental Brief. On February 27, 2020, the  
2 Defendants filed their Supplemental Reply in Support of Motion for Summary Judgment. Each party  
3 attached voluminous exhibits.

4 On April 7, 2020, this Court held a hearing regarding the Defendants' motion, and makes the  
5 following findings of fact and conclusions of law.  
6

7 **III.**

8 **LEGAL STANDARDS**

9 The following legal standards are applicable to this case:

10 **A. Summary Judgment Standards**

11 Because the parties presented matters outside the pleadings, this Court treats the Defendants'  
12 motion "as one for summary judgment and disposed of as provided in Rule 56." *See* NRCP 12(c) and  
13 *Kopicko*, 114 Nev. at 1336, 971 P.2d at 790 (1998).  
14

15 Since *Wood v. Safeway*,<sup>5</sup> the Nevada Supreme Court has followed a gradual trend toward  
16 favoring summary judgment as a "valuable tool to weed out meritless cases [which is] no longer a  
17 'disfavored procedural shortcut.'" *Boesiger v. Desert Appraisals, LLC*, 444 P.3d 436, 438-439, 2019  
18 Nev. LEXIS 39, \*4-5 (July 3, 2019) ("[s]ummary judgment is an important procedural tool by which  
19 factually insufficient claims or defenses [may] be isolated and prevented from going to trial with the  
20 attendant unwarranted consumption of public and private resources"). *See also Wood*, 121 Nev. at  
21 730, 121 P.3d at 1030 (summary judgment "is an integral part of the [rules of civil procedure] as a  
22 whole, which are designed to secure the just, speedy and inexpensive determination of every action.")  
23

24 "Summary judgment is appropriate if the pleadings and other evidence on file, viewed in the  
25 light most favorable to the nonmoving party, demonstrate that no genuine issue of material fact  
26

27 <sup>5</sup> *Wood v. Safeway*, 121 Nev. 724, 727, 121 P.3d 1026, 1028 (2005).  
28



remains in dispute and that the moving party is entitled to judgment as a matter of law.” *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 427 P.3d 113, 117, 134 Nev. Adv. Rep. 72 (September 13, 2018). “A genuine issue of material fact exists if, based on the evidence presented, a reasonable jury could return a verdict for the nonmoving party.” *Id.*

**B. NRS Chapter 113 Standards Regarding Pre-Closing Disclosures in Real Estate Transactions**

Plaintiffs’ claims are premised on the Defendants’ purported failure to disclose a February 16, 2017 water leak which, according to the Plaintiffs, was indicative of a systemic plumbing defect. The Plaintiffs’ claims are based on violation of NRS Chapter 113.

NRS §113.140 provides:

Disclosure of unknown defect not required; form does not constitute warranty; duty of buyer and prospective buyer to exercise reasonable care.

1. NRS §113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware.
2. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property.
3. Neither this chapter nor chapter 645 of NRS relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself.

In *Nelson v. Heer*, the Nevada Supreme Court defined a seller’s disclosure obligations under NRS 113.130 and NRS 113.140. The Nevada Supreme Court ruled that repairing damage negates a seller’s duty to disclose damage because repaired damage “no longer constitute[s] a condition that materially lessen[s] the value of the property.” *Nelson*, 123 Nev. at 224, 163 P.3d at 425. *Id.* According to the Court, “the seller of residential real property does not have a duty to disclose a defect or condition that ‘materially affects the value or use of residential property in an adverse manner,’ if the seller does not realize, perceive, or have knowledge of that defect or condition.”<sup>6</sup>

<sup>6</sup> Further, pursuant to statute, recovery is completely barred “on the basis of an error or omission in the disclosure form that was caused by the seller’s reliance upon information provided to the seller by:… (b) A contractor, engineer, land



1 NRS §113.150(2) provides:

2 Remedies for seller's delayed disclosure or nondisclosure of defects in property;  
3 waiver.

4 2. If, before the conveyance of the property to the purchaser, a seller or the seller's agent  
5 informs the purchaser or the purchaser's agent, through the disclosure form or another written  
6 notice, of a defect in the property of which the cost of repair or replacement was not limited  
7 by provisions in the agreement to purchase the property, the purchaser may:

8 (a) Rescind the agreement to purchase the property at any time before the conveyance  
9 of the property to the purchaser; or

10 (b) Close escrow and accept the property with the defect as revealed by the seller or  
11 the seller's agent without further recourse.

#### 12 IV.

#### 13 SUMMARY OF FINDINGS OF FACT

14 The Court finds the following facts are undisputed and supported by the evidence presented  
15 by the parties:

- 16 • In 2015, Rakeman Plumbing installed the plumbing system manufactured by Uponor at  
17 property located at 42 Meadowhawk Lane, Las Vegas, Nevada.
- 18 • The 42 Meadowhawk Lane property is the subject of the Plaintiffs' lawsuit.
- 19 • There was a leak in the Uponor plumbing system on February 16, 2017;
- 20 • Plaintiffs' action is premised on the Defendants' failure to disclose the February 16, 2017 leak;
- 21 • A licensed plumbing contractor, Rakeman Plumbing, completely repaired the February 16,  
22 2017 leak;<sup>7</sup>
- 23 • Because Rakeman repaired the February 16, 2017 leak, Defendants did not disclose it on the  
24

25 \_\_\_\_\_  
26 surveyor, certified inspector as defined in NRS 645D.040 or pesticide applicator, who was authorized to practice that  
27 profession in this State at the time the information was provided." NRS 113.150(5).

28 <sup>7</sup> The Court notes that the Rakeman invoice relating to the February 2017 leak has a May 23, 2017 date. However, the  
undisputed evidence shows that the invoice was created after the fact when Rakeman submitted its warranty claim to  
Uponor. The evidence is undisputed that invoice with the May 23, 2017 date is for the February 16, 2017 leak and  
documents that Rakeman completely repaired that leak.

October 24, 2017 Sellers' Real Property Disclosure form;

- There was a second leak in the Uponor system on November 7, 2017 during the escrow period of the sale;
- On November 15, 2017, prior to the November 17, 2017 closing date, Defendants disclosed the leak in an addendum;
- Defendants' agent emailed the disclosure to Plaintiffs' agent on November 16, 2017;
- Plaintiffs did a walk-through before closing and knew about the November 7, 2017 leak;
- With knowledge of the November 7, 2017 leak, the Plaintiffs' agent emailed Defendants' agent with proposed options, including an acknowledgment that Plaintiffs could walk away and elect to terminate the contract and not close on the property;
- With knowledge of the November 7, 2017 leak, the Plaintiffs elected to close on the property on November 17, 2017;
- In 2015, an inspection revealed that two recirculating pumps were leaking and the recirculating pumps were replaced. The recirculating pumps failure occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint;
- The same inspection showed a plumbing leak above the ceiling of the basement bathroom, which the report also described as a "drip." The leak/drip occurred in a different area of the residence than the February 2017 and November 2017 leaks, and are not related to the claims in Plaintiffs' Second Amended Complaint. Neither Rakeman nor the Defendants could identify a source of the drip, and there is no evidence that the leak/drip persisted after the date of the report, May 11, 2015;
- On November 17, 2017, the day of the closing, Infinity Environmental Services conducted

1 mold tests at the property;

- 2 • Infinity tested for possible fungal levels in the master bathroom and master closet, which is the
- 3 area where the February 2017 and November 7, 2017 leaks occurred;
- 4 • Infinity provided results of their mold testing on November 24, 2017, seven (7) days after the
- 5 Plaintiffs closed on the property;
- 6 • Plaintiffs knew Infinity was conducting the tests on November 17, 2017.
- 7 • Plaintiffs closed on the property on November 17, 2017 before the Infinity results were
- 8 reported;
- 9 • After closing, the mold was fully remediated and a subsequent mold test conducted on
- 10 December 5, 2017 showed the area to be mold-free, as documented in a December 7, 2017
- 11 Infinity Report;
- 12 • The results of the mold test were not provided by Infinity to Defendants because the
- 13 Defendants no longer owned the property and there is no evidence showing that the Defendants
- 14 knew of the results of the mold test on or before the closing date.
- 15
- 16
- 17

18 V.

19 **CONCLUSIONS OF LAW**

20 This case centers around the Plaintiffs' claim that the Defendants concealed a February 2017  
21 water leak. Throughout these proceedings, the Defendants have asserted, together with providing  
22 undisputed proof, that the February 2017 water leak was completely repaired by a licensed plumbing  
23 contractor, Rakeman Plumbing. Defendants have always asserted that under *Nelson v. Heer* and NRS  
24 Chapter 113, the repair negated Defendants' duty to disclose.

25 In responding to the Defendants' motion on the Plaintiffs' Second Amended Complaint, the  
26 Plaintiffs did not refute the Defendants' proof that the leak had been repaired. However, rather than  
27 dismiss the action at that time, this Court granted the Plaintiffs' request for discovery to establish facts  
28



1 showing the February 2017 leak was not repaired and that the Defendants knew the leak had not been  
2 repaired, two facts required by *Nelson*.

3 The Defendants cooperated fully with the discovery undertaken by the Plaintiffs. While the  
4 discovery revealed additional facts, none of those additional facts are material to the claims made in  
5 the Plaintiffs' Second Amended Complaint. Rather, the end-result of Plaintiffs' discovery efforts is  
6 that, despite the testimony and the plethora of documents produced, and despite the Plaintiffs' efforts  
7 to cast the evidence in their Supplement as creating genuine issues of material fact, the Plaintiffs' case  
8 still fails as a matter of law.  
9

10 Specifically, through the discovery undertaken and the resulting arguments in Plaintiffs'  
11 Supplemental Brief, Plaintiffs attempted to create a question of fact by asserting that there were "at  
12 least six (6) water losses in a little over two years (April 2015 to November 2017) that [the Defendants]  
13 owned the home." However, the evidence shows that the only relevant "water losses" relate to two  
14 failures in the Uponor plumbing system, one which occurred in February 2017, which the Defendants'  
15 repaired, and one which occurred in November 2017, which the Defendants disclosed prior to the  
16 Plaintiffs' closing on the property.  
17

18 The Plaintiffs have failed to present evidence to establish the one fact that could possibly make  
19 their claims viable: that the February 2017 leak was not repaired. To the contrary, the undisputed facts  
20 establish that the February 2017 leak was repaired, thus abrogating any requirement that it be  
21 disclosed, as fully explained in *Nelson*. The other purported "water losses" complained of by the  
22 Plaintiffs are unrelated to their claims and, further, do not materially affect the value of the property.  
23

24 **A. The Undisputed Evidence Shows that the Allegedly Concealed Leak Was**  
25 **Repaired and that Pursuant to NRS Chapter 113 the Defendants Did Not Conceal**  
26 **the Leak**

27 Plaintiffs lawsuit is predicated on their allegations that the Defendants failed to disclose a  
28



February 16, 2017 water leak in the Uponor plumbing system. The Plaintiffs allege the leak indicated a “systemic” defect “known to the defendants prior to the closing of the transaction.” The Plaintiffs allege that:

Shortly after the closing occurred, the Plaintiffs were made aware of [a] water loss that had occurred at the Subject Property in approximately February of 2017 by the plumbing system manufacturer, Uponor.

The Defendants have always maintained that the February 2017 leak was repaired, and the undisputed evidence shows that indeed it was repaired. The Defendants presented an invoice from Rakeman Plumbing showing that Rakeman repaired the leak in question.

The Rakeman invoice is dated May 23, 2017, thus causing some confusion regarding the date the leak occurred. The documents and testimony, considered in conjunction with one another, clarify any potential confusion.<sup>8</sup> The undisputed evidence shows the following: (1) The Uponor system had two leaks in 2017, one occurring on February 16, 2017 and one occurring on November 7, 2017; (2) the February 16, 2017 leak was completely repaired by Rakeman, and the details of the repair are outlined in the May 23, 2017 Rakeman invoice; and (3) the November 7, 2017 leak was disclosed by the Defendants on November 15, 2017, prior to closing.

The Defendants presented the following testimony showing the leak occurred on February 16, 2017, and that Rakeman repaired that leak:

***Dr. Swanson’s Testimony***

The undisputed evidence shows that early in the case, just prior to the August 2018 mediation, Dr. Swanson recalled a “small pinhole leak” which, to his recollection, occurred in January 2017.

---

<sup>8</sup> The affidavit of Rakeman owner Aaron Hawley, which accompanied the Defendants’ motion for judgment on the Plaintiffs’ Second Amended Complaint, references work done on May 23, 2017. The affidavit was prepared with reference to the May 23, 2017 invoice. The May 23, 2017 document has confused everyone - because there is *no evidence* of a May 23, 2017 leak. However, as discussed herein, the May 23, 2017 date reflects Rakeman’s documentation for seeking payment under the Uponor warranty. The documents and testimony, reviewed together, establish that the leak occurred in February 16, 2017, not May 23, 2017.

1 During his deposition, Dr. Swanson testified that the leak actually occurred in February:

2 Q: So there was another leak in January, 2017?

3 A: No. I think there was a lot of trouble pinning down the date of the February leak,  
4 but the date was February 17<sup>th</sup> or 18<sup>th</sup> or something like that, I think. Or 7<sup>th</sup> or 8<sup>th</sup>.

5 The Defendants' responses to Plaintiffs' interrogatories confirmed the February 16, 2017 date.  
6

7 Dr. Swanson testified in his deposition and when questioned about the May 23, 2017 date on  
8 the Rakeman invoice, cleared up the confusion regarding the date of the leak:

9 Q: [The May 23, 2017 date is] not accurate, is it, Doctor?

10 A: I don't believe so, unless my dates are off. Because I keep seeing this date, but I  
11 think that was the date of the [Rakeman] invoice.

12 Q: Okay. And the actual leak occurred sometime in February of 2017, didn't it Doctor?

13 A: Yeah, to the best of my knowledge.  
14

15 Dr. Swanson also testified as follows:

16 Q: Doctor, were there two leaks in early part of '17? Did it occur in January or February  
17 of 2017 and then there was a subsequent leak in May of 2017.

18 A: No. . . . There was only one leak.

19 Plaintiffs' counsel cleared up the confusion by his own questions:

20 Q: Okay. I — and that's what we don't want to be, is confused about the dates of any  
21 of these leaks occurring. So it's your understanding that the leak occurred somewhere  
22 in the time period of January or February of 2017, correct?

23 A: Yes, I — I saw those dates and I found some documents that were pretty persuasive  
24 that the date was in February, whatever the date was, February 8<sup>th</sup> or whatever.

25 \*\*\*

26 A: All I know is that I kept seeing [the May 23, 2017] date and it didn't make sense,  
27 so I tried to find the correct date. . . . And that's what I came up with.  
28

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///



***Rakeman Plumbing Testimony***

The Rakeman Plumbing documents and testimony showed that the leak in question occurred in February 2017 and that Rakeman plumbing repaired the leak. The Defendants submitted the affidavit of Aaron Hawley, which establishes that the leak in question was repaired. Clearing up the date "confusion," Mr. Hawley testified that Rakeman does not always prepare invoices for Rakeman warranty work. According to Mr. Hawley,

if there's warranty work done behind our new construction, there may not be any papers behind it. It's not like it's an invoiceable call to where somebody calls up. . . . If this was done under warranty, which I don't know if it was or wasn't, there may not be any papers involved.

Mr. Hawley testified that he was very familiar with the 42 Meadowhawk Lane property and that he and his employee, Rocky Gerber, discussed the property on many occasions. Mr. Hawley recalled that there were only two leaks in 2017. He recalled one leak during closing (November) and testified that the other leak occurred in either February or May, but not both.

Rocky Gerber testified that for warranty work covered by the manufacturer, as opposed to work covered under Rakeman's own warranty, a summary is always prepared "after the fact." According to Mr. Gerber, a summary to the manufacturer "has to be done after the fact."<sup>9</sup>

***Uponor Documents***

The Uponor documents are perhaps the most revealing. Uponor records show the "initial claim [was] submitted [by Rakeman Plumbing] to Uponor in February 2017. Uponor documents reference a failure date of February 16, 2017. Uponor sent a check to Rakeman for \$2,496.00 on June 9, 2017 in satisfaction the February 16, 2017 leak. The check and letter reference the \$2,496.00 amount, which

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<sup>9</sup> Consistent with the testimony from Hawley and Gerber, the May 23, 2017 invoice had to be prepared after the fact. Indeed, the attached Rakeman document references April 5, 2017 as "Wanted" and "Promised" which predates the May 23, 2017 invoice date. So, it is impossible that the leak occurred in May.

corresponds with the May 23, 2017 Rakeman invoice which was also for \$2,496.00.

These documents clearly establish a nexus between the February 16, 2017 “failure date” documented by Uponor and the Rakeman repair invoice dated May 23, 2017, thereby establishing the fact that there was only one leak in the first half of 2017, on February 16<sup>th</sup>.

*Nicky Whitfield's Testimony*

At the time Dr. Swanson's assistant, Nicky Whitfield, began working for Dr. Swanson in March 2017, Rakeman was in the process of finalizing repairs on the February 16, 2017 leak. According to Ms. Whitfield's sworn testimony, “when I started [working for Dr. Swanson] they were just finishing repairs of the carpet.” Based on this testimony, the repairs could not have been underway in March if the leak did not occur until May.

Viewing the evidence in the light most favorable to the Plaintiffs, it cannot be reasonably disputed that the first leak in 2017 was in February. Further, the Plaintiff presented no evidence that more than one leak occurred in the first half of 2017. It cannot be reasonably disputed that the leak occurring in the first half of 2017, regardless of whether it happened in February or May, was fully repaired, thus abrogating its disclosure under *Nelson*.

This Court finds that the undisputed evidence establishes that the leak which is the subject of the Plaintiffs' action occurred on February 16, 2017, not May 23, 2017, which is the date on the Rakeman invoice.

Further, this Court finds that the Rakeman invoice, testimony and Hawley affidavit provide uncontroverted evidence that the February 16, 2017 leak was completely repaired, thus negating the Defendants' duty of disclosure. This Court finds that the Plaintiffs' allegation the Defendants failed to disclose a water leak in their October 24, 2017 disclosures is not supported by the evidence and fails as a matter of law. Thus, summary judgment is warranted under the standards set forth in NRCP 56(a), NRS Chapter 113 and *Nelson v. Heer*.



**B. The Undisputed Evidence Shows that the Plaintiffs Knew About the November 7, 2017 Leak, But Nonetheless Elected to Close**

Plaintiffs Supplement asserted for the first time that Plaintiffs did not know about the November 7, 2017 leak until after the closing. Referencing “Affidavit of Joe Folino and Affidavit of Nicole Folino,” the Plaintiffs’ Supplement asserts they executed the closing documents on November 16, 2017 and “were not notified of any plumbing problems with the Subject Property prior to November 17, 2017.” Plaintiffs’ filed Supplement, however, did not actually include either affidavit.<sup>10</sup>

On February 25, 2020, 12 days after filing their Supplement and 5 days after Defendants’ counsel requested that Plaintiffs provide the affidavits, Plaintiffs’ counsel emailed two un-signed “affidavits,” purportedly made by Joseph Folino and Nicole Folino, to defense counsel. However, the un-signed and unsworn Folino “affidavits” do not support Plaintiffs’ claim that they were unaware of the November 7, 2017 leak prior to closing. Even if they did, under NRCP 56, the “affidavits” are not admissible “facts” for purposes of challenging summary judgment since neither is signed.

The admissible facts, however, refute the Plaintiffs’ claim they did not know about the November 7, 2017 leak before they closed. First, this new allegation *directly* contradicts the allegations in the Plaintiffs’ own pleadings. Plaintiffs asserted the following allegations in their Second Amended Complaint:

24. Prior to the closing of this transaction, the Plaintiffs requested and were given the opportunity to perform their own site inspection of the Subject Property;
25. This pre-closing inspection occurred on or before November 17, 2017;
26. During this inspection, the Plaintiffs uncovered a water leak that was in the process of being repaired by the Defendants;

\*\*\*

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<sup>10</sup> The unsigned and unsworn “affidavits” further allege that Defendants requested a lease-back of the property “for the purpose of concealing repairs taking place on a leak that had occurred on or about the first week of 2017.” This contention ignores the undisputed evidence that the lease-back agreement is dated November 6, 2017, which was the day before the November 7, 2017 leak.

28. The Plaintiffs' real estate agent, Ashley Lazosky . . . had specific conversations with the Defendants and the subcontractor hired to make the repairs.

These allegations directly contradict the unsupported argument that they did not know about the November 7, 2017 leak.

Second, Plaintiffs' assertion is also contradicted by evidence showing the Defendants specifically disclosed the leak via Addendum 4-A, emailed to Plaintiffs' agent early in the day, at 8:31 a.m., on November 16, 2017.<sup>11</sup> Addendum 4-A, stated:

Seller is disclosing that there was a water leak in the master closet from a water pipe that broke. The Seller is fully remediating the issue to include new baseboards, carpet, etc. and all repair items regarding this leak will be handled prior to closing.

The same day, at 1:48 p.m., the parties' agents exchanged texts discussing a \$20,000 hold back because the buyers "don't want to rely on the plumber and their warranty." This shows that on November 16, the day prior to closing, the parties' agents were discussing potential remedies for dealing with the disclosed leak.

Again, later that same day, but prior to closing, at 9:00 p.m. on November 16, 2017, the Plaintiffs' agent, Ashley Oakes-Lazosky, sent a detailed email to Defendants' agent wherein she acknowledges that "at this point due to the change in circumstances with the last minute issue with the leak, the buyer's recourse is to walk at this point if they are not comfortable with the repairs/credits."

Finally, Plaintiffs' knowledge of the November 7, 2017 leak is further confirmed by the

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<sup>11</sup> An agent's knowledge is imputed to the principal. *ARCPE I, LLC v. Paradise Harbor Place Trust*, 2019 Nev. Unpub. LEXIS 1017, \*2, 448 P.3d 553 (2019); *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 355, 34 P.2d 1076, 1077 (1934). Under this maxim, the Plaintiffs had at least constructive knowledge of the November 7, 2017 leak. See e.g. *Kahn v. Dodds (In re AMERCO Derivative Litig.)*, 127 Nev. 196, 214, 252 P.3d 681, 695 (2011).



1 testimony of Nicky Whitfield. Ms. Whitfield testified by affidavit that “[o]n November 16, Mr. &  
2 Mrs. Folino conducted a walk-through of the entire house” and Ms. Whitfield “showed [Ms. Folino]  
3 exactly where the leak had occurred. Ms. Whitfield’s testimony is consistent with the Plaintiffs’ own  
4 allegations and the other evidence.  
5

6 **C. The Plaintiffs’ Election to Close Bars Their Concealment Action**  
7

8 The Plaintiffs’ election to close escrow bars their claims under general waiver principles. *See*  
9 *e.g. Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) (discussing elements of  
10 waiver as: (1) voluntary and intentional relinquishment of a known right; and (2) made with  
11 knowledge of all material facts.) Waiver of a known right can be implied by conduct. *Id.* The  
12 Plaintiffs’ conduct shows that they relinquished their rights to refuse to close.

13 NRS 113.150(2) incorporates these waiver principles. Under NRS §113.150(2), the Plaintiffs’  
14 options were to either “rescind the agreement to purchase the property at any time before the  
15 conveyance of the property to the purchaser; or close escrow and accept the property with the defect  
16 as revealed by the seller or the seller’s agent without further recourse.”  
17

18 The evidence is undisputed that prior to closing, the Defendants provided notice to the  
19 Plaintiffs regarding the November 2017 Uponor system leak. The evidence is undisputed that the  
20 Plaintiffs’ agent sent a detailed email to Defendants’ agent acknowledging that the Plaintiffs’ recourse  
21 was to elect to not close. The evidence is undisputed that with knowledge of all the material facts,  
22 Plaintiffs relinquished their right to walk by closing on the property on November 17, 2017.  
23

24 This Court finds that the Plaintiffs’ election to close escrow bars “further recourse,” as a matter  
25 of law.

26 ///

27 ///

**D. The 2015 "Water Losses" are Unrelated to the Plaintiffs' Allegations that the Defendants Failed to Disclose a Systemic Plumbing Defect**

For the first time in their Supplement, Plaintiffs assert that Defendants wrongfully failed to disclose "water losses" that occurred in 2015. But the Plaintiffs failed to present any evidence showing that the 2015 leaks have anything to do with the Uponor plumbing system, which is the basis of their Second Amended Complaint. In contrast, the undisputed evidence shows that these issues have nothing to do with the Uponor system. Rocky Gerber of Rakeman Plumbing testified that the recirculating pumps and the Uponor piping system are two different systems.

The parties do not dispute that construction of the 42 Meadowhawk property was completed in April 2015. Shortly thereafter, on May 11, 2015, Defendants contracted for a post-construction Home Inspection Report. The evidence shows that Dr. Swanson made notes on the report as the items in the report were repaired, to document the progress of the repairs,<sup>12</sup> rather than to conceal a defect. Dr. Swanson testified:

Q. What was the reason why you had this report prepared?

A. Because the house was essentially finished being built. I had moved in already, and I wanted to make sure that there were no issues or problems that Blue Heron hadn't finished or there were no problems with their construction.

This Court finds that the Plaintiffs' failed to present any facts that the 2015 leaks are in any way related to their claims that the Defendants concealed a water leak indicative of a "systemic defect" in the plumbing system, as alleged in their Second Amended Complaint and as such, cannot defeat summary judgment.

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<sup>12</sup> The notes are admissible as "present sense impressions" and thus are not hearsay under NRS 51.085. NRS 51.085 provides that a "present sense impression" is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter, is not inadmissible under the hearsay rule."



Because this court finds that summary judgment is warranted regarding the Plaintiffs concealment claim, the Plaintiffs' fraud claim fails as a matter of law.

## ORDER

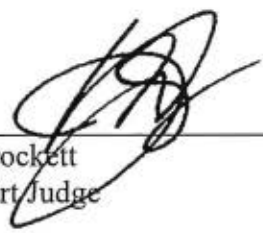
The evidence shows that the Defendants' purported concealment relates to a February 16, 2017 water leak and that the leak was completely repaired by licensed plumbing contractor, Rakeman Plumbing. The evidence shows that under *Nelson v. Heer* and NRS §113.130 & 140, the repair and Defendants' knowledge of the repair negated the Defendants' duty to disclose the leak in the October 24, 2017 Sellers Real Property Disclosure Form. Further, the undisputed evidence shows the Plaintiffs knew about the November 2017 leak, but nonetheless elected to close on the property. The Plaintiffs' election to close bars further recourse under NRS §113.150(2).

JA002267

THE GALLIHER LAW FIRM  
1850 E. Sahara Avenue, Suite 107  
Las Vegas, Nevada 89104  
702-735-0049 Fax: 702-735-0204

1 Accordingly, this Court hereby GRANTS the Defendants' motion regarding Plaintiffs' Second  
2 Amended Complaint, and ORDERS that the Plaintiffs' Second Amended Complaint is hereby  
3 DISMISSED, with prejudice.

4 DATED this 11th day of May 2020.

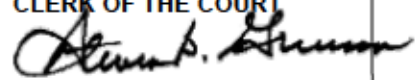
6  
7   
8 Hon. Jim Crockett  
District Court Judge

9  
10 Respectfully submitted by:

11 /s/ Jeffrey L. Galliher  
12 Jeffrey L. Galliher, Esq.  
13 GALLIHER LEGAL P.C.  
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16 Attorney for Defendants

17 Approved as to form and content:

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Attorneys for Defendants

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

JOSEPH FOLINO, an individual and NICOLE  
FOLINO, an individual,

Plaintiff(s),

CASE NO.: A-18-782494-C  
DEPT. NO.: XXIV

v.

TODD SWANSON, an individual; TODD  
SWANSON, Trustee of the SHIRAZ TRUST;  
SHIRAZ TRUST, a Trust of unknown origin;  
LYON DEVELOPMENT, LLC, a Nevada limited  
liability company; DOES I through X; and ROES  
I through X,

Defendant(s).

**DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR ATTORNEY'S FEES**

COME NOW Defendants, TODD SWANSON, an individual; TODD SWANSON, Trustee of  
the SHIRAZ TRUST; SHIRAZ TRUST, a Trust of unknown origin; LYON DEVELOPMENT, LLC,  
(hereinafter referred to as "Defendants") by and through their counsel of record CHRISTOPHER M.

1 YOUNG, ESQ., and JAY T. HOPKINS, ESQ., of the law firm of CHRISTOPHER M. YOUNG, PC,  
2 and JEFFREY L. GALLIHER, ESQ., of the law firm of GALLIHER LEGAL P.C., and hereby reply  
3 in support of their motion for Attorney Fees and Costs pursuant to NRCP 68 and NRS 18.010.

4 This reply is made and based upon the attached points and authorities, affidavit, and all the  
5 pleadings, papers and files herein.

6  
7 DATED this 2<sup>nd</sup> day of June 2020.

8 GALLIHER LEGAL P.C.

9 /s/ Jeffrey L. Galliher  
10 Jeffrey Galliher, Esq.  
11 Nevada Bar No. 8078  
12 1850 E. Sahara Ave., Suite 107  
13 Las Vegas, NV 89104

### 14 INTRODUCTION

15 It is hard to imagine a case more appropriate for an award of fees and costs. Before dismissing  
16 the Plaintiffs' case, this court acted cautiously and gave the Plaintiffs every opportunity to develop  
17 their case. But Plaintiffs could not present any evidence supporting their claims against the  
18 Defendants.

19 The Plaintiffs now attempt to side-step the evidence presented to the court and the clear record  
20 developed here in a desperate attempt to avoid the rightful sanction of reimbursing Defendants for  
21 their reasonable fees and costs incurred in defending this baseless case.

22 *The Court Gave the Plaintiffs Every Opportunity to Develop Their Case Despite Significant*  
23 *Deficiencies, but Plaintiffs Failed to Present Specific Facts to Defeat Summary Judgment*

24 The Plaintiffs initially filed their claim with six causes of action and included voluminous  
25 documents in purported support of their claims. When the Defendants filed a motion to dismiss  
26  
27  
28



1 Plaintiffs' ungrounded and improperly pled claims,<sup>1</sup> rather than even considering dismissal, the court  
2 denied the Defendants' motion and allowed the Plaintiffs to amend their Complaint.

3 Without otherwise changing a word in the allegations and claims, the Plaintiffs filed a First  
4 Amended Complaint. But, instead of bolstering their claims, the Plaintiffs simply added a seventh  
5 claim for piercing the corporate veil. The court dismissed all of the Plaintiffs' claims except the NRS  
6 Chapter 113 concealment and fraud claims. Plaintiffs were directed to file a Second Amended  
7 Complaint with the surviving claims.  
8

9 In a motion to dismiss the Plaintiffs' Second Amended Complaint, the Defendants presented  
10 evidence which negated a critical element of the Plaintiffs' claim. The evidence showed that the  
11 purportedly undisclosed leak had been repaired which, under Nevada law, negated the Defendants'  
12 duty to disclose.  
13

14 Even though the Plaintiffs could not present specific facts to rebut the evidence presented by  
15 the Defendants, under NRCP 56 standards, and even though the Plaintiffs filed a rogue and  
16 inappropriate motion for sanctions, the court delayed its ruling. Instead, the court threw the Plaintiffs  
17 a life-line and granted the Plaintiffs leave to conduct discovery and file a supplemental opposition  
18 with evidence that rebutted the Defendants' otherwise undisputed evidence.

19 *The Discovery Supported Defendants' Defense, so the Plaintiffs Changed Course and Asserted*  
20 *Facts Unrelated to their Underlying Claims that Defendants Concealed Uponor System Defects*

21 The Plaintiffs engaged in virtually unbridled discovery for over 90 days. The parties produced  
22 thousands of pages of documents and conducted numerous depositions. But the Plaintiffs' still came  
23 up empty. Thereafter, in opposing the Defendants' motion for dismissal/summary judgment, the  
24 Plaintiffs claimed *Nelson v. Heer* did not apply, and presented irrelevant facts which had nothing to  
25

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26  
27 <sup>1</sup> For instance, the Plaintiffs asserted claims for Deceptive Trade Practices and Civil RICO, without alleging most of the  
28 required elements. The Plaintiffs' fraud claim was not pled with specificity and only survived (until its ultimate  
dismissal) because the court determined that claim was fact-dependent.

do with their underlying claim that the Defendants concealed “a systemic plumbing defect” in the Uponor system.

### ARGUMENT

#### *The Plaintiffs’ Opposition Relies on the Same Specious Arguments Already Rejected by this Court*

Contrary to Plaintiffs’ assertion, discovery did *not* uncover “numerous leaks, some of which were not repaired”. What Plaintiffs refer to is the desperate attempt by Plaintiffs themselves to infer that there was a leak in the basement bathroom of the residence based solely on 2 photos taken in May of 2015 which purportedly show 3-4 drops of water in the basement bathroom. It cannot be stated clearly enough that Plaintiffs’ repeated claims that the “leak” in the basement bathroom referenced in the May 2015 inspection by Caveat Emptor forms the basis for a cognizable claim are patently absurd.

The undisputed evidence in the case is that Rakeman Plumbing, a licensed plumbing contractor, investigated the area where the photos showed drops of water and found no “leak”. In the 5 years since then, including more than 2 years where the Plaintiffs themselves have lived in the property, there has never been any evidence of a “leak” at that location. Presumably a “leak which was never repaired” would still exist. After all, it is axiomatic that leaks don’t repair themselves. So if, as Plaintiffs suggest, there was a “leak” in the basement bathroom and that “leak” was never repaired, then where is the evidence that the “leak” persists? There is none. The more realistic conclusion is that the few drops of water that were present in May 2015 were not from a “leak”, but instead from a spill or other temporary condition which has never re-occurred despite the passage of more than 5 years. The idea that a few drops of water in a photograph five years ago – never to be seen again – materially affects the value of a \$3,000,000.00 house is preposterous. And if the condition does not materially affect the value of the property it need not be disclosed under Nevada law.

Plaintiffs' claim that the instant lawsuit was based upon "multiple leaks" is also non-sensical. The Plaintiffs claim they did not know about any leaks which occurred prior to 2017 until taking discovery. How could the suit possibly be based upon leaks that Plaintiffs didn't know about when they filed the suit? Further, none of the earlier leaks implicated the Uponor system which is the basis for Plaintiffs' claim of a "systemic defect" requiring disclosure. The reality is that Plaintiffs' case is predicated on the February 2017 leak and the November 2017 leak, as clearly stated in their pleadings. However, as pointed out in the instant motion, the evidence that the February leak had been repaired, the Rakeman Plumbing invoice showing the repair to be completed, was attached as an exhibit to the complaint itself. The November 2017 leak is a non-issue because it was disclosed prior to closing in Addendum 4A to the Purchase Agreement. Therefore, the evidence which directly refutes the allegations in the complaint was contained within the complaint itself.

***The Plaintiffs' Invented Claim that the Defendants Concealed Mold is Utterly Unsupported by Any Evidence and in Bad Faith***

In their Supplement and as argued before this court, the Plaintiffs presented a blatant un-truth – that the Defendants knew that the property had a mold issue *before closing*. The court did not challenge the Plaintiffs' misrepresentation, but determined the Plaintiffs waived their right to object to the mold because they knew there was a pending test and they could have delayed the closing until after the test came back.

However, in the instant Opposition, the Plaintiffs' state that "Plaintiff (sic) asserted that there was never any mold that existed at this residence. This is also false, as the condition existed at the time of the closing." Opposition at page 4, lines 12-13. Assuming that this passage actually was intended to claim that Dr. Swanson failed to disclose a known condition of mold when he completed the SRPD on October 24, 2017, such a claim is blatantly false and intentionally misleading. There can be no dispute that the first evidence of mold at the property was contained in the report dated November 24,



2017 which was a month AFTER the SRPD was completed and a week AFTER escrow closed on the sale to Plaintiffs. While it is true that the mold *testing* was done on November 17, 2017 (the same date as closing) the *results* were not had until a week later. Furthermore, those results were never provided to Dr. Swanson until his deposition in 2020, since as of the date of the report he was no longer the owner of the property. (See, excerpt of the Deposition of Todd Swanson, M.D., Volume II at page 303, lines 6-18, attached hereto as Exhibit "J") Finally, after the positive mold result was reported the property was remediated at no expense to Plaintiffs and a subsequent test revealed no mold. No test since that time has ever resulted in a positive mold result.

*The Plaintiffs' Sanctions Motion Was Inappropriate, Vexatious and in Bad Faith*

Plaintiffs lament that Defendants "repeatedly deem 'inappropriate'" the countermotion for sanctions filed by Plaintiffs. But the characterization of the motion for sanctions as "inappropriate" originated with the Court, not Defendants. (See, the Court's minute order of November 7, 2019 attached as Exhibit B to Defendants' Motion for Fees and Costs which states in relevant part "the Court was inclined ...to deny to (sic) inappropriately filed counter motion for sanctions".) Nevertheless, Plaintiffs' conduct in the case is indicative of the motives behind bringing the case in the first place. When combined with the dubious factual basis of the case itself, filing a frivolous, or "inappropriate," motion for sanctions indicates a deeper motive beyond merely seeking legal redress. It is an indicator that Plaintiffs sought to punish Defendants because Plaintiffs assumed that Dr. Swanson was aware of the need to re-pipe the house prior to selling it. Discovery has established that was not the case. The Plaintiffs' misguided desire for retribution colored the decision making by Plaintiffs to the point where Defendants' good faith, even generous, offer to settle the case went ignored.

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*The Plaintiffs' Damages Claims Are Speculative and Unsupported by Any Evidence*

Plaintiffs claim that their damage claims of \$300,000.00 for "Fraud" and \$100,000.00 for "Bad Faith" "were calculated as the result of both (1) the need to complete a re-pipe of the entire residence due to the systemic issues with the plumbing system; (2) the likely affect to the value of the home due to the multiple water leaks that will be required to be reported going forward; and (3) the additional expenses Plaintiffs incurred for additional living expenses due to their home remaining non-functional for such a significant period of time." Opposition at page 12, lines 2-7.

This attempted justification falls short for many reasons. First, there is no evidence that Plaintiffs paid *any* of the costs to re-pipe the house. All indications are that Uponor bore that cost as a warranty expense based upon a manufacturing defect in the Uponor piping. Despite producing over 5,400 pages of documents in this case Plaintiffs never produced a single page which indicated that they paid a penny towards the re-piping of the house.

Second, the only evidence adduced in the case regarding the effect of the re-piping or other leak issues on the value of the house indicated that there would *not* be a negative effect on the property value. Ivan Sher, a Realtor with decades of experience selling luxury properties in Las Vegas, testified that he had personal experience with homes in the same neighborhood that had suffered "seven figures in water damage" and positive mold tests but had nevertheless subsequently sold at a premium:

10- . . . And -- and he was -- I think he was  
11- frustrated. He said that -- you know, that -- that  
12- things were not looking good and that the buyers were  
13- painting the picture that their house is permanently  
14- damaged and that it'll never -- it'll never be able  
15- to get the -- that they're going to lose money because  
16- of the stigma of the plumbing issue, and he wanted my  
17- thoughts on that. He didn't ask me to present  
18- anything. He just wanted my thoughts on that.  
19- . . . . And I said -- I said, "I absolutely don't  
20- believe that." And I said, "I don't believe it because  
21- it's not like they're in a fire where there's -- you  
22- know, there's fumes afterwards. It's not like in a

23· situation -- it's -- the broken parts of the house were  
24· fixed, so it's a better version of what it was before."  
25· . . . . And -- and I expressed that here -- there was

·1· a home across the -- just one street over that I sold  
·2· for -- I think it was \$6 million, and there was seven  
·3· figures in water damage to that house in litigation,  
·4· and they reconstructed and sold it for a premium  
·5· because it was a style and a design that people liked  
·6· and it had great views, and that's hard to find.  
·7· . . . . And so I guess that was my basis of  
·8· understanding. Since then, I've worked in other homes  
·9· where they've had floods and they came in and -- as a  
10· result of an insurance settlement, came in and redid  
11· the house, and the home would sell for a premium above  
12· what the market was, regardless of the water damage,  
13· and the water damage was fully disclosed in every  
14· situation.

15· . . . Q. . . So were -- in those other examples that you  
16· just gave, was there any mold tests that were positive?

17· . . . A. . . Yes.

18· . . . Q. . . Was the mold or the prior existence of the  
19· mold disclosed?

20· . . . A. . . Yes.

21· . . . Q. . . So what are the addresses of those homes?

22· . . . A. . . One is 15 Hawk Ridge. That's going to be the  
23· biggest case. And the other one I'll have to get for  
24· you.

25· . . . Q. . . Okay.

·1· . . . A. . . The other one's on Meadowhawk. I think it's  
·2· 82 Meadowhawk, but I'll get that for you as well.

·3· . . . . And we were presented with a whole  
·4· environmental study and the mold that was done and the  
·5· gutting of the house and everything.

*Deposition of Ivan Sher, Page 122, line 10- Page 124, line 5,*

Finally, Plaintiffs have likewise never produced any documentation or other evidence that they incurred any "additional expenses ... for additional living expenses due to their home remaining non-functional for such a significant period of time." The calculation of damages disclosed by Plaintiffs includes no component of special damages. No affidavit, declaration or other testimony has been produced by Plaintiffs to support such a claim. Without that information being provided it could not

1 have been possible for Defendants to consider such alleged damages when making their offer of  
2 judgment. Even if Plaintiffs' new claim for "additional living expenses" could be substantiated, these  
3 are not damages allowable under NRS 113.150(4) ("purchaser is entitled to recover from the seller  
4 treble the amount necessary to repair or replace the defective part of the property, together with  
5 court costs and reasonable attorney's fees. ") Nev. Rev. Stat. § 113.150 (Emphasis added).  
6

7 Plaintiffs argue that any offer less than the \$400,000.00 of "damages" alleged in their  
8 computation of damages, plus their accrued attorney's fees and costs, cannot be in good faith. *See*  
9 Opposition at page lines 12-15. But any settlement is a compromise. Under the facts here: where  
10 Plaintiffs had not disclosed any real out-of-pocket costs, where the precedential case law weighed  
11 heavily against any recovery, where the applicable statute dictated that Plaintiffs likely waived the  
12 bulk of any potential damages and where the court had indicated in open court its inclination to grant  
13 a pending dispositive motion, rejecting a six-figure settlement was grossly unreasonable.  
14

15 While Plaintiffs correctly assert that "[t]he Court's inclination was not an actual decision" it  
16 was vital information available to the Plaintiffs as a factor to be considered regarding the likelihood  
17 that their case would succeed, or even proceed, on its merits. In the face of a substantial offer of  
18 judgment, Plaintiffs ignored that information at their peril.

19 ***Throughout This Case, the Plaintiffs Ignored - and Continue to Ignore – Controlling Nevada Law***  
20

21 Throughout their Opposition, Plaintiffs stubbornly cling to a string of irrelevant facts and their  
22 continued refusal to accept the clear precedent of *Nelson v. Heer* to avoid the realities of this case.  
23 The recirculating pumps replaced by a licensed contractor in 2015 were simply not a condition which  
24 required disclosure. Further, they were not part of the Uponor system which was ultimately deemed  
25 defective in late 2017 or early 2018 and required replacement. The few drops of water spotted in the  
26 basement bathroom ONE TIME in 2015, never to be seen again, could certainly never reasonably  
27 form the basis for a claim like the one brought in this case.  
28



1 The only relevant “leaks” are the two which occurred in 2017: the first leak (February) was  
2 repaired as evidenced by the invoice attached to Plaintiffs’ complaint; the second leak (November)  
3 was disclosed in Addendum 4A and with that knowledge Plaintiffs nevertheless closed escrow.

4 *In Their Motion, the Defendants Amply Established the Brunzell Factors*

5 Plaintiffs argue that “this matter was not difficult to handle”. However, that characterization  
6 belies the fact that defense counsel had to prepare for and participate in 6 separate depositions over  
7 the period of only a couple of weeks. During that same time Plaintiffs were producing thousands of  
8 pages of documents from multiple sources.

9 Plaintiffs also ignore the inherent difficulty of litigating a case where the opposition is  
10 constantly evolving, as it was in this case. Initially, Plaintiffs’ complained that Defendants failed to  
11 disclose the Uponor warranty issue. Then that switched to a failure to disclose the earlier 2017 leak  
12 which eventually became a general failure to disclose issues from as far back as 2105. Plaintiffs are  
13 correct that Defendants believed the case was easily analyzed under *Nelson*. But Plaintiffs’ stubborn  
14 refusal to accept that fact made defending the case more difficult than it needed to be.

15 Plaintiffs’ suggestion that “on September 19 and September 20, 2019 both firms worked on  
16 the affidavit of Aaron Hawley” is in error. After Mr. Galliher associated as counsel in late November  
17 2019, Galliher Legal PC assumed the role as lead firm, including billing the Defendants. Included on  
18 the first billing was work completed by Mr. Hopkins in September when he worked through Mr.  
19 Young’s firm. Mr. Hopkins has worked Of Counsel to both firms at various points in the case. The  
20 claim put forth that “Mr. Hopkins cannot possibly work for both Nevada law firms at the same time  
21 and be deemed to have done so reasonably in terms of time and amount” is non-sensical. Plaintiffs’  
22 argument is akin to saying a lawyer can only work on one case at a time. Further, it suggests that  
23 multiple lawyers in one firm are “double billing” when they work together on a case.  
24  
25  
26  
27  
28



1 A careful review of the bills submitted makes it clear that there were no instances of "double  
2 billing" as suggested by Plaintiffs. The duties of counsel for the defense were clearly defined  
3 internally and coordination between counsel is not the same as "double billing". This argument seems  
4 hypocritical since at least three lawyers from Plaintiffs' counsel's firm billed on the case. Further, all  
5 three lawyers who worked on this case on the defense side charged LESS per hour than the most junior  
6 associate at Black & Lobello despite the fact that they average more than 20 years of litigation  
7 experience between them.

9 Plaintiffs misunderstand the characterization of the work as "unnecessary". It was unnecessary  
10 from the standpoint that Plaintiffs case was doomed by its facts, and no amount of discovery was  
11 going to change those facts. However, once Plaintiffs rejected the offer of judgment and charged  
12 ahead with extensive discovery, defense counsel's participation became absolutely required.

13 *Fees Are Warranted Under NRS 18.010(2)(b)*

15 Plaintiffs' characterization of the holding in *Singer v. Chase Manhattan*<sup>2</sup> is grossly  
16 misleading. While the *Singer* court specifically notes that the decision under review was not issued  
17 pursuant to NRS 18.010(2)(b)<sup>3</sup>, the reasoning cited to in Plaintiffs' opposition, including reference to  
18 Chief Justice Steffen's concurrence, relates solely to requests for fees brought under NRS 18.010(2)(a)  
19 as a *prevailing party*. But Defendants' request for fees and costs since inception of suit herein is clearly  
20 brought under NRS 18.010(2)(b) which provides that "the district court may make an allowance of  
21 attorney's fees to a prevailing party if it finds that the claim of the opposing party "was brought without  
22

23  
24 <sup>2</sup> *Singer v. Chase Manhattan Bank*, 111 Nev. 289 (Nev. 1995).

25 <sup>3</sup> [NRS 18.010\(2\)](#) provides for an award of attorney's fees in two circumstances only. Pursuant to [NRS 18.010\(2\)\(b\)](#), the  
26 district court may make an allowance of attorney's fees to a prevailing party if it finds that the claim of the opposing  
27 party "was brought without reasonable ground or to harass the prevailing party." In this case, the district court's  
28 judgment included an express finding that appellants' claims were not brought in bad faith. Therefore, it is apparent that  
the district court did not award attorney's fees pursuant to [NRS 18.010\(2\)\(b\)](#). *Singer v. Chase Manhattan Bank*, 111 Nev.  
289, 293 (Nev. 1995)

reasonable ground or to harass the prevailing party." " *Singer v. Chase Manhattan Bank*, 111 Nev. 289, 293 (Nev. 1995). *See also* Defendants' Motion for Attorneys' Fees and Costs at page 14, line 10 – page 16, line 14.

"In *Bergmann*, this court stated: "In assessing a motion for attorney's fees under [NRS 18.010\(2\)\(b\)](#), the trial court must determine whether the plaintiff had reasonable grounds for its claims. Such an analysis depends upon the actual circumstances of the case. . . ." " *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095 (Nev. 1995). Here, the reality that Plaintiffs had actual knowledge of the very facts which defeated their claim at the time of filing the complaint establishes that the circumstances here warrant an award of fees and costs. The decision to pursue this case when the very evidence that disproves it is known to Plaintiffs at the time of filing – and in this case even attached to the complaint itself – is clear evidence of the frivolity of the claim. It is actually difficult to imagine a more blatant example of a "lack of reasonable grounds" for a lawsuit than when the very allegations in the complaint, and the documents attached to it, are fatal to the Plaintiffs' cause.

Plaintiffs' arguments that this case can be seriously distinguished from *Nelson* have no merit. If anything, the facts in *Nelson*, where a cabin was virtually destroyed by major flooding and required a near total re-build, were much more egregious than any possible set of facts in this case where minor leaks, fully repaired by licensed contractors, had no material effect on the value of a \$3,000,000 luxury home. If, under Nevada law, the seller in *Nelson* was not required to disclose the near total destruction of that property and the corresponding massive re-build, then Plaintiffs could have had no reasonable belief that Defendants here were obligated to disclose a minor leak which was immediately discovered and timely repaired to like new condition by a licensed contractor.

Plaintiffs aver that the few drops of a water spotted in the basement bathroom on a single occasion in May 2015 constitutes "credible evidence" that Defendants failed to disclose a condition that materially affected the value of this \$3,000,000.00 home, thus justifying their filing of the

1 complaint in this case. See Opposition at page 22, line 20-Page 23, line 5. Notwithstanding the  
2 uncontroverted fact that Plaintiffs didn't become aware of those drops of water until more than a year  
3 after filing the complaint, the mere discovery of a few drops of water in a bathroom during a home  
4 inspection does not rise to the level of a condition materially affecting the value of this property.  
5 Further, Dr. Swanson testified that he reported the finding by his home inspector to the builder and  
6 that, despite looking for it, a licensed plumber could not identify a leak in the area. Added to that is  
7 Dr. Swanson's testimony that in the ensuing 2 ½ years he used that bathroom regularly and never saw  
8 evidence of a leak as well as the fact that Plaintiffs themselves have had possession for more than two  
9 years and have not presented any evidence of an unrepaired leak at that location. These facts do not  
10 constitute "credible evidence" that there has been an unrepaired (apparently invisible) leak in the  
11 basement bathroom for 5 years which has materially affected the value of the property. Rather, it is  
12 the slimmest of probabilities, with no factual basis, representing a Hail Mary by the Plaintiffs to justify  
13 their stubborn prosecution of this case without any credible evidence to support it.  
14  
15

16 *Defendants are Entitled to Fees and Costs as the Prevailing Party*

17 Plaintiffs cannot argue Defendants did not prevail in this case. Yet, Plaintiffs cite to the 1997  
18 Nevada Supreme Court decision in the case of *Parodi v. Budetti* for the proposition that since  
19 Defendants herein did not receive a money judgment then they are not the prevailing party. But *Parodi*  
20 doesn't say that at all. It is clear that the reason the Supreme Court decided *Parodi* was because it  
21 represented a case of first impression with respect to the issue of multiple consolidated cases with  
22 variable outcomes. That is not the case here. Under Plaintiffs' reasoning it would be virtually  
23 impossible for a defendant to ever be a "prevailing party" since a defense verdict or decision rarely  
24 includes a money judgment.  
25  
26  
27  
28



1 But many cases have awarded costs to a prevailing defendant. In the matter of *Coker*  
2 *Equipment Co. v. Wittig*, 366 F. App'x 729 (9th Cir. 2010), the Ninth Circuit affirmed an award of  
3 costs under NRS 18.020 to a defendant who had prevailed on summary judgment.

4 In Nevada, even third-party defendants may recover their costs after prevailing on summary  
5 judgment. *Copper Sands Homeowners Ass'n, Inc. v. Flamingo*, 94 Ltd. Liab., 335 P.3d 203 (Nev.  
6 2014).

7 Even a voluntary dismissal by a plaintiff may confer "prevailing party" status upon a  
8 defendant for the purposes of NRS 18.020 treatment. *145 E. Harmon II Tr. v. Residences at MGM*  
9 *Grand - Tower A Owners' Ass'n*, 136 Nev., Advance Opinion 14 (Nev. Apr. 2, 2020). In that very  
10 recent case the Nevada Court of Appeals held that the voluntary dismissal by the plaintiff in the face  
11 of a dispositive motion which was likely to be granted "was substantively a judgment on the merits.  
12 Accordingly, the [defendant] was the prevailing party for purposes of [NRS 18.010\(2\)](#) and 18.020." *Id.*  
13 at 10 (Nev. Apr. 2, 2020)

14 Under the circumstances of this case there can be no question that Defendants are the  
15 "prevailing party" and are entitled to costs and fees under NRS 18.010(2) as well as 18.020.

### 16 CONCLUSION

17 Pursuant to NRS 18.020, Defendants must be awarded their costs incurred in the amount of  
18 \$6,427.26. Pursuant to NRS 18.010(2)(b) Defendants should be awarded their attorney's fees incurred  
19 since the inception of this case in the amount of \$82,021.50. In the alternative, pursuant to NRCP 68  
20 Defendants should be awarded their attorney's fees accrued since December 11, 2019 in the amount

21 ///

22 ///

23 ///

24 ///



1 of \$39,447.00.

2 DATED this 2nd day of June 2020.

3 GALLIHER LEGAL P.C.

4  
5 */s/ Jeffrey L. Galliher*  
6 Jeffrey Galliher, Esq.  
7 Nevada Bar No. 8078  
8 1850 E. Sahara Ave., Suite 107  
9 Las Vegas, NV 89104  
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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that, on the 3rd day of June 2020 and pursuant to NRCP 5(b), I caused the foregoing **REPLY IN SUPPORT OF MOTION FOR ATTORNEYS FEES AND COSTS** to be served upon the following through the Court's electronic filing system:

Rusty Graf, Esq.  
Shannon M. Wilson, Esq.  
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Las Vegas, Nevada 89135  
rgraf@blacklobello.law  
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*/s/ Kimalee Goldstein*  
An employee of Galliher Legal PC

# EXHIBIT J

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DISTRICT COURT

CLARK COUNTY, NEVADA

\* \* \* \* \*

JOSEPH FOLINO, an individual  
and NICOLE FOLINO, an  
individual,

Plaintiffs,

Case No. A-18-782494-C  
vs. Dept. No. XXIV

TODD SWANSON, an individual;  
TODD SWANSON, Trustee of the  
SHIRAZ TRUST; SHIRAZ TRUST, a  
Trust of unknown origin; LYONS  
DEVELOPMENT, LLC, a Nevada  
limited liability company; DOES  
I through X; and ROES I through  
X,

Defendants.

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VIDEO TELECONFERENCE DEPOSITION OF

TODD SWANSON, M.D.

VOLUME II

Taken on February 6, 2020

at 9:34 a.m.

By a Certified Court Reporter

Las Vegas, Nevada

Stenographically reported by:

Heidi K. Konsten, RPR, CCR  
Nevada CCR No. 845 - NCRA RPR No. 816435  
JOB NO. 604719



1 Video teleconference deposition of TODD  
2 SWANSON, M.D., Volume 2, stenographically taken at  
3 10777 West Twain, Las Vegas, Nevada, on Thursday,  
4 February 6, 2020, at 9:34 a.m., before Heidi K.  
5 Konsten, Certified Court Reporter in and for the  
6 State of Nevada.

7

8 APPEARANCES OF COUNSEL

9 For the Plaintiffs:

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17 For the Defendants:

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21 Suite 107  
22 Las Vegas, Nevada 89104  
23 (702) 735-0049

24

25 \* \* \* \* \*

26

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1           Q     And it goes through 1831. And then in  
2     that same e-mail is 1832 through 1837, which will  
3     be Exhibit 36, which is the report you've already  
4     seen, the December 7th report.

5           A     Okay.

6           Q     So Exhibit 35 is the November 24, 2017,  
7     Infinity Environmental Services report. And it  
8     says "To whom it may concern. Rakeman Plumbing,"  
9     and it's "Fungal Indoor Air Quality Assessment  
10    Report: Visual, Airborne and Surface Fungal  
11    Assessment. Water-damaged master bedroom closet  
12    set, 42 Meadowhawk Lane, Las Vegas, Nevada 89135."  
13               And that's the address of this home;  
14    correct, Doctor?

15          A     Yes.

16          Q     Have you ever seen this report before,  
17    Doctor?

18          A     I have not.

19          Q     Were you ever told by Rakeman Plumbing  
20    that the home had tested positive for mold?

21          A     Not that I recall.

22          Q     Okay. Would you have done anything  
23    differently with the seller's real property  
24    disclosure form if you were made aware of this  
25    report?