

IN THE SUPREME COURT STATE OF NEVADA

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<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**

**JOINT
APPENDIX ON APPEAL
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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 9th, 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

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1 DISTRICT COURT
2 CLARK COUNTY, NEVADA
3)
4 JOSEPH FOLINO, an)
5 individual, and NICOLE)
6 FOLINO, an individual,,)
7)
8 Plaintiffs,)
9)
10 vs.) CASE NO. A-18-782494-C
11) DEPT. NO. XXIV
12 TODD SWANSON, an)
13 individual; TODD SWANSON,)
14 Trustee of the SHIRAZ)
15 TRUST; SHIRAZ TRUST, a)
16 trust of unknown origin;)
17 LYONS DEVELOPMENT, LLC, a)
18 Nevada limited liability)
19 company; DOES I through X;)
20 and ROES I through X,,)
21)
22 Defendants.)
23)
24)
25)

14
15
16

17 VIDEOTAPED DEPOSITION OF IVAN SHER
18 MONDAY, FEBRUARY 3, 2020
19 3:04 P.M.
20 AT 10777 WEST TWAIN AVENUE, THIRD FLOOR,
21 LAS VEGAS, NEVADA
22
23

24 REPORTED BY: MICHELLE R. FERREYRA, CCR No. 876
25 JOB NO. 601855A

1 VIDEOTAPED DEPOSITION OF IVAN SHER,
2 taken at 10777 West Twain Avenue, Third Floor,
3 Las Vegas, Nevada, on MONDAY, FEBRUARY 3, 2020, at
4 3:04 p.m., before Michelle R. Ferreyra, Certified Court
5 Reporter, in and for the State of Nevada.

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33 darren@dwelshlaw.com

34 THE VIDEOGRAPHER: Terrell Holloway,
35 Litigation Services

36 Also Present: Michelle Stringer

1 I N D E X

2 WITNESS: IVAN SHER

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1 LAS VEGAS, NEVADA, MONDAY, FEBRUARY 3, 2020;

2 3:04 p.m.

3 -oOo-

4 (Exhibit 1 marked.)

5 VIDEOGRAPHER: This is the beginning of
6 Media No. 1 in the deposition of Ivan Sher in the
7 matter of Folino, Joseph, versus Swanson, Todd, held at
8 Black & Lobello on February 3, 2020, at 3:04 p.m.

9 The court reporter is Michelle R. Ferreyra.
10 I'm Terrell Holloway, the videographer, an employee of
11 Litigation Services.

12 This deposition is being videotaped at all
13 times unless specified to go off the video record.

14 Would all present please identify themselves,
15 beginning with the witness.

16 THE WITNESS: I'm Ivan Sher. I work at
17 Berkshire Hathaway. I represent the seller in the
18 transaction.

19 MR. WELSH: I'm Darren Welsh, attorney on
20 behalf of Ivan Sher, the deponent today.

21 MR. GALLIHER: Jeff Galliher, counsel for the
22 defendants.

23 MS. STRINGER: Michelle Stringer, transaction
24 coordinator for Ivan Sher Group.

25 MR. GRAF: Rusty Graf representing the

1 Folinos.

2 VIDEOGRAPHER: Will the court reporter please
3 swear in the witness.

4 MADAM REPORTER: Raise your right hand
5 please.

6 (Court reporter duly administers oath to
7 witness.)

8 THE WITNESS: I do.

9 MADAM REPORTER: Thank you.
10 Whereupon,

11 IVAN SHER,
12 having been first duly sworn to testify to the truth,
13 the whole truth and nothing but the truth, was examined
14 and testified as follows:

15

16 EXAMINATION

17 BY MR. GRAF:

18 Q. All right.

19 We introduced ourselves off the record, but
20 my name is Rusty Graf, and I represent the Folinos in
21 this action.

22 We're here to take your deposition in a case
23 captioned Joseph and Nicole Folino vs. Todd Swanson and
24 Todd Swanson as trustee of the Shiraz Trust and Lyons
25 Development, LLC.

1 Are you aware of that?

2 A. Well, I understand the relationship. I
3 didn't know the trust situation.

4 Q. But just that, also, we're here to take your
5 deposition --

6 A. Yes.

7 Q. -- in terms of your involvement --

8 A. Yes.

9 Q. -- regarding that transaction.

10 A. Yes.

11 Q. Okay.

12 Have you ever been deposed before, Mr. Sher?

13 A. I have.

14 Q. How many times?

15 A. Once.

16 Q. Okay.

17 So I'm going to go over what we call the
18 "admonitions," and that's just a fancy word for the
19 ground rules.

20 A deposition is just a formal conversation
21 between you, me, your attorney, and the attorney for
22 Dr. Swanson at the end, Mr. Galliher.

23 The most important thing that we do here
24 today is that we have a clear record.

25 A. (Witness nods.)

1 Q. So during this process, if I ask, "Is that a
2 'yes'?" or "Is that a 'no'?" or to otherwise verbalize
3 your response, I'm not trying to be rude or curt; I'm
4 just trying to make sure we have a clear record.

5 Okay?

6 A. Yes.

7 Q. All right.

8 During the process -- I'm sure your attorney
9 went over this with you, but if you went to wait for a
10 count of one or two before you respond, that's usually
11 best so the court reporter has the opportunity to make
12 sure that she finishes my question before she starts
13 transcribing your answer.

14 Okay?

15 A. Yes.

16 Q. All right. See, you are good at it.

17 You were just sworn in by the court reporter.

18 Are you aware of that?

19 A. Yes.

20 Q. And that's the same oath that you would take
21 in front of a judge or a jury.

22 Are you aware of that?

23 A. Yes.

24 Q. And you're going to be held to the same level
25 of truthfulness that you would be in front of that

1 judge or jury.

2 You're aware of that?

3 A. Yes.

4 Q. Okay.

5 One of the other things, in terms of getting
6 a clear record, is that if you answer a question, I'm
7 going to assume you answered the question that I posed.

8 Is that a fair assumption?

9 A. Yes.

10 Q. All right.

11 If you don't understand the question, didn't
12 hear the question, or simply would like me to rephrase
13 the question, please ask me to do so, and I will.

14 Okay?

15 A. Yes.

16 Q. All right.

17 I'm entitled to your best estimate here
18 today. I don't want you to guess. If any question
19 that I pose to you, you feel like you have to guess,
20 tell me, and I'll try and rephrase the question.

21 Okay?

22 A. Okay.

23 Q. So I'm going to ask you some questions about
24 some time frames and stuff like that, but for the most
25 part, we've got documents to help us with the dates and

1 times and that sort of thing. But in terms of an
2 estimate versus a guess, the best example that I can
3 give you is if I -- I may ask you how long this table
4 is. You'll say, Oh, it's 12 to 15 feet long. But if I
5 ask you how wide my desk is, you wouldn't know because
6 you've never been in my office.

7 Do you understand the difference?

8 A. Yeah.

9 Q. All right.

10 Any reason why you cannot give your best
11 testimony here today?

12 A. No, not at all.

13 Q. Are you under a doctor's care today?

14 A. No.

15 Q. All right.

16 Have you taken any prescribed medications or
17 intoxicating substances within the last 24 hours?

18 A. Super Bowl was yesterday.

19 Q. Right.

20 Do you feel like that will inhibit your
21 ability --

22 A. No.

23 Q. -- to testify truthfully or understand my
24 questions here today?

25 A. Not at all.

1 Q. Okay.

2 So in front of you is the notice of subpoena
3 that you were served with, and -- actually, this is the
4 amended notice of subpoena that you were served with
5 for your deposition here today, February 3rd, at
6 3:00 o'clock.

7 Is there any reason why we could not proceed?

8 A. No.

9 Q. All right.

10 Please state your name and spell your last
11 name for the record.

12 A. Ivan Sher, S-h-e-r.

13 Q. Have you ever been known by any other names?

14 A. No.

15 Q. Do you have a middle name?

16 A. Garth.

17 Q. Okay.

18 What is your business address?

19 A. I'm in the building, so we just moved --

20 MS. STRINGER: 10777 West Twain.

21 MR. GALLIHER: You can't answer for him.

22 MS. STRINGER: Oh.

23 MR. WELSH: Yeah, don't say anything.

24 THE WITNESS: Yes. So my address is the same
25 address as where we are, 10777 West Twain, and we're in

1 the suite next door. I'm not sure what that is.

2 BY MR. GRAF:

3 Q. So Suite 330?

4 A. Sounds accurate.

5 Q. And that's Las Vegas, Nevada 89135?

6 A. Correct.

7 Q. And what's your business telephone number?

8 A. My cell: (702) 400-2400.

9 Q. Okay.

10 And how long has that been your cell?

11 A. Twenty years, 15 -- 15 years.

12 Q. And what is your home address?

13 A. My home address is 3020 Hammerwood Drive, and
14 Hammerwood is one word, 89135.

15 Q. How long have you resided at that address?

16 A. About a year.

17 Q. What did you do in preparation for your
18 deposition here today?

19 A. I went over the -- the paperwork, the
20 correspondence of the transaction.

21 Q. So your office has produced -- and -- and
22 you're aware that we also subpoenaed Kelly Contenta to
23 be deposed here today; correct?

24 A. Correct.

25 Q. And we also subpoenaed records from her, in

1 addition to subpoenaing records from you. And let's
2 look at what I've got.

3 MR. WELSH: What are we looking at?

4 MR. GRAF: The subpoena for the records.

5 (Exhibit 2 marked.)

6 BY MR. GRAF:

7 Q. You've been handed what's been marked as
8 Exhibit 2 for purposes of this deposition. It contains
9 documents or a list of documents that were requested
10 pursuant to that subpoena. If you'd take a look at it.
11 On the -- is it -- fourth page of five, it says,
12 "documents to be produced."

13 A. Okay.

14 Q. And No. 1, it says: Any and all
15 documentation related to or referencing the sale of
16 purchase of 42 Meadowhawk from January 1st, 2015, to
17 the present.

18 Do you see that?

19 A. I do.

20 Q. Have you, in fact, made a diligent search of
21 your records for those documents?

22 A. I have.

23 Q. And have those been produced in this case?

24 A. They have.

25 Q. Number 2: Any and all documentation or

1 communication related to or referencing 42 Meadowhawk
2 from January 1st to present -- January 1st, 2015, to
3 present.

4 Same question: Did you make a diligent
5 search?

6 A. I did.

7 Q. And have those been produced?

8 A. They have.

9 Q. Okay.

10 So No. 3: Any and all other documentation or
11 communications related to or referencing seller
12 disclosures made for 42 Meadowhawk Lane.

13 You're aware of a seller's real property
14 disclosure form, an SRPD?

15 A. I am.

16 Q. Okay.

17 Were there any documents that were -- other
18 than the SRPD itself that were -- that you found that
19 were produced in this case pursuant to that?

20 A. No.

21 Q. And so four is kind of a catchall: Any and
22 all communications with or documents referencing or
23 related to Joseph or Nicole Folino.

24 Did you search for those, and did you find
25 any?

1 A. Whatever I found, you guys have.

2 Q. Okay.

3 Same thing with No. 5 for Todd Swanson: Did
4 you --

5 A. Correct.

6 Q. Did you look, and did you produce anything?

7 A. Correct. Everything -- yeah, everything that
8 I -- that I have, you have.

9 Q. Okay.

10 And then it says, No. 6, the final category:
11 Any documents or communications related to or
12 referencing knowledge of any repairs made to
13 42 Meadowhawk from January 1st, 2015, till the present.

14 Did you make a diligent search for those
15 records?

16 A. Yes.

17 Q. And did you produce them?

18 A. Everything we have, you have; correct.

19 Q. Okay.

20 So included in the documents that you
21 reviewed, are those the documents that you produced
22 pursuant to the subpoena?

23 A. Correct.

24 Q. Were there any documents that you reviewed in
25 preparation for your deposition that you didn't

1 produce?

2 A. No.

3 Q. Are there any documents that you deemed to be
4 privileged and you withheld --

5 A. No.

6 Q. -- on the production? Okay.

7 And I'll preface this question with the fact
8 that I don't want to know what you discussed with your
9 attorney. Did you meet with anybody in preparation for
10 your deposition?

11 A. No.

12 Q. Did you meet with your attorney?

13 A. I met with my attorney.

14 Q. Okay.

15 A. And can I clarify that --

16 Q. Sure.

17 A. -- previous?

18 I did meet my team to organize the documents,
19 those that were involved, so we could present accurate
20 depiction of what happened.

21 Q. Okay.

22 So who was at that meeting? Yourself?

23 A. It was me, it was my attorney, and our
24 transaction coordinator at the time was there as well.

25 Q. And who is that?

1 A. I believe that was Austin Sherwood.

2 Q. Okay.

3 Was Ms. Contenta there?

4 A. Kelly came, yes. And so was my assistant,
5 Kristine.

6 Q. Can you spell that?

7 A. K-r-i-s-t-i-n-e.

8 Q. And their last names?

9 A. Austin is Sherwood, S-h-e-r-w-o-o-d.
10 Kristine is Valle, V-a-l-l-e.

11 Q. Okay.

12 What did you guys talk about?

13 A. Trying to understand the timeline of when
14 things happened. It was a few years back.

15 Q. Did you talk to Dr. Swanson?

16 A. No.

17 Q. When's the last time you spoke with
18 Dr. Swanson?

19 A. Couple of years ago, year ago. Two years
20 ago, I think.

21 Q. Okay.

22 When's the last time -- well, strike that.

23 Have you ever spoken with Nicole Whitfield?

24 A. Never.

25 Q. That's his assistant --

1 A. Oh, I'm sorry.

2 Probably during the transaction, we spoke. I
3 would imagine through e-mail and correspondence,
4 getting into the house, that kind of thing.

5 Q. Okay.

6 Did you do anything else in preparation for
7 your deposition today?

8 A. No.

9 Q. Okay.

10 What is your date of birth?

11 A. 8/16/69.

12 Q. And are you married?

13 A. Yes.

14 Q. Okay. And to who?

15 A. Jennifer Sher.

16 Q. How long have you been married?

17 A. Twenty-five years.

18 Q. Have any children?

19 A. Three.

20 Q. And what are their ages?

21 A. Twenty-two, 20 -- well -- yeah, 22, 20, and
22 16.

23 Q. Okay.

24 Where did you go to high school?

25 A. Reno High and Redwood High.

1 Q. Where is Redwood?

2 A. Marin County, San Francisco.

3 Q. Did you graduate?

4 A. I did.

5 Q. From where?

6 A. University of Arizona in Tucson -- oh,
7 Redwood High. Sorry. That's the follow-up question.

8 Q. Yeah.

9 And so did you attend college?

10 A. I did.

11 Q. Where?

12 A. Tucson, Arizona, at the U of A.

13 Q. And did you obtain a degree?

14 A. B.A.

15 Q. And what was your primary area of study?

16 A. Communication.

17 Q. When did you graduate?

18 A. Ninety -- '92 --

19 Q. Okay.

20 A. -- with a question mark.

21 Q. Okay.

22 Any other education after obtaining your
23 bachelor's?

24 A. Just licensing for real estate.

25 Q. Okay. And we'll talk about that in just a

1 second.

2 Any other -- any licenses that you hold?

3 A. Just my real estate license, broker
4 salesperson, in California and in Nevada.

5 Q. Okay.

6 So you have a broker's license in the state
7 of Nevada?

8 A. Correct.

9 Q. Do you have a broker's license in the state
10 of California?

11 A. Salesperson's license.

12 Q. Okay.

13 How long -- let's backtrack just a second.

14 Which license did you obtain first in Nevada?

15 A. Which license did I get first in Nevada?

16 Q. Sure.

17 Which real estate license? Did you get a
18 broker's license, or did you get a salesperson's
19 license?

20 A. Salesperson's, and then it became broker
21 salesperson's.

22 Q. Okay.

23 And when did you obtain your salesperson's
24 license?

25 A. I believe in 2000.

1 Q. Okay.

2 And when did you get your broker's license in
3 Nevada?

4 A. Must have been three years ago.

5 Q. So 2017 or '16?

6 A. '17 sounds good.

7 Q. Okay.

8 And in California, your salesperson's
9 license, how long have you had that?

10 A. Six months.

11 Q. Okay.

12 Where do you hang that license?

13 A. It's being hung with Berkshire Hathaway.

14 Q. In which office?

15 A. In Orange -- in -- it's their Newport office.
16 I don't know which -- what the address is.

17 Q. Okay.

18 Your license in Nevada, has it ever been
19 suspended or revoked?

20 A. No.

21 Q. Have you ever been disciplined by the Nevada
22 Board of Realtors?

23 A. No.

24 Q. Same thing for California: Ever had your
25 license suspended or revoked?

1 A. No.

2 Q. Any other licenses or certifications that
3 you've held in a professional capacity --

4 A. Not that I'm aware of.

5 Q. -- other than your driver's license?

6 A. No.

7 Q. Okay.

8 So what did you do between 1992 and 2000,
9 when you first got your Realtor license?

10 A. Sold real estate.

11 Q. Okay.

12 Did you just work for other realtors?

13 A. I started out working for a Realtor, and then
14 that lasted about less than a year. And then I went --
15 basically, went out on my own and -- and sold --

16 Q. All right.

17 A. -- in Tucson.

18 Q. Okay.

19 So have you -- have you ever held a real
20 estate license in Tucson?

21 A. Yeah.

22 Q. Or in Arizona?

23 A. Yes.

24 Q. Okay.

25 When did you obtain that? Was that '92?

1 A. I want to say '95, '96, somewhere in there.

2 Q. When did you move to Las Vegas?

3 A. I moved to Las Vegas in 2000.

4 Q. Okay. All right.

5 So let's talk about your -- let me ask you up
6 front: Is it easier for you, in your mind, to go
7 forward or backwards in terms of your employment?

8 A. Oh, God, it's a crapshoot either way. Go for
9 it.

10 Q. All right.

11 So when you came to Nevada in 2000, who did
12 you first start working for?

13 A. So --

14 Q. And when I say "working for," I'm saying who
15 was your broker?

16 A. So this part will be easy, because it was
17 Prudential, and I worked for Flora Shapiro as a buyer's
18 agent on her team, and -- and I stayed with her and
19 became a partner in 2005. And Berkshire Hathaway
20 bought out Prudential at some point in the -- early
21 2011, I guess, or '12. And so I still remained with
22 Berkshire -- the now-Berkshire Hathaway.

23 My partner passed away probably three years
24 ago, is what I'm guessing, and -- and then -- but, at
25 the same time, I've been Berkshire Hathaway, formerly

1 Prudential, the entire time.

2 Q. Okay.

3 So what types of property do you specialize
4 in?

5 A. I focus on luxury properties.

6 Q. And when you say "luxury properties," you're
7 talking about homes, condos, that sort of thing?

8 A. Correct.

9 Q. Okay.

10 So over the years, how many homes/condos do
11 you think you've sold?

12 A. So I can give you last year's numbers, and we
13 can work backwards.

14 Q. Okay.

15 A. So I have a team, and everything -- all the
16 transactions go under me, whether they're my personal
17 sales or not.

18 I'd say our team last year -- we did 230-ish
19 transactions, 230 sales, average sales price of just
20 over a million dollars. My personal average sales
21 price is probably closer to two and a half to three.

22 Q. Okay. Let's talk about that.

23 So currently or, say, in 2019, what did your
24 team -- what was it composed of?

25 A. In terms of the volume or the agents or --

1 Q. People.

2 A. Okay.

3 So I've -- I've scaled my team down. I have
4 14 agents, and I probably have about eight or nine
5 employees.

6 Q. Okay. And let's see.

7 So do any of them specialize in anything
8 other than home -- any of the agents specialize in
9 anything other than homes and condos?

10 A. I have somebody that -- that focuses on
11 commercial.

12 Q. And when you say "commercial," is that
13 leasing? Is that sales? Is that dirt?

14 A. It's mainly sales, but he will -- he will
15 work -- it's basically based upon the needs of my
16 clients.

17 Q. Okay.

18 And the eight to nine employees that you had
19 in 2019, what do they do?

20 A. They're -- they're really divided into two --
21 two or three aspects: One is client satisfaction, two
22 is transaction coordination, and the third is
23 assistance for me and my day-to-day activities.

24 Q. Okay.

25 So in 2019, how many assistants did you have?

1 A. 2019, I had Kristine, who is my primary
2 assistant, and Austin, who is now my -- my secondary
3 assistant. But in 2019, it was just Kristine. I'm
4 sorry. That's the correct answer to your question.

5 Q. That's all right.

6 So who -- how many people worked in your
7 transaction department?

8 A. Right now, it's just Michelle, who is sitting
9 here now, and she has an assistant -- she can't talk --
10 Stephanie -- Victoria. She has an assistant.

11 Q. Okay.

12 And what about client satisfaction; is that
13 like setting up viewings and --

14 A. Exactly.

15 Q. -- that sort of thing?

16 A. Exactly.

17 Q. How many people back in 2019?

18 A. Four -- three.

19 Q. Okay.

20 So what -- what, if anything, was different
21 about that structure of your team back in 2017?

22 A. Just the names. My assistant was the same.
23 We had a similar structure. It wasn't as refined as it
24 is now, but it was similar.

25 Q. Okay.

1 And I'm not trying to delve into your
2 personal life or anything, but when did your partner,
3 Mr. Shapiro, pass away?

4 A. I -- I want to say it was three years ago.

5 Q. So this transaction took place sometime
6 between, like, August of 2017 and November '17?

7 A. I think she passed. She wasn't a part of
8 this. I don't think she was a part of this; correct.

9 Q. You think it was prior to August of 2017?

10 A. I think it was in the spring of 2017.

11 Q. Okay.

12 A. Early to spring.

13 Q. All right.

14 A. Am I allowed to ask Darren if he -- if he
15 recalls?

16 THE WITNESS: Does that sound accurate?

17 MR. WELSH: It's not relevant.

18 BY MR. GRAF:

19 Q. Yeah.

20 So in 2017, tell me what you would do on a
21 project or a transaction like the Folinos, the Swanson
22 residence.

23 A. In -- in what capacity?

24 Q. So let's talk about it in this context.

25 So you handle both buyers and sellers?

1 A. Correct.

2 Q. So this was a listing that your office held
3 with Dr. Swanson? Is that a fair statement?

4 A. Correct.

5 Q. And so in that type of scenario, where you're
6 the seller's agent, you personally, what would you have
7 done regarding marketing, getting the house ready for
8 sale, any of that thing? And if it's just "I directed
9 people to do certain things," tell me that. But I want
10 to understand kind of what you would have done in this
11 deal.

12 A. In a -- in this specific deal or in a deal
13 like this one?

14 Q. Let's talk about a deal like this one first,
15 and then I'll ask you some specifics on this deal --

16 A. Okay.

17 Q. -- and how it was different.

18 A. I would meet with the seller. I would sit
19 down with him. We'd look at the markets. We'd go over
20 a market analysis, understand pricing. I would present
21 our company structure, how we do business. I'd present
22 our results, our sales results. I would present our
23 marketing efforts that we intend to do and where I feel
24 the best opportunities are for this particular home.
25 We would take care of the paperwork with regard to the

1 listing and the disclosures.

2 Back then, I think we did -- I don't recall
3 if the paperwork -- the listing paperwork was
4 DocuSigned or if it was done on the spot. I don't
5 recall. I think it was DocuSigned.

6 And then we would begin the process of
7 putting that in -- in motion and in effect.

8 And in this case, I believe there was a
9 reason we didn't quite put it on the market initially,
10 at first. We put it in what's called a "private
11 collection," which is not in the MLS. We try and sell
12 it in-house first. There's a little bit of brain
13 damage that the sellers don't need to go through if
14 they don't have the high-level traffic through the
15 house, and -- and oftentimes in this process, we end up
16 selling it on our own anyway.

17 So it just gives an opportunity to sell it
18 without the brain damage. And so that's I think what
19 we did in this case.

20 Q. Okay. So let's look at this.

21 MR. GRAF: What are we on, 3?

22 (Exhibit 3 marked.)

23 MR. WELSH: You are going to get one from
24 her.

25 THE WITNESS: Thank you.

1 BY MR. GRAF:

2 Q. So I have handed you what's been marked as
3 Exhibit 3 for purposes of this deposition. It's
4 something that got produced by your office, and it
5 appears to be an MLS sheet regarding 42 Meadowhawk.

6 Is that an accurate statement?

7 A. Yes.

8 Q. Okay.

9 Who in your office would normally prepare --
10 strike that.

11 How is this document prepared?

12 A. It would have been I believe done by either
13 Denise, who no longer works with me, or Kristine, who
14 is my assistant.

15 We had it separated into two departments, a
16 listing coordinator and -- and I guess my assistant. I
17 think Denise would have taken the data from the seller,
18 that the seller represented, and put it in this
19 context.

20 Q. Okay.

21 And so whether it was Denise or Kristine,
22 would they speak with the seller to get this
23 information?

24 A. It would be in writing. It would be -- they
25 would have filled out an MLS form.

1 Q. Okay.

2 So I didn't see any type of MLS form in the
3 documents that were produced to me.

4 A. Yeah.

5 Q. So do you -- is that a form that you would
6 keep?

7 A. We -- if we have it, you'd have it. So --

8 Q. Is that something that the seller would sign?

9 A. Yes.

10 Q. Okay. And --

11 A. Let -- let me -- let me scratch that.

12 Historically, it has been something that
13 they -- that required a seller's signature. However,
14 toward the more recent years, I believe it's not
15 required that the seller sign it but that they fill it
16 out.

17 Q. Okay.

18 So then this document gets produced.

19 It's my understanding that the realtors go
20 through and they fill out, like, the little toggle
21 boxes for -- basically, a checklist to input all this
22 information. Is that a fair statement?

23 A. That's correct. And that's --

24 Q. Okay.

25 A. That's based upon the document that we have

1 in the office from the seller.

2 Q. Okay.

3 A. And let me also say that this is definitely
4 not my specialty. This is -- how they fill this out,
5 I'm not entirely -- that's not what I understand.

6 Q. Yeah.

7 So this has an original list price of
8 \$3.199 million. Do you see that?

9 A. I do.

10 Q. Who in this transaction determined that list
11 price?

12 A. The seller, with the understanding that it
13 was a conversation that we had. He wanted to see what
14 the market value was. I presented the facts and the
15 figures, and he came up with a price that he felt was
16 appropriate based upon that. And I either agreed or
17 disagreed. I don't remember. I feel like I probably
18 agreed.

19 Q. Okay.

20 How do you determine the market value for a
21 home?

22 A. We look at the market comparables.

23 Q. Did you keep track of the comparables in this
24 instance?

25 A. No.

1 Q. Did you prepare an actual broker's price
2 opinion?

3 A. No.

4 Q. Okay.

5 Do you know what a broker's price opinion
6 is --

7 A. Yes.

8 Q. -- a BPO?

9 A. Yeah.

10 Q. Okay.

11 Do you normally prepare a BPO --

12 A. No.

13 Q. -- when you list a property?

14 A. I don't think I ever have.

15 Q. Okay.

16 A. And I don't -- and it's -- just for
17 clarification, it's not the norm to do. In fact, I
18 don't know anybody that does it in my price range.
19 It's the comps and handling knowledgeable local sales.

20 Q. Okay.

21 Is there a date on this document as to when
22 it was entered -- there it is.

23 So it appears that on -- where is it? I just
24 lost it again.

25 What's the date that this was put on MLS?

1 A. I see the acceptance date. I see the close
2 date.

3 Q. The acceptance and the close date, though,
4 that was for the transaction --

5 A. Right.

6 Q. -- itself; right?

7 A. Yeah. I'm looking. I'm looking.

8 This is not quite the same format as it is
9 today, like on new builds. I don't see it. I would
10 have to look at it.

11 Q. So I guess we can do some math, though.

12 It says: Days listing to close. If we
13 deducted 49 days --

14 A. September 29th.

15 Q. Okay.

16 And where are you finding that?

17 A. Under the "Financial" section.

18 See that little box on the left? Go all the
19 way down toward where that line is and go all the way
20 right.

21 Q. Okay. All right.

22 So we got a little bit sidetracked, and I had
23 asked you a question on how many homes you've sold over
24 your career, and you said 230 in 2019.

25 You've been selling homes since about 1995,

1 1996; fair statement?

2 A. Correct.

3 Q. So how many homes a year do you think you've
4 sold over the years?

5 A. So I can tell you that since about -- let's
6 just factor in from 2010 and above. I'd say we're
7 200-plus a year.

8 Q. Okay.

9 A. I mean, that should give you a good idea.

10 Q. So 2000 over -- 20-something hundred homes
11 over the last ten years. And then before that, do you
12 know -- was it like half of that?

13 A. I don't know.

14 Q. Okay. All right. Some more background
15 stuff.

16 You're --

17 A. And, obviously, we're in a challenged market
18 at one point, which probably impacts the results as
19 well.

20 Q. Like 2008 to two thousand and, what, '12?

21 A. '12, '13.

22 Q. And the challenged market, some people call
23 it "the bubble."

24 A. Right.

25 Q. Okay.

1 Couple of other background questions. Ever
2 been convicted of a crime?

3 A. No.

4 Q. Ever served in the military?

5 A. No.

6 Q. So let's talk about this transaction and go
7 through your -- what you testified previously as to
8 what you normally do when you have a listing like this.
9 So when was the first time that you met with
10 Dr. Swanson?

11 A. I'd known Dr. Swanson for years prior through
12 my partner. He was a previous business client. I
13 can't give you a date.

14 Q. So this is the time I will ask you to give me
15 some sort of estimate.

16 Dr. Swanson's testified in this case, and he
17 bought and sold somewhere between eight and ten
18 different houses over the years; some he still owns,
19 and some he doesn't. And that goes back to -- I think
20 very similar, 1995, 1996, somewhere in that time frame
21 of being in Las Vegas.

22 So since 2002, can you tell me, was he a
23 client on more than one home?

24 A. Yes.

25 Q. Okay.

1 How many?

2 A. I can remember three.

3 Q. Including the 42 Meadowhawk?

4 A. Correct.

5 Q. Okay.

6 And when you say including 42 Meadowhawk,
7 you're just talking about the listing and for sale?

8 A. Yeah, the fact that it closed, correct.

9 Q. And the other two homes, which other two
10 homes did you assist Dr. Swanson with?

11 A. There was two others in The Ridges, and there
12 may have been one prior that I can remember, but
13 I -- I don't recall, three for sure.

14 Q. So it's my understanding that there were
15 three other homes on Meadowhawk. Two other homes?
16 Three total on Meadowhawk.

17 A. So I'm --

18 Q. Did you assist him with the purchase or the
19 sale of the other two homes on Meadowhawk?

20 A. The previous -- let's work backwards.
21 There's the one home that we're talking about on
22 Meadowhawk. Then there's another home previous to that
23 on Meadowhawk. We listed the home. I don't recall if
24 we represented the buyer on that or not.

25 And then we had another home on Promontory

1 Ridge, and we represented him on that, on the sale of
2 it.

3 Q. Okay.

4 Is that the one to Troy Herbst -- the sale to
5 Troy Herbst?

6 A. No, I don't think so.

7 Q. No?

8 A. I think -- I think the one I'm thinking of
9 is -- I don't recall who bought that one.

10 Q. So you represented Dr. Swanson as a seller at
11 42 Meadowhawk?

12 A. (Witness nods.)

13 Q. The previous Meadowhawk address -- and you
14 don't know what the address is there?

15 A. I don't.

16 Q. You represented him as the seller?

17 A. Correct.

18 Q. And then what about the Promontory Ridge, who
19 did you represent?

20 A. The seller, him.

21 Q. Okay.

22 Are those sales within the last five years?

23 A. Maybe one of them is.

24 Q. Okay.

25 In addition to 42 Meadowhawk?

1 A. Correct.

2 Q. Okay. So -- all right.

3 What type of market analysis did you do as to
4 42 Meadowhawk?

5 A. A standard market analysis.

6 Q. And I just want to make sure I understand
7 what you're talking about.

8 Are you talking about supply and demand for
9 similar luxury-type homes? What -- what are you
10 talking about in terms of market analysis?

11 A. In The Ridges it's really simple because
12 there's usually 20, 30 homes on the market. There's
13 home that have sold that are similar. Or if they're,
14 you know, new construction versus resale, are they
15 Tuscan? Are they -- are they traditional? Are they
16 contemporary, like Todd's home was?

17 You know, all those are variables in creating
18 value. What you put into a home has little to do with
19 the value of the home to the market.

20 Q. Explain that to me.

21 A. So if you put -- I have a home right now
22 where I represent the seller, and he's got \$18 million
23 in his home right now, and it's his finishes. It's
24 stunning. He paid a lot of money for it, but it's
25 traditional; it's not new; it's not contemporary. And

1 so he's -- we're going up for auction. Not for
2 financial reasons -- the guy's incredibly wealthy --
3 with a no reserve, which means that it could sell for
4 \$3 million. We have it listed for \$13. That's an
5 example of somebody that's put a lot of money into a
6 property where he's not going to get his return.

7 Todd's home, conversely, is a home that was
8 done very stylish. It was contemporary, it was edgy,
9 and it's what was selling. And we, at the time, had
10 been selling a lot of those type of properties and had
11 a very good understanding of what -- what it would go
12 for.

13 Q. Okay. All right.

14 So when you were talking to or -- your normal
15 seller about team structure, Dr. Swanson would have
16 already known what your team structure was like?

17 A. Probably.

18 Q. Okay.

19 A. He dealt with Florence for us -- or me
20 directly, with the exception of this case, when Kelly
21 was involved, but yes.

22 Q. And when you say "Florence," you're talking
23 about your former partner?

24 A. Yes. Yeah.

25 Q. Ms. Shapiro?

1 A. Yes. Thank you.

2 Q. All right.

3 So let's talk about your marketing efforts
4 that you would have undertaken to sell this house or
5 that you would have discussed with Dr. Swanson.

6 A. At this point, I don't think we needed to. I
7 mean, in terms of saying this is what I'm going to do
8 and this is my commitment to you and this is -- I think
9 we've proven ourselves over the last few times where he
10 just knew -- he wanted to rely on us to sell a house.
11 We gave him an analysis and price; he knew our
12 reputation; he'd worked with us.

13 And so that's what happened, if I remember
14 correctly.

15 Q. Okay.

16 A. That's usually the way it is. If it's -- if
17 you and I are a first-time client, I'll -- there's a
18 whole different experience than, you know, if we've
19 been doing business for the last ten years.

20 Q. Okay.

21 So Dr. Swanson didn't need to know that you
22 were going to list it in Luxury Homes Las Vegas or
23 something like that?

24 A. Correct.

25 Q. And in this instance, you wouldn't have done

1 that anyways because you weren't listing it off the
2 bat?

3 A. Right.

4 Q. This was something that you were going to --

5 A. It was listed, just not in the MLS.

6 Q. Okay.

7 And -- and when you say "listed," what do you
8 mean?

9 A. We had paperwork signed.

10 Q. With you?

11 A. Correct.

12 Q. Okay.

13 But in terms of the efforts that you would
14 have undertaken to lease this property, is it a fair
15 statement to say that you would have first marketed it
16 towards buyers that you had access to?

17 A. Correct. And not leased, but sell.

18 Q. Yes. Yeah.

19 Do you recall anything particular about this
20 property or your efforts to sell this property?

21 A. I remember that I -- that I liked the
22 esthetic of the home. I felt he did a good job; I felt
23 it would sell relatively quickly; I felt we were priced
24 right.

25 That's all I recall.

1 Q. Okay.

2 So did you -- Dr. Swanson had previously had
3 a home that he lived in with his ex-wife at Planting
4 Fields. Did you or Ms. Shapiro assist him in his
5 ex-wife selling that home?

6 A. I don't believe so.

7 Q. Okay.

8 Were you aware of that home?

9 A. No. I don't know where that street is.

10 Q. Okay.

11 Did you know Dr. Swanson outside of the
12 business relationship of selling his homes?

13 A. No.

14 Q. Had Dr. Swanson ever treated you?

15 A. No.

16 Q. Okay.

17 Do you know what kind of doctor Dr. Swanson
18 is?

19 A. Yes.

20 Q. What kind?

21 A. He deals with hip surgery.

22 Q. Okay.

23 Let's talk about Kelly Contenta. How long
24 had Kelly Contenta worked for you as of 2017?

25 A. I'm really bad at dates; so I'm just going to

1 wing it.

2 Kelly has -- has worked -- Kelly and I have
3 had a business relationship for a long time. I don't
4 know -- you know, there were times she was working with
5 me and times she was work withing my competitor. It
6 would be difficult for me to tell you how long she had
7 been with me. At one time she was my assistant, back
8 in the day.

9 I can't put it together. I can't find the
10 timeline.

11 Q. Well, let's do it this way, then: Does she
12 currently work for you?

13 A. No.

14 Q. When did she leave?

15 A. About a week ago.

16 Q. Oh. Did she quit or was she fired?

17 A. I guess it would be she quit.

18 Q. Do you know where she's currently working?

19 A. She works at Simply Vegas.

20 Q. What is Simply Vegas?

21 A. It's -- it's a brokerage like Berkshire
22 Hathaway.

23 Q. And is she a salesperson, or is she a broker?

24 A. I believe she's a salesperson, but I'm not
25 sure.

1 Q. Okay.

2 Do you -- are you aware as to whether or not
3 she's ever obtained her broker's license?

4 A. No, I'm not aware.

5 Q. Okay.

6 So prior to the Todd Swanson residence, how
7 long had she been with you? Was it a period of years?

8 A. I honestly can't even guess.

9 Q. And I don't want you to guess, I want you to
10 somewhat give me some sort of estimate.

11 So if she left, like, a week ago -- so she
12 left beginning of 2020?

13 A. Yes.

14 Q. Okay.

15 And she was with you in 2017?

16 A. Correct.

17 Q. Was it a matter of months or years that she
18 had been with you as of August of 2017?

19 A. And I don't know.

20 Q. You said that she had worked with a
21 competitor of yours prior. Who is that competitor?

22 A. Ken Lowman.

23 Q. Lowman?

24 A. Uh-huh, L-o-w-m-a-n.

25 Q. And do you know: Is he a broker?

1 A. He is.

2 Q. And what's the name of his brokerage?

3 A. I think it's Luxury Homes Las Vegas or Luxury
4 Homes of Las Vegas.

5 Q. So the offer in this instance was from
6 Vegas Homes and Fine Estates.

7 Are you aware of that brokerage?

8 A. I know the people. I don't know the
9 brokerage very, well.

10 Q. Okay.

11 A. I know Ashley.

12 Q. That's not the same --

13 A. No.

14 Q. -- as Luxury Homes Las Vegas?

15 A. Correct.

16 Q. Okay.

17 Do you have any idea as to how long she was
18 there?

19 A. I don't.

20 Q. Okay.

21 So Kelly had worked for you as -- as your
22 assistant; is that fair?

23 A. Very, very, very early on.

24 Q. So you came to town in --

25 A. 2000.

1 Q. -- 2000. So was it in 2000? 2001?

2 A. I'm guessing 2006 or '07. It was for a
3 period of months.

4 Q. Did she quit or did you fire her?

5 A. I -- I fired her.

6 Q. Okay.

7 In 2017, were you aware as to whether or not
8 Ms. Contenta had a personal relationship with
9 Dr. Swanson?

10 A. I knew she did -- or had had one in the past.

11 Q. Okay.

12 And so which was it? Was she currently
13 dating Dr. Swanson, or was it a past relationship?

14 A. I -- I actually didn't ask her.

15 Q. Okay.

16 So you knew that at some time prior to this
17 listing that she had dated him?

18 A. Correct.

19 Q. Okay.

20 Does that create any issues for you ethically
21 or professionally?

22 A. Not at all.

23 Q. Okay.

24 Did Ms. Contenta ever live in that home?

25 A. I'm unaware.

1 Q. What was your understanding as to
2 Ms. Contenta's involvement in this transaction, the
3 listing of the 42 Meadowhawk?

4 A. I knew that she had had a relationship
5 with -- with Todd, and -- and that they were still
6 cordial and friendly.

7 And I -- and she -- I believe she brought the
8 listing to us. I'm really trying to rack my brain for
9 this, but I believe she brought the listing to us, even
10 though Todd was our client, which is kind of a unique
11 situation. And so based upon their relationship or
12 previous relationship, we -- we -- I believe we honored
13 it to some degree and didn't just kick her out of the
14 transaction and let her participate with us in it.

15 And in terms of what that looked like,
16 another set of hands for showing, things like that.

17 Q. So I may understand what you're saying, but
18 let's make sure that we're clear on the record here.

19 So say another Realtor in your office --
20 well, strike that.

21 Did Kelly ever ask that she get a commission
22 on this property?

23 A. She -- she -- she didn't and she wouldn't,
24 but I think I paid her automatically. I think she
25 would have gotten a referral fee of some kind.

1 Q. Okay. So let's talk about that.

2 How are the Realtors in your team back in
3 2017 compensated?

4 A. They're on a split. They're on a -- they're
5 on a split based upon their production.

6 Q. Okay. So let's break it down.

7 What types of splits are there?

8 A. It -- it really depends on -- each agent can
9 be a little different. It's more uniform now, but back
10 in the day, we had various different rates for plans
11 and different programs.

12 Anything from a 50-50 to an 80-20.

13 Q. Okay.

14 So what would get you a 50-50 versus an 80-20
15 split?

16 A. 50-50, you'd have to prove yourself. You'd
17 have to work for a year or so and bring the production
18 to the team and show that you -- I guess that
19 you're -- you have the ability.

20 80-20, we don't offer that anymore. It ended
21 up being a little bit tough from a financial business
22 standpoint, but let's just say to be an 80-20, you'd
23 need to have your own book of business; you need to be
24 a high producer, that kind of thing.

25 Q. So I -- I probably wasn't asking the question

1 right because I didn't get the answer that I thought I
2 was going to get; so let me ask it a different way.

3 If a Realtor like Ms. Contenta who brought a
4 transaction to you for an existing client like
5 Dr. Swanson, would she have normally received a
6 commission on that transaction?

7 A. I'd have -- I'd have to say on that -- in
8 that case, it would be a case-by-case basis. And I
9 actually don't remember the commission structure that
10 we agreed upon, but I'm sure I paid her something.

11 Q. Okay. All right.

12 Back in 2017, your Realtor -- the real estate
13 agents that worked for you, did they receive any type
14 of salary?

15 A. No.

16 Q. So it's all commission?

17 A. All commission.

18 Q. Okay.

19 Do they have to pay anything towards the
20 marketing efforts of the house?

21 A. Very, very rarely, almost never.

22 Q. So when would be the specific instance when
23 they would have to?

24 A. There was no specific incidence.

25 It's -- it's -- it's a -- it's -- there's no rule of

1 thumb. It's -- it may have happened one time, and
2 that's because it was a development as opposed to an
3 individual house.

4 Q. Okay.

5 A. So I cover the costs of marketing the house.

6 Q. Oh, I get that. Yeah.

7 So you paid for -- like if it's listed in,
8 like, Vegas Magazine or one of those other types of
9 publications, you pay for all the marketing and
10 the -- the fees?

11 A. Correct.

12 Q. Okay.

13 You pay for the MLS listing or the MLS
14 service for your office?

15 A. Correct.

16 Q. Okay.

17 What types of efforts did you undertake, if
18 any, to market this home?

19 A. I don't recall.

20 Q. Okay.

21 Who would have that information?

22 A. It would be me.

23 Q. All right.

24 So I didn't see any marketing, either ads or,
25 you know, like -- what do they call them -- proofs for

1 ads, anything like that, that you produced.

2 So if you didn't produce it, you didn't do
3 it?

4 A. No. We don't -- we don't collect our
5 marketing efforts.

6 Q. Okay.

7 A. I have no marketing representations
8 for -- for just about any of my clients, especially not
9 backdating that far.

10 Q. Okay.

11 Now, you're not saying that you didn't, like,
12 have pictures of the house and what the -- the costs or
13 anything like that in a particular magazine. What
14 you're saying is -- is you don't keep those?

15 A. Correct.

16 Q. Okay.

17 Back in 2017, do you know what magazines you
18 would have listed a house like this in?

19 A. I'm trying to look here. This is --

20 Q. I said "list," and I didn't mean list. I
21 mean just advertise this type of house. Because we've
22 already talked about what way you would have listed it.

23 A. So the variables -- we have our own
24 publication that we put out, and it's quarterly.

25 Q. What's that called?

1 A. Well, it's changed now. It's called
2 "Is Luxury", Las Vegas' Luxury.

3 Q. So what was it in 2017?

4 A. I'll have to look and see. I don't -- I
5 don't recall. I can see if we have any old -- old
6 issues. But if it's quarterly, this home was only on
7 the market for just a couple months. It never would
8 have -- it's hard to image it would have made the cut
9 for that magazine.

10 Q. Okay.

11 A. So I can't -- I can't tell you. That's a
12 challenge.

13 Q. Berkshire Hathaway, though, that was the
14 brokerage name back in 2017?

15 A. I believe so.

16 Q. Okay.

17 A. Yes. It says it in the MLS.

18 Q. All right.

19 And you're looking at Exhibit 3?

20 A. Correct.

21 Q. All right.

22 Do you know when your group came to Berkshire
23 Hathaway, or was that when she purchased the Prudential
24 group?

25 A. We were a part of the acquisition.

1 Q. Okay.

2 So you're currently in this building at
3 10777 West Twain. How long have you been in this
4 building?

5 A. Just -- just through the -- the end of 2019.

6 Q. And where were you at prior to that?

7 A. We had a -- we had an office on, let's see,
8 Rampart and Charleston, and I can't remember the
9 address.

10 1215 South Fort Apache, Suite 210. That's
11 also in Exhibit 3.

12 Q. How long were you there?

13 A. Ten years, 12 years --

14 Q. Okay.

15 A. -- 13 years.

16 Q. Were you aware of any of the problems that
17 arose regarding the sale of this house?

18 A. When?

19 Q. At any point in time during the transaction.

20 MR. GALLIHER: Object to form.

21 THE WITNESS: Just as they owned it.

22 MR. GALLIHER: Sorry. Object to form.

23 Go ahead.

24 BY MR. GRAF:

25 Q. So are you referring to the water leak at the

1 house?

2 A. Correct.

3 Q. And I think that there's a couple of other
4 instances that we'll go through on some of these
5 e-mails where they -- the Folinos had requested an
6 engineering report, and then there was a water leak.

7 When you would sit down and meet with a
8 seller like Dr. Swanson, would you talk to him about
9 the house, any particular issues about the house?

10 A. We -- you know, again, because this
11 was -- not his first time with us, we were
12 very -- we're always very clear about -- are you
13 talking about the disclosure statements?

14 Q. Uh-huh.

15 A. We're always very clear that it is not
16 something we can participate in, and it's -- it's --
17 it's exclusively how -- how he knows the house, and we
18 encourage all of our clients to be upfront and honest
19 in their representations of the property.

20 Q. Okay.

21 So when you say "it's nothing that you can
22 participate in," what do you mean by that?

23 A. There are clients in the past that say "Hey,
24 can you just fill this out for us, and we'll give you
25 the answers?"

1 And the answer is "No."

2 Q. And that's a generous qualification. I
3 appreciate that.

4 The -- I'm looking more along the other side
5 of that conversation.

6 So did -- and in this particular instance,
7 did Dr. Swanson ever ask you about how to interpret
8 anything on the SRPD?

9 A. No.

10 Q. Okay.

11 On prior houses, did Dr. Swanson ever ask you
12 how to interpret something on the SRPD?

13 A. No. And it's nothing I would ever do.

14 Q. And when you say that, is it because you
15 wouldn't have the direct communication with the seller
16 at that junction, or are you saying that it's just
17 you --

18 A. We've been taught not to be -- not to advise
19 in any capacity on the disclosure statements.

20 Q. So when you say you've "been taught," who
21 taught you that?

22 A. Well, I'd have to go back to -- I don't know.
23 I can't give you an answer on that. I mean,
24 it's -- there's -- there's certain things that you
25 learn through the dos and don'ts in real estate, and

1 the prob- -- the biggest problems that people have.
2 And we're -- we're advised, whether it's by Florence
3 who is the broker of -- of Berkshire Hathaway, in
4 e-mails that he puts out or it's -- it may have even
5 been through my ex-partner, Florence, who was -- who
6 advised never ever to interpret that document. We
7 could help with any other document, but when it comes
8 time to the seller's disclosure, we take a step back.
9 We just advise them to be honest and to fill it out
10 diligently.

11 Q. So if Dr. Swanson would have ever asked you
12 anything, that's what you would have said?

13 A. Exactly.

14 Q. Okay.

15 You raised a good question that I probably
16 should have asked earlier.

17 You have a broker license, but are you the
18 broker for Berkshire Hathaway?

19 A. I'm not.

20 Q. In 2017, who was the broker?

21 A. Florence Barbee.

22 Q. Can you spell the last name?

23 A. B-a-r-b-e-e. Or one E. Two Es? One E? Two
24 Es? Two Es. It's in Exhibit 3.

25 Q. Still the broker --

1 A. Yeah.

2 Q. -- for Berkshire Hathaway?

3 A. Correct.

4 Q. Okay.

5 Would you or your agents ever offer any
6 advice about the purchase of the property to a buyer
7 where you represent the seller?

8 A. No.

9 Q. Do you ever have any communications with the
10 buyers?

11 A. I'm sorry. Where we only represent the
12 seller?

13 Q. Yes.

14 A. We have no communication with the buyer.

15 Q. So let's talk about that.

16 In this transaction, did you have an
17 understanding as to whether or not the Folinos had
18 representation in the transaction?

19 A. They did have representation.

20 Q. So in that instance, you wouldn't have any
21 communication with them?

22 A. Not starting off in our court. We would not
23 initiate communication.

24 Q. I believe it's -- Ashley Oaks was the -- the
25 agent that the Folinos used.

1 A. Correct.

2 Q. Do you have that understanding?

3 A. Correct.

4 Q. Did you know Ms. Oakes prior to this
5 transaction?

6 A. Just by reputation. I don't think we'd done
7 any business together.

8 Q. In terms of that reputation, what's your
9 knowledge of that reputation?

10 A. Let me rephrase.

11 Not necessarily good or bad, just that she
12 does business, and she and her husband were -- were
13 people that other people would talk about as being good
14 Realtors -- or not good realtors, but being productive
15 Realtors in the city.

16 Q. And that's what I was going to ask you.

17 Do you have an understanding as to whether or
18 not they were good or bad Realtors?

19 A. I don't. But I think I would lean to the
20 good side, from just the basic -- the chatter.

21 Q. Okay.

22 So at the time that this property closed,
23 November 17, 2017, were you aware of a water leak in
24 the master bathroom/closet?

25 A. Only at the time when it was disclosed to all

1 parties.

2 Q. So -- and we're going to go over some
3 documents. But that's a very specific statement. Why
4 do you say it that way?

5 A. Because when I was going through my
6 timelines, trying to look and see when it was
7 that -- for the exact same reason. I was trying to
8 understand when I first had knowledge of this event.
9 And then as I was going through the e-mails, I was
10 remembering -- or looking at the addendums, I was
11 remembering that -- that the night -- that
12 Dr. Swanson's either call or text, or what have you, to
13 me saying, "Hey, we've got a problem. There's a leak."

14 And -- and he's like -- you know, if I
15 remember correctly, he wanted to take care of that
16 leak, but we were closing the next day.

17 So it was -- it was one of those moments in
18 real estate which nobody wants to get that call.

19 Q. Okay.

20 So you think, as you sit here and having
21 reviewed the documents, that you got notified of the
22 leak the night before closing?

23 A. Correct.

24 Q. Okay.

25 And if I understood you correctly,

1 Dr. Swanson informed you of that leak?

2 A. I believe so. This is going back on my
3 memory, but that's what I believe. That's the only way
4 I would have known. Buyer wouldn't have known.
5 Maybe -- yeah.

6 Q. What did you do after being notified of the
7 leak?

8 A. I believe what we did was we created an
9 addendum and presented it to the buyer, either that day
10 or the following day, representing the issue. It may
11 have even been that night. I don't recall.

12 Q. Now, would you have transmitted that directly
13 to the buyer, or would you have sent that to the
14 buyer's agent?

15 A. To the agent.

16 Q. At the time that you were informed by
17 Dr. Swanson of the leak, the night before closing, did
18 you ever ask Dr. Swanson if there had been other leaks
19 in the house?

20 A. No. I don't -- I don't recall. It seemed
21 like a very specific, isolated incident.

22 Q. Okay.

23 Did Dr. Swanson ever tell you that there had
24 been a prior leak in the master bath/master closet in
25 2015?

1 A. No, no.

2 Q. Okay.

3 What about any leaks in the single-car
4 garage?

5 A. No.

6 Q. Okay.

7 And then what about any leaks in the basement
8 bathroom adjacent to the workout room?

9 A. No.

10 Q. Okay.

11 Do you recall if Ashley Oakes had asked you
12 or anybody in your office about any prior leaks?

13 A. I don't recall.

14 Q. Okay.

15 Let's start going through some of these, I
16 guess.

17 MR. WELSH: Can I let Michelle -- do you mind
18 if I excuse Michelle? I just wanted her get a good
19 feel of this.

20 Thanks for coming, Michelle.

21 MS. STRINGER: Thank you.

22 MR. WELSH: Thank you.

23 MR. GRAF: No problem.

24 (Ms. Stringer exited deposition
25 proceedings.)

1 (Exhibit 4 marked.)

2 MR. GRAF: All right. Let's mark this as
3 next.

4 That one is yours.

5 THE WITNESS: Thank you.

6 BY MR. GRAF:

7 Q. You have been handed what is marked as
8 Exhibit 4 --

9 A. Uh-huh.

10 Q. -- for purposes of this deposition. It
11 purports to be a residential purchase agreement. Just
12 take a second and take a look at that, and then I'll
13 ask you a couple of follow-up questions.

14 A. (Witness complies.)

15 Q. You've had a second to take a look at
16 Exhibit 4?

17 A. Yes.

18 Q. Do you recognize Exhibit 4?

19 A. This is the purchase agreement and the
20 repair -- looks like a repair addendum.

21 Q. Okay.

22 And it is for the 42 Meadowhawk property?

23 A. Correct.

24 Q. All right. And we have some other addendums
25 that we will go through here in a minute. But is it

1 your understanding that the property, in fact, sold for
2 \$2.7 million?

3 A. No. It sold for more.

4 Q. Okay.

5 And then if we look at -- I will actually
6 have you look at some other document.

7 MR. GRAF: Let's go ahead and mark this as 5.

8 (Exhibit 5 marked.)

9 THE WITNESS: Thank you.

10 BY MR. GRAF:

11 Q. The way these were grouped together in the
12 file when I got them was this was the -- Exhibit 4 was
13 grouped together as the residential purchase agreement,
14 and Exhibit 5 was grouped together as the various
15 addendums and counteroffers that were included on this
16 property.

17 Do any of these documents help to refresh
18 your recollection as to what the sale price was?

19 A. Counteroffer 2 reflects a \$3 million sales
20 price, and that seems to be the final counter.

21 Q. So included in this packet of documents,
22 Exhibit 5, is Addendum No. 1.

23 And what is Addendum No. 1?

24 A. Looks like a personal property addendum.

25 Q. Which is what?

1 A. An itemization of the personal property that
2 the buyers are requesting.

3 Q. That's being sold with the home?

4 A. That's what they're requesting, correct.

5 Q. And it is signed by both the buyer and the
6 seller. So that appears that that was the agreement as
7 to what would and would not be sold with the home;
8 correct?

9 A. Okay.

10 Q. Is that a fair statement?

11 A. That's a fair statement.

12 Q. All right.

13 So Addendum No. 2, it looks like an extension
14 of the due diligence period?

15 A. Okay.

16 Q. And that, again, is signed by both parties.

17 So that appears to be the agreement of the
18 parties?

19 A. Correct.

20 Q. All right.

21 Addendum No. 3 is a leaseback provision?

22 A. Uh-huh.

23 Q. Is that a "yes"?

24 A. Yes. Sorry.

25 Q. No, you're good.

1 And that's also signed by the buyer and the
2 seller -- buyers and the seller; is that a fair
3 statement?

4 A. Correct.

5 Q. And there's some additional personal items
6 that are being purchased in this addendum?

7 A. Correct.

8 Q. So then there is Addendum 4-A. Do you see
9 that?

10 A. I do.

11 Q. What is Addendum 4-A?

12 A. This looks to be the disclosure of the leak
13 that we discussed in the master closet.

14 Q. Okay.

15 This is not signed by the buyers.

16 Do you have another version of this document
17 that is signed by the buyers?

18 A. I don't believe they signed it. We couldn't
19 find it in our records.

20 Q. When is your understanding as to when this
21 was transmitted to the buyers?

22 A. I don't recall. It look -- the date is the
23 22nd of October. Or am I reading that wrong?

24 Q. You're reading that wrong.

25 A. Yeah. The date is the 15th of November.

1 Q. Let's make sure we have a clear record.

2 A. Yeah.

3 Q. So Addendum 4-A says, at the top, "Dated:
4 10/22/17" --

5 A. Is the purchase agreement.

6 Q. -- is the date of the purchase agreement.

7 A. Right.

8 So the -- 11/15 is the date when it was
9 signed by Todd.

10 Q. Okay.

11 And we're going to go over some e-mails
12 regarding that. Let's go over the rest of these
13 documents in this packet.

14 Next, the next page appears to be the
15 addendum number, and then it says, "Final." It says,
16 "Buyer requests close on or before November 17, 2017."

17 So what was the purpose of this addendum?

18 A. This looks like it came from Ashley, and it
19 looks like the net result is that they had made the
20 decision that they were going to close escrow and that
21 we were going to move forward with the transaction.

22 And I believe -- I believe -- and you can
23 show me right or wrong later, but I believe the missing
24 component in between these is the letter from the
25 contractor. Is it Raken? Raven?

1 Q. Rakeman?

2 A. Rakeman.

3 That they were waiting for -- for some kind
4 of a letter from Rakeman saying that they would repair
5 the damage done and they were prepared to close.

6 Q. So -- and I don't want to get ahead of
7 ourselves here too much.

8 This -- this appears to have been signed by
9 the Folinos, according to DocuSign, on or about
10 November 6, 2017.

11 Do you see that?

12 A. No. I see November 8th. Where are we?

13 Q. Am I reading that wrong?

14 A. Under "Acceptance"?

15 Q. Yeah, and where it says --

16 A. Oh, I'm sorry. Yes, you are correct. And
17 then the seller signed it on the 8th. You're correct.

18 Q. Okay.

19 My finger cramped. Sorry. That was weird.

20 And you'd agree that November 6, 2017, that's
21 some ten days before November 16, 2017?

22 A. Yes.

23 Q. So -- and -- and the reason why I'm asking is
24 you seem to intimate that the buyers were aware of the
25 leak when they signed this document. Was that your

1 understanding?

2 A. I may be -- I -- no. I'm mistaken. This was
3 in reverse order. When it said "Final," I got them
4 reversed.

5 Q. Okay.

6 So Addendum 4-A, capital A, that has
7 Mr. Swan- -- or Dr. Swanson's signature, and it's dated
8 by DocuSign of November 15, 2017; correct?

9 A. Correct.

10 Q. All right.

11 So then the next couple of pages of Exhibit 5
12 is the leaseback agreement.

13 Is that a fair statement?

14 A. Correct.

15 Q. And these are all -- all these documents, the
16 addendums, all that stuff, these are GLVAR documents
17 that you just insert specific provisions into in that
18 "Description" section at the top?

19 A. Correct.

20 Q. Or "Amendment" section at the top?

21 A. Correct.

22 Q. All right, sir.

23 And then the final two pages is the
24 Counteroffer 1 and Counteroffer 2 on the purchase
25 price?

1 A. Correct.

2 Q. All right.

3 So between Exhibits 4 and 5, that is the
4 documentation that should represent the purchase
5 agreement between the Folinos and Dr. Swanson?

6 A. Correct.

7 Q. Were you aware of any other addendums or
8 changes or amendments to the documents?

9 A. No. This is -- well, this is all we have; so
10 this is all I know.

11 Q. All right. So let's talk --

12 A. Can I -- can I amend a comment that I made
13 about Addendum No. Final?

14 Q. Yeah.

15 A. I think you asked me why this was done.
16 Typically, this is done when -- and it's coming from
17 them, when the loan is taking a little bit longer and
18 they need to extend, and that would be my -- my -- my
19 educated guess.

20 Q. Okay.

21 MR. GRAF: So let's go ahead and mark this as
22 next.

23 (Exhibit 6 marked.)

24 THE WITNESS: Thank you.

25 MR. GRAF: What time does anybody have?

1 MR. WELSH: 4:26.

2 MR. GRAF: Did you want to take a break?

3 We've been going for about an hour and a half.

4 THE WITNESS: Oh, just a bathroom break. Be
5 back in 30 seconds.

6 MR. GRAF: Yeah. That's fine.

7 VIDEOGRAPHER: Off the video record at 4:25.

8 (A short break was taken.)

9 (Exhibit 7 marked.)

10 VIDEOGRAPHER: Back on the video record at
11 4:32.

12 BY MR. GRAF:

13 Q. Mr. Sher, you're aware we're still under
14 oath?

15 A. I am.

16 Q. Okay.

17 So you've been handed what's been marked as
18 Exhibit 6 and 7 for purposes of this deposition. Let's
19 go over 6 first. That purports to be an e-mail dated
20 October 24, 2017, between, I guess, Mike Pappas and
21 Dr. Swanson initially.

22 Did you have in your -- on your team an
23 individual by the name of Mike Pappas back in
24 October of 2017?

25 A. I did.

1 Q. What was his title and job?

2 A. I actually don't recall. He wore a couple of
3 different hats at different times. I'm not sure what
4 his position was.

5 Q. Was he a Realtor, or was he somebody that
6 worked in your office?

7 A. He was -- he was someone that worked in my
8 office that ultimately evolved into a salesperson
9 position.

10 Q. Okay.

11 And so he sent an e-mail: "Hi, Todd. We
12 just need this SRPD form filled out and sent back."

13 And then Dr. Swanson responded: "Attached is
14 the signed SRPD."

15 Do you see that?

16 A. I do.

17 Q. And then Exhibit 7 is the fully executed SRPD
18 with both the seller and the buyers' initials?

19 A. Correct.

20 Q. Okay.

21 So it appears that Dr. Swanson signed this on
22 October 24, 2017.

23 Do you see that?

24 A. Yes.

25 Q. Okay.

1 And then would Dr. Swanson have an obligation
2 to amend or to supplement this SRPD for the type of
3 water loss that occurred here the day before closing on
4 or about November 16, 2017?

5 MR. GALLIHER: Objection. Calls for a legal
6 conclusion.

7 MR. WELSH: Join.

8 THE WITNESS: What he said.

9 BY MR. GRAF:

10 Q. So he's going to object as we go through this
11 process, but unless he tells you --

12 MR. WELSH: You can still answer.

13 BY MR. GRAF:

14 Q. Yeah. Unless he tells you not to answer, you
15 still answer.

16 A. Okay.

17 Q. So -- and I get what you're saying. You're
18 saying --

19 A. Right. And -- and could you ask the question
20 one more time?

21 So just to be clear, when -- when it's -- an
22 objection happens by you, I still answer?

23 MR. WELSH: Right, unless I instruct you
24 otherwise.

25 THE WITNESS: Okay. Got it.

1 BY MR. GRAF:

2 Q. Unless he tells you "Don't answer."

3 A. Right. Okay.

4 So would you please repeat the question.

5 MR. GRAF: She's going to read it to you.

6 (Record read.)

7 THE WITNESS: And -- thank you.

8 And I believe that was the intent of

9 Addendum 4-A.

10 BY MR. GRAF:

11 Q. So is your response yes, he would have an
12 obligation to inform the buyers?

13 A. I'm -- I'm not an attorney. I wouldn't
14 respond that way. But I'll say this was our intention,
15 was to give notice to the buyers as soon as we had the
16 notice and give them the right to respond.

17 Q. Okay. All right.

18 And, again, this SRPD -- this is the SRPD, as
19 far as you're aware, that Dr. Swanson filled out on or
20 about October 24, 2017?

21 A. Correct.

22 Q. And, again, your office did not assist him in
23 how they filled out this document -- or how he filled
24 out this document?

25 A. Correct.

1 Q. All right.

2 MR. GRAF: We will mark this as next.

3 (Exhibit 8 marked.)

4 THE WITNESS: Thank you.

5 BY MR. GRAF:

6 Q. Okay.

7 Now, you've been handed what's been marked as
8 Exhibit 8 for purposes of this deposition. It purports
9 to be an e-mail string on or about November 7th -- I
10 mean -- excuse me -- 2, 2017, between Austin Sherwood
11 and Dr. Swanson.

12 I think you said it previously, but I'll ask
13 a follow-up.

14 In November of 2017, what was Mr. Sherwood's
15 title?

16 A. He was the transaction coordinator.

17 Q. Okay.

18 So would his duties include the photographing
19 of the personal property, as in this e-mail?

20 A. No.

21 Q. So who would have done that?

22 A. It could have been anybody. That was more of
23 a task-oriented situation. It could have been Kelly;
24 it could have been me; it could have been an
25 assistant's.

1 Q. And so I'm not trying to trick you or
2 anything else here.

3 A. I just don't know.

4 Q. So here it says in quotes at the bottom
5 of -- and you'll see there's Bates stamped pages on
6 this one --

7 A. Correct.

8 Q. -- Swanson 401.

9 A. Correct.

10 Q. And you'll see in quotes it says, "Hello.
11 Please find the attached electronic appliance addendum
12 attached with photos. I wanted to outline the
13 appliances, since I noticed not all were listed on the
14 MLS."

15 So -- and then if you look at "Subject," it
16 says "FW picks."

17 Do you see that on the bottom e-mail and on
18 the top e-mail?

19 A. Oh, right.

20 Q. So it appears that buyers' agent did these
21 pictures of the various appliances to make sure that
22 they were being -- they were part of the sale.

23 Is that a fair statement?

24 A. That looks accurate.

25 Q. Okay.

1 What, if anything, did anybody else in your
2 office do in response to this, other than prepare the
3 addendum?

4 A. I -- I don't recall. I mean, it would be in
5 the paperwork that follows.

6 Q. And this appears, at least, to confirm that
7 buyer's agent prepared the addendum, the
8 electronic/appliance addendum?

9 A. (Witness nods.)

10 MR. GRAF: We will mark this as next. Is
11 that 9?

12 MADAM REPORTER: Yes.

13 (Exhibit 9 marked.)

14 THE WITNESS: Thank you.

15 BY MR. GRAF:

16 Q. You've been handed what's been marked as
17 Exhibit 9 for purposes of your deposition here today.
18 It is an e-mail string that is Bates Stamped 37- --
19 SWANSON370 to SWANSON372, Pages 1, 2, and 3.

20 Take a second to take a look at those, and
21 I'll you some questions.

22 A. (Witness complies.)

23 Okay.

24 Q. So having refinanced my house just recently,
25 I noticed the e-mail -- the original e-mail from you to

1 the attention of Lyons Development. This is a signing
2 or a prompting e-mail to execute documents.

3 Do you see that on Page 3, or SWANSON372?

4 A. So this looks like, you're saying -- to me, I
5 read this as a DocuSign.

6 Is that what you're --

7 Q. Yeah, an Authentisign --

8 A. Yeah.

9 Q. -- or whatever they call it?

10 A. Yeah.

11 Q. Okay.

12 And you were asking Dr. Swanson to sign
13 various documents related to the transaction?

14 A. Correct.

15 Q. Okay.

16 And then it appears that this is the addendum
17 final.

18 So that one that we talked about in terms of
19 extending the closing until November 17, 2017, this was
20 the e-mail transmitting that?

21 A. Okay.

22 Q. Does that appear to be an accurate statement?

23 A. It does.

24 Q. Okay.

25 MR. GRAF: Here you go, Jeff. Sorry.

1 MR. GALLIHER: Oh.

2 (Exhibit 10 marked.)

3 BY MR. GRAF:

4 Q. Mr. Sher, you've been given what's been
5 marked as Exhibit 10 for purposes of this deposition.
6 It purports to be an e-mail chain with some
7 attached -- I believe attached photographs, inspection
8 pictures, and it's Bates Stamped SWANSON248 to 251.

9 Do you see that?

10 A. 248 -- sorry. Say that last part again.

11 Q. -- to 251.

12 A. Where are we looking for those numbers? I'm
13 sorry.

14 Q. The Bates stamp at the bottom.

15 A. Oh, I see. Yes. Yes, that's accurate.

16 Q. Okay.

17 So what is -- and you recognize your name
18 being as one of the people copied with the e-mail?

19 A. Correct.

20 Q. Okay.

21 And, again, the first e-mail is dated
22 November 8, 2017, at 12:04 p.m., and it's from Austin,
23 in your office, to Nicky Whitfield and that -- it even
24 says, Assistant at TS -- or, excuse me,
25 tswansonmd.com, and then Dr. Swanson.

1 Do you have an understanding as to what this
2 e-mail was about?

3 A. It looks to be that Todd needed some
4 clarification, as I don't believe he was living at the
5 home at the time. So we were corresponding via e-mail.
6 It looks to be that he wanted to understand where the
7 damage really was or where the concerns were for the
8 buyers.

9 Q. Okay.

10 A. And we attempted to send them -- send him
11 photos representing those, and this is Todd's response
12 to that.

13 Q. Do you know if these two issues were resolved
14 prior to the close of escrow?

15 A. I don't recall. I'd have to look at the
16 paperwork. It was either resolved or resolved with a
17 monetary amount, but I don't remember.

18 Q. I think that there was a report that was
19 prepared by Nova engineers?

20 A. Uh-huh.

21 Q. Does that help to refresh your recollection
22 as to what may have happened?

23 A. Whenever we sell a home, we have a home
24 inspection. Nova most likely did the inspection.

25 These are probably the -- again, just going

1 based upon the -- putting the fragments together, these
2 were probably some of the remaining items of concern
3 for the buyer and that the seller was wanting questions
4 about or wanting clarification on, and I don't
5 recall -- I'm sure we'll figure it out if we keep
6 going, what -- what happened.

7 Q. Okay.

8 MR. GRAF: So let's go ahead and mark this as
9 next.

10 (Exhibit 11 marked.)

11 THE WITNESS: Thank you.

12 BY MR. GRAF:

13 Q. You've been handed what's been marked as
14 Exhibit 11 for purposes of this deposition. It is, or
15 purports to be, an e-mail exchange or chain from
16 SWANSON302 to SWANSON304, with those same photographs
17 attached.

18 Do you remember or recognize this e-mail
19 chain?

20 A. Okay.

21 Q. So this appears to be an addition or an
22 add-on to the previous exhibit that we just looked at,
23 Exhibit 10, and then -- so Exhibit 10 left off at the
24 November 8, 2017, e-mail at 1:17 p.m. from Dr. Swanson.

25 And then in e-mail, Exhibit -- or this e-mail

1 chain, Exhibit 11, it appears that he's asking
2 about -- or they're discussing, I guess, the leaseback
3 agreement and then the other two addendums that we
4 talked about previously. They're all dated
5 November 8th.

6 A. (Witness nods.)

7 Q. I want to ask you a question about that
8 second sentence in the November 8, 2017, at 5:16 p.m.
9 e-mail from Dr. Swanson to Austin Sherwood, but I want
10 to ask you some questions about these e-mails first.

11 Would you read all of these e-mails if you
12 got copied on them?

13 A. It's a tough question. It depends if there's
14 reason to read them. If something jumped out, then
15 yes. If it's just a correspondence going back and
16 forth about the mechanics of a move out or a move in or
17 something along those lines.

18 Based upon this e-mail, are you asking me if
19 I read it? Reading it now, I -- I -- I must have read
20 it, so I guess the answer is yes.

21 Q. And when you say you must have read it, why
22 do you say that?

23 A. Because it seems to have pertinent
24 information in it. Or if I didn't read it, it would
25 have been brought to my attention.

1 Q. And that's kind of where I'm going, you know.

2 Would Mr. Sherwood act on his own volition
3 regarding the topics being discussed in these e-mails,
4 or would he seek your advice and/or instruction?

5 A. He's very proactive. He very well may have
6 acted on his own accord, but I would have been brought
7 in. He would have talked to me about this.

8 Q. In particular, that second sentence in that
9 top e-mail on SWANSON302, where it says, "Please do not
10 share with buyer until we have a signed leaseback
11 agreement from them."

12 Do you see that?

13 A. I do.

14 Q. So the two signed addendums, the one is
15 increasing the closing date to November 17th; right?

16 A. Correct.

17 Q. And the other is the appliance or listing all
18 of the --

19 A. Personal --

20 Q. -- personal electronics and everything.

21 So do you have an understanding as to why
22 Dr. Swanson said, "Please do not share with buyer until
23 we have a signed leaseback agreement"?

24 MR. GALLIHER: Calls for speculation.

25 THE WITNESS: Just winging it and -- and

1 trying to be in the moment at the same time of what
2 happened.

3 BY MR. GRAF:

4 Q. So in that next paragraph, it says, "When are
5 they planning on closing? The signing agent wanted to
6 sign today because she said they may be closing on
7 Monday, question mark, question mark. FYI, I have a
8 hot water heater pipe sprang a leak yesterday resulting
9 in water in the master closet."

10 And this appears to be the first reference to
11 the leak.

12 A. Right.

13 Q. Is that a fair statement?

14 A. Yes.

15 Q. Does this document help to refresh your
16 recollection as to when you were first notified of the
17 water leak?

18 A. It must have been here.

19 Q. Okay.

20 A. But I would like to go back to the "please do
21 not share with the buyers" section.

22 Q. Yep.

23 A. I -- I believe that that -- that was to -- we
24 were negotiating multiple things at the same time.
25 Whether it was the leaseback and the furniture and all

1 the other items, it doesn't make sense to present one
2 item or one negotiation without understanding the
3 components of the other negotiations; so --

4 Q. So explain that to me a little bit further.

5 I get if what you're saying is this: He
6 doesn't want to give them the extension on the close of
7 escrow until he gets his agreement on the leaseback.
8 Makes sense. He doesn't want to say, Hey, this is what
9 I'm going to pay for the leaseback until you -- until
10 we come to some agreement on the extension.

11 Is that what you're saying?

12 A. Something along those lines, and I'm trying
13 to piece it together. That's what it feels like to me.

14 It's -- I'm in a transaction right now where
15 a very similar thing has happened and the seller said
16 to me, "Ivan, before you talk to" -- "before we
17 acquiesce at all upon any due diligence items and
18 repairs, I want to see what the appraisal comes in at.
19 Because if the appraisal comes in low, then we've got
20 another negotiation. We may as well have them all
21 together."

22 Q. Okay.

23 The next line reads, "Rakeman Plumbing, who
24 did the original plumbing, came right out and fixed it,
25 and they have a water remediation coming, drying

1 everything out."

2 Did you or anybody in your office do anything
3 else regarding the leak?

4 A. I imagine that warranted a full conversation
5 with Todd and myself.

6 Q. So that begs the question: Did you have a
7 conversation?

8 A. And I -- I mean, I would have to say yes. I
9 just don't recall what it would have been or the
10 exact -- the exact content of that conversation.

11 Q. So we have -- but as you sit here today,
12 without having your recollection refreshed, you don't
13 remember having that conversation?

14 A. I can almost promise you I had a
15 conversation. I just don't recall how it went, where
16 it went, how long it went. I don't know what the
17 result was.

18 Q. Okay.

19 One of the things that I wanted to ask you
20 about was, though -- this e-mail is dated November 8,
21 2017.

22 Addendum 4-A, in Exhibit 5, was
23 signed -- DocuSigned by Todd Swanson on November 15,
24 2017. Is there any way that we can find out when this
25 document was prepared?

1 A. 4-A?

2 Q. Yes.

3 A. Can we go into Authentisign or something
4 or -- and see when it was -- meaning when we presented
5 it to him?

6 Q. Yep.

7 A. I can certainly -- I can certainly check and
8 see. We are somewhat compromised because we've changed
9 databases, and there were some casualties, but so far
10 we've been able to pull up what we need. But I -- I
11 can check and see if we have the access to that. Some
12 of our archived e-mails disappeared.

13 Q. And I just want to make sure.

14 So this e-mail from Dr. Swanson, where he
15 says "please do not share with buyer until we have a
16 signed leaseback agreement with them," he's not
17 referencing the information as the leak there, is he?

18 A. I don't believe so. And the reason I don't
19 believe so is because this was not at the bottom of the
20 paragraph; it was at the top.

21 Q. You'd agree with me, though, that that e-mail
22 doesn't say "please inform the buyer of the water
23 leak," does it?

24 MR. GALLIHER: Objection. Document speaks
25 for itself.

1 THE WITNESS: I -- I think I -- yeah. I
2 think that's -- correct.

3 BY MR. GRAF:

4 Q. Okay.

5 MR. GRAF: Let's go ahead and mark this as
6 next.

7 (Exhibit 12 marked.)

8 THE WITNESS: Thank you.

9 BY MR. GRAF:

10 Q. So you've been -- my bad.

11 So you've been handed what we've marked as
12 Exhibit 12 for purposes of this deposition. It is,
13 again, an extended e-mail chain that includes some of,
14 if not all of, those previous e-mails we went over in
15 Exhibits 10 and 11. This document is Bates Stamped
16 SWANSON363 through SWANSON369.

17 So if you look at the bottom of Page 2, it
18 has that e-mail that we just talked about that was
19 dated November 8, 2017, at 5:16 p.m., from Dr. Swanson
20 to Austin.

21 And then there's a series of e-mails that
22 follow-up. None of these follow-up e-mails between or
23 amongst Austin and Dr. Swanson or Nicky Whitfield, they
24 don't discuss that leak again, do they?

25 A. No, they don't, not that I've seen.

1 Q. Is there -- and you were copied on some of
2 these e-mails. Did you ever send, like, a separate
3 e-mail that said, "Hey, what's going on with the leak?"

4 A. It would be a call.

5 Q. Okay.

6 And when you say "it would be a call," it
7 would be a call to who?

8 A. To Todd.

9 Q. Okay.

10 MR. GRAF: Let's mark this as next.

11 (Exhibit 13 marked.)

12 BY MR. GRAF:

13 Q. You've been handed what's been marked as
14 Exhibit 13 for purposes of this deposition.

15 Do you recognize that document, Mr. Sher?

16 A. So this was just sent to Austin.

17 Q. What -- look at -- look at all of it.

18 Because on SWANSON235, it's transmitting an e-mail, or
19 appears to be transmitting an e-mail, from Austin to
20 Nicky and Dr. Swanson that says, "Please read e-mail
21 below from buyer's agent and advise."

22 And then it says, "Ivan and Austin, we sign
23 at 9:00 today."

24 So that's why I -- I'm asking you about this.

25 A. I see.

1 Please see the -- so I'm confused. This is
2 coming from who to Austin?

3 Q. So the way I read this is Austin is sending
4 an e-mail to Nicky and Dr. Swanson on November 16th at
5 8:28 a.m., and then he's saying, "Hey, guys, see this
6 e-mail."

7 A. I see.

8 Q. And then that e-mail says, in quotes, "Ivan
9 and Austin."

10 So I'm assuming that's from Ashley --

11 A. Correct.

12 Q. -- to you guys.

13 A. Correct. I get that now. I understand.

14 Q. Okay.

15 And it says, "We sign at 9:00 today," which
16 would have been about 32 minutes later. "We need to
17 please gain access to the house around 12:00 to 1:00.
18 We're trying to get the pool company."

19 And then there's some other chatter about
20 just different things. You'd agree with me, though,
21 that that e-mail doesn't discuss any leak, the e-mail
22 that's purportedly from Ashley?

23 A. Correct. Correct.

24 Q. And then, if you look at -- on 234, the
25 e-mail from Nicky to Austin and Dr. Swanson, there is a

1 reference as to the closet.

2 Do you see that?

3 A. "All testing is scheduled tomorrow."

4 Yes, I do see that.

5 Q. You'd agree with me there that that e-mail
6 doesn't say, Hey, we should probably tell the buyers
7 about the leak and the fact that the house is being
8 tested for mold, does it?

9 A. It does not.

10 Q. And that e-mail certainly doesn't say, Hey,
11 have the buyers said anything about the recent water
12 leak or that they want to close or don't want to close?

13 A. Correct.

14 Q. Okay.

15 Did you have an understanding as to when the
16 Folinos were told about the leak?

17 MR. WELSH: This is Darren Welsh. I don't
18 know -- on the documents that we provided you as part
19 of this e-mail, I understand that --

20 MR. GRAF: Those are not -- that is not a
21 document you provided me.

22 MR. WELSH: Oh, okay.

23 MR. GRAF: That is a document that was
24 provided -- that was produced by Dr. Swanson in the
25 case.

1 MR. WELSH: Oh, okay.

2 Because in our chain of e-mails, there's an
3 earlier one from Austin to Ashley with the addendum at
4 8:31 in the morning. And then after that, it goes on,
5 8:29 until -- I believe we get to "Good morning,
6 Austin."

7 See what I'm looking at here? She -- he --
8 she has the 4-A addendum at -- and this is -- this
9 starts off at November -- 8:30 in the morning.

10 MR. GRAF: What day?

11 MR. WELSH: November 16.

12 MR. GRAF: Yeah. That's around the same time
13 as this because it's at 8:28 in the morning on
14 November 16th.

15 MR. WELSH: Is this the same?

16 MR. GRAF: We're going to go over that,
17 though --

18 MR. WELSH: Oh, you have that one. Okay.

19 MR. GRAF: -- what you produced to us. So --

20 MR. WELSH: Okay.

21 MR. GRAF: -- I'm going to go over that with
22 you.

23 MR. WELSH: I got lost.

24 MR. GRAF: I'm trying to feather these
25 together as best I can.

1 So what was my pending question?

2 (Record read.)

3 THE WITNESS: I think that's what Darren just
4 presented. That's -- to my knowledge, that is the
5 formal notification.

6 BY MR. GRAF:

7 Q. But that was an e-mail -- he showed you an
8 e-mail that was sent to Ashley; right, on
9 November 16th, at approximately 8:30 in the morning?

10 A. Right. With the -- with the addendum
11 attached.

12 Q. Addendum 4-A?

13 A. 4-A, correct.

14 Q. Okay. But --

15 A. Was there any other discussion with Ashley?
16 Not that I'm aware of.

17 Is that what your question is?

18 Q. Somewhat, yes. But I also want to know any
19 other communications that you had with Dr. Swanson as
20 to the leak. And let me backtrack just a second here.

21 Were you present at the closing?

22 A. I don't recall. It's -- it wasn't a -- I
23 don't even remember if it was a local closing or if he
24 signed it -- if he signed out of state.

25 Q. So I think on the other addendum and

1 everything else, Dr. Swanson was in Denver --

2 A. Right.

3 Q. -- and he was signing there.

4 A. Right.

5 Q. I'm talking about: Were you present when the
6 Folinos closed?

7 A. I wouldn't be. The buyers' agent's present
8 with their -- with their client, never the seller. I
9 mean -- I'm sorry, never the seller's agent.

10 Q. Okay.

11 A. You -- and I'm going to ask you this
12 question, and maybe you can help me.

13 Q. Okay.

14 A. In my texts with Ashley, there were a couple,
15 I'll call them, "Oh, crap" moments in her responses to
16 my texts.

17 Were those -- I don't know how those feather
18 in or -- as you said, how they tie in on a timeline.

19 Q. So I have some -- let's see.

20 Because I think I was up to this -- let's see
21 if these were before the 17th.

22 A. This was on the 16th.

23 Q. It is. So you've raised a good time, and
24 we'll talk about this one now.

25 A. Okay.

1 MR. GRAF: Here you go. This is a document
2 that you guys produced.

3 (Exhibit 14 marked.)

4 THE WITNESS: Thank you.

5 BY MR. GRAF:

6 Q. And what is this, 14?

7 A. Yeah.

8 Q. So you've been handed what's been marked as
9 Exhibit 14 for purposes of this deposition. It
10 purports to be -- actually, this is two different
11 e-mails.

12 A. Right.

13 Q. So let's look at -- let's just look at these
14 first -- the first two pages, which is an e-mail, I
15 think, from Ashley to you, and then set aside the other
16 two pages for now --

17 A. Okay.

18 Q. -- December 16th e-mail between Ashley and
19 yourself.

20 A. Okay.

21 Q. All right?

22 MR. GRAF: Did you guys get that?

23 MR. GALLIHER: Sorry?

24 MR. GRAF: 14 is just going to be the
25 November 16th e-mail.

1 MR. GALLIHER: So not this one?

2 MR. GRAF: Yeah, not the last two pages.

3 MR. GALLIHER: Okay.

4 BY MR. GRAF:

5 Q. Okay.

6 So do you recognize this document, Mr. Sher?

7 A. Only from just recently reviewing it, but
8 yes.

9 Q. Okay.

10 Do you recall receiving this document?

11 A. I'm sure -- obviously, I did, but I don't, to
12 be honest with you.

13 Q. Okay.

14 Does -- so it says, "Ivan, well, I was
15 enjoying my time at the bar until I received your V --
16 voicemail" --

17 A. Correct.

18 Q. -- "VO."

19 A. Correct.

20 Q. So does this document help to refresh your
21 recollection as to whether or not you spoke with Ashley
22 Oakes --

23 A. Yes.

24 Q. -- on or about November 16th?

25 A. Yes.

1 Q. Okay. So let's talk about this.

2 It says, "Okay. There's some -- basically,
3 some issues for the closing tomorrow. We need to
4 resolve them. One of the issues is, it says, mold
5 remediation holdback amount, question mark."

6 Do you see that?

7 A. I do.

8 Q. And was there ever any agreement as to that?

9 A. Addendum 4-A and getting -- from what I
10 recall, the -- the Rakeman statement that they would
11 take care of the -- they would take care of the leak
12 was what sat- -- ultimately satisfied the buyer.

13 Q. Okay.

14 There was no holdback amount in the addendum
15 4-A; correct?

16 A. Correct. There didn't need to be.

17 Q. All right.

18 MR. GRAF: So let's go ahead and mark this as
19 next. And keep that e-mail out in front of you.

20 (Exhibit 15 marked.)

21 MR. GRAF: So this is 15?

22 MADAM REPORTER: This is 15.

23 THE WITNESS: Thank you.

24 BY MR. GRAF:

25 Q. So it says "or" in that e-mail, and then the

1 third bullet point is, "Seller to obtain the
2 certification from plumbing company for pressure test,
3 and that plumbing company will warranty and replace all
4 of the damage from leak."

5 It says, "Listing agent to" -- the next line
6 item or bullet point says, "Listing agent to coordinate
7 repairs from the -- from plumber post closing directly
8 or work with buyer's agent, John or Ashley, to
9 coordinate repairs. Buyer does not want to be
10 involved."

11 Do you see that?

12 A. I do.

13 Q. So -- and then, again, it's got -- the last
14 bullet point says, "mold remediation holdback amount."

15 Do you see that?

16 A. I do.

17 Q. So what, if anything, did you do in response
18 to receiving that e-mail?

19 A. Well, I believe that the -- the gist of it
20 was a conversation that I probably had with Todd, and
21 that conversation was that the sellers -- the buyers
22 want some reassurance that we're going to be -- that
23 we're going to assist in getting this handled if
24 there's -- if the problem remains or if -- if -- to
25 assist that this problem is handled properly.

1 And I don't recall 100 percent, but I believe
2 I asked Ashley if -- something directly from the
3 plumber stating that they would satisfy the problem and
4 the expense relating to the problem, if that would be
5 sufficient. And then this letter was, I'm assuming,
6 sent to her, and then we closed.

7 Q. You're referring to Exhibit 15, the Rakeman
8 Plumbing November 16, 2017, letter to Dr. Swanson when
9 you say "this letter"?

10 A. Correct.

11 Q. Did you ever have any conversations with
12 Rakeman Plumbing about preparing that letter?

13 A. No.

14 Q. Do you --

15 A. Hold on. Let me think.

16 If I did have conversation, the only
17 conversation would have been either with Todd or with
18 Rakeman directly telling them what we needed for it to
19 close and what they should be willing to do, meaning
20 no one at Rakeman is going to randomly present a letter
21 stating they're prepared to guarantee unless they have
22 advice or information knowing that -- that we need that
23 information. So somewhere along the line, that was
24 communicated somewhere.

25 Q. As you sit here today, do you recall having

1 that conversation with either Aaron Hawley or anybody
2 at Rakeman Plumbing?

3 A. No.

4 Q. Do you know Aaron Hawley?

5 A. No.

6 Q. Okay.

7 He's the individual that owns Rakeman
8 Plumbing.

9 A. Oh, no.

10 Q. So this is an e-mail on the 16th at about
11 9:00p.m.

12 Do you know if you had any more conversations
13 with Ashley after that?

14 A. I don't recall. Most likely, in this kind of
15 a situation, where we're all kind of trying work
16 together to resolve an issue, there's communication in
17 the last hour, back and forth, just getting it done
18 kind of conversations.

19 Q. Okay. Let's look at --

20 MR. GRAF: We will mark that as next.

21 (Exhibit 16 marked.)

22 MR. GALLIHER: Rusty, are you going to mark
23 this other -- this Saturday, December 16th e-mail that
24 originally was going to be part of 14?

25 MR. GRAF: Not yet. I'm trying to do these

1 in chronological order, but I think eventually we will.

2 BY MR. GRAF:

3 Q. Mr. Sher, you've been handed what's been
4 marked as Exhibit 16 for purposes of this deposition.
5 It purports to be -- or what does it purport to be?

6 A. It looks like it's a correspondence between
7 myself and Todd.

8 Q. So these -- these were documents that were
9 produced by your office; so is this text messages?

10 A. Yes.

11 Q. Did you screenshot it?

12 A. Correct.

13 Q. Okay.

14 And is this on your phone?

15 A. I -- I actually don't know. I don't know who
16 these came -- it must be because it's between Todd and
17 myself; so it would have to be my phone.

18 Q. Was it -- and that -- and that's part of the
19 questions that I had for you.

20 Was anybody else in this chain or group chat?

21 A. It looks like just one person --

22 Q. Okay.

23 A. -- at the top. Usually, it would show
24 additional icons or pictures if there's more than one
25 person.

1 Q. Okay.

2 So in terms of this text string or whatever
3 you want to call it, is this it that's on your phone?

4 A. I mean, yes. This is -- this is all we got.

5 Q. You didn't have any other texts between
6 yourself and Dr. Swanson at any or time during --

7 A. So I -- I switch through multiple phones.
8 It's a sickness. So I have multiple phones that I
9 don't have anymore. The iPhone is only the one that
10 keeps the chain. So when you go from phone to phone to
11 phone, it keeps the -- you know, from the next phone.
12 But several of my phones were Android. It's possible
13 there's correspondence before the end of the same phone
14 number.

15 Q. Okay.

16 A. But this is what we pulled directly from my
17 iPhone.

18 Q. Okay.

19 And the -- the first text message on
20 November 17th at 10:00 a.m., do you know if that is --

21 A. It's me to him.

22 Q. It says, "Hi, Todd. Please call me when you
23 can. We have to resolve some items now so that the
24 buyers can fund and record by the end of the day.
25 Their wire needs to go out by noon if this is going to

1 happen."

2 Do you see that?

3 A. Correct.

4 Q. And this stands to reason, this is
5 November 17th, the date that we're supposed to close,
6 and it's about 10:00 o'clock in the morning.

7 So then the next part of the string is, "I
8 dropped the call. Can Austin call me back? I'll call
9 soon, Todd."

10 Do you see that?

11 A. Yes.

12 Q. Do you know what that was about?

13 A. It's most likely in relation to getting the
14 buyers what they needed to be satisfied to close.

15 Q. Okay.

16 So then on the 22nd, which you would agree
17 was after the time to close; right?

18 A. Correct.

19 Q. I think it starts at the bottom.

20 A. Correct, yes.

21 Q. And then it goes over to the next page -- or
22 the full text is on the next page. It says, "Hi, Ivan.
23 I told Kelly, but apparently she doesn't think it's her
24 responsibility to pass this information on to the
25 buyer."

1 What information are you referring to there?

2 A. I'm not. Todd is.

3 Q. Do you know what he's referring to there?

4 A. No, not until we go a little bit further
5 down, it looks like. The mold test came back positive.

6 Q. Okay.

7 "And they've highly recommended from the day
8 they took the test that no construction goes on in the
9 house because it will" --

10 A. Oh.

11 Q. -- "disseminate mold throughout the house.
12 It makes no difference to me because all my stuff is
13 packed up, but somebody probably needs to tell the
14 buyer."

15 A. Yes. Okay. So -- so I will retract that. I
16 think what the information that -- that he was talking
17 to Kelly about was the buyers wanted to come in and do
18 some work while Todd was living there, or while Todd
19 still had an occupancy --

20 Q. Uh-huh.

21 A. -- and Todd was against it. I guess he's
22 saying that, Well, I told Kelly that -- that we can't
23 have construction. He was against anything happening
24 while he occupied the property.

25 And then he's saying here "the mold test came

1 back positive, and they have highly recommended
2 from -- from the day they took the test that no
3 construction goes on because it can disseminate the
4 mold."

5 Q. Okay.

6 So the mold test came back on November 24th.
7 That's the date of the mold test or the report from a
8 company called Infinity Environmental Services.

9 Do you know how Dr. Swanson had this
10 information on November 22nd?

11 A. I don't.

12 Q. So then if you go to another -- the next
13 page, it says, "Good morning, Todd. Please call me
14 when you get a moment. We're having trouble -- and
15 we're having trouble with the plumber in your old
16 house."

17 And then he corrected it to Todd, two Ds.
18 What was the problem?

19 A. I don't recall.

20 Most of my communication is over the phone.
21 It just is easier to have a conversation with someone
22 than sitting here and trying to text back and forth to
23 send an e-mail outlining the deal points. I'm seeing
24 that in my texts.

25 Q. Okay.

1 So then on December 14th, at 10:40 a.m.,
2 you're saying -- or he's saying, "Hi. Hey, Ivan, give
3 me a call. I just got some news from the plumber that
4 is good/bad. They are going to replumb the entire
5 house."

6 Do you see that?

7 A. I do.

8 Q. So what, if anything, did you do in response
9 to that?

10 A. Probably wept a little, shed a tear.
11 Honestly, I -- I was probably in shock, you know, that
12 all of a sudden we could -- it's not just a little
13 leak. This is something more -- more -- more involved.

14 So, obviously, I tried calling, and he says,
15 "Ivan, I was in a dental appointment."

16 Q. Do you recall talking to Dr. Swanson about
17 the replumbing?

18 A. My only conversations with -- with him
19 afterwards that I recall were him saying, you know,
20 that -- that -- I believe him saying that
21 they're -- they're trying to work with the buyer,
22 trying to get the -- trying to -- I don't know if the
23 insurance company paid for it or what ended up
24 happening but that they were displaced.

25 So I was kind of updated, but there was no

1 real conversation. There was a comment later on down
2 the road where he asked for my opinion on would this
3 adversely affect the value of the home when it comes
4 time for them to resell. And I sent an e-mail
5 outlining my thoughts on that, and I think that was
6 about it. And that it was going to -- and that,
7 ultimately, with -- ultimately, that it was going to go
8 to -- to litigation.

9 Q. Okay.

10 MR. GRAF: Mark that as next.

11 (Exhibit 17 marked.)

12 THE WITNESS: Thank you.

13 MR. GRAF: 17?

14 MADAM REPORTER: Yes.

15 BY MR. GRAF:

16 Q. You've been handed what's been marked as
17 Exhibit 17. This purports to be an e-mail from
18 Dr. Swanson to you on November 17th at about 9:13 a.m.,
19 so a little bit before these others, and this is the
20 e-mail transmitting the Rakeman letter that we've gone
21 over --

22 A. Yeah.

23 Q. -- dated November 16, 2017 --

24 A. Yeah.

25 Q. -- correct?

1 A. Correct.

2 Q. Okay.

3 And this appears to be an accurate statement
4 that Rakeman was going to come in, they were going to
5 make the repairs, and then they were going to test --
6 do a pressure test, a visual inspection, and do mold
7 testing?

8 A. Correct.

9 Q. Is that your understanding?

10 A. Correct.

11 Q. You or anybody in your office, did they make
12 sure that that scope of work got done?

13 A. No. That wouldn't be -- that really wouldn't
14 be our job.

15 Q. Okay.

16 A. I mean, we would probably have to let them
17 in; so there's that.

18 Q. All right.

19 MR. GRAF: Let's go ahead and mark this as
20 next.

21 (Exhibit 18 marked.)

22 THE WITNESS: Thank you.

23 BY MR. GRAF:

24 Q. So I've handed you what's been marked as
25 Exhibit 17 --

1 A. Eighteen.

2 Q. -- 18 for purposes of this deposition. And
3 at the top of the first page is an e-mail from Austin
4 Sherwood to Dr. Swanson and your -- copied upon
5 yourself, dated June 15, 2018.

6 Do you see that?

7 A. I do.

8 Q. It says, "Hello, Todd. I apologize, as I did
9 not see the previous e-mail. This addendum was sent to
10 the buyer's agent to serve as a disclosure of our
11 knowledge of the leak that occurred; however, they did
12 not send us a signed copy back of the addendum."

13 So my question about that: So if you look at
14 the -- what is this -- the --

15 A. 4-A?

16 Q. No, no.

17 -- fourth page of this document, and it's in
18 the e-mail string. There appears to have been an
19 e-mail that was sent at 8:27 p.m. on June 15th from
20 Dr. Swanson to Austin, asking him if he'd seen an
21 e-mail three or four days earlier, and then there's a
22 prior e-mail that's asking -- Dr. Swanson is asking for
23 a copy of the signed Addendum 4-A.

24 So these -- these are the e-mails back and
25 forth about Addendum 4-A being sent to Ashley Oakes on

1 or about November 16th.

2 You'd agree with me, though, that none of
3 these e-mails or attachments contain a signed copy of
4 Addendum 4-A from the buyers?

5 A. Are you asking me if the buyers signed the
6 copy?

7 Q. Nope. I'm just asking you what's contained
8 in these e-mails.

9 None of these e-mails discuss, describe, or
10 attach Addendum 4-A that is signed by the buyers, the
11 Folinos.

12 A. Just the disclosure by the sellers.

13 Q. Okay. All right.

14 A. That pile's not moving.

15 Q. It's going down.

16 A. Huh-uh.

17 Q. Yeah. We're only -- it'll fly by.

18 MR. GRAF: That's next.

19 (Exhibit 19 marked.)

20 MR. GRAF: That's yours. That's yours.
21 That's mine.

22 THE WITNESS: Thank you.

23 BY MR. GRAF:

24 Q. You've been handed what's been marked as
25 Exhibit 19 for purposes of this deposition. It

1 is -- or purports to be, at the top of the first page,
2 a November 17, 2017, e-mail at 9:36 from Dr. Swanson to
3 yourself.

4 Do you recognize this document?

5 A. Is this the mold remediation, the one you
6 were talking to me about?

7 Q. (Shakes head.)

8 This is on the patio deck evaluation?

9 A. I see. Okay.

10 I don't recall it, but it's timestamped and
11 it's -- I know what it is.

12 Q. Okay.

13 Did you do anything in response to this
14 e-mail? Because at the top it says, "If this is not a
15 structural issue, but possibly a ripping issue
16 according to the report, am I responsible for fixing
17 it?"

18 Did you respond to that?

19 A. I don't recall.

20 Q. As you sit here today, do you believe that
21 Dr. Swanson was responsible for fixing that?

22 MR. WELSH: You calls for legal conclusion.
23 Objection.

24 THE WITNESS: Right.

25 Is this after the closing, by the way? Have

1 we closed already?

2 BY MR. GRAF:

3 Q. It's like contemporaneously with the closing.
4 Because it's -- November 17th is the date that we
5 closed, and then I think at, you know, 12:00 o'clock,
6 1:00 o'clock.

7 A. Am I reading this right in them saying that
8 it's a cosmetic issue only? Is that how -- am I
9 interpreting that right? Is that what you are reading
10 as well?

11 Q. I'm not asking you to interpret the Nova
12 letter.

13 What I'm asking is: Did you respond to
14 Dr. Swanson and say yes or no, you're responsible to
15 fix this issue?

16 A. I don't recall doing that.

17 Q. Okay.

18 Do you recall this ever being an issue later
19 on down the road?

20 A. I don't.

21 Q. Okay. All right.

22 (Exhibit 20 marked.)

23 THE WITNESS: Thank you.

24 MR. GRAF: 20?

25 MADAM REPORTER: Yes.

1 BY MR. GRAF:

2 Q. Mr. Sher, you've been handed what's been
3 marked as Exhibit 20 for purposes of this deposition.
4 It purports to be a November 22nd e-mail from Austin
5 Sherwood, in your office, to Dr. Swanson and his
6 assistant, Nicky Whitfield.

7 First off, was it your understanding that
8 Dr. Swanson was still occupying the residence as of
9 November 22, 2017?

10 A. I don't recall.

11 Q. So if we talk about the Monday morning that
12 Rakeman Plumbing and CPI Restoration were going to be
13 out there, that would have been November 27th?

14 A. Correct. I just don't remember when he
15 actually was in the property versus when he -- when he
16 wasn't. I don't recall those dates.

17 Q. So if you look at Exhibit 5, which is all the
18 addendums -- in particular, if you look at the
19 agreement to occupy after the close of escrow, that
20 appears to at least state that he's going to occupy it
21 through November 28, 2017?

22 A. He had possession, but I don't think -- he
23 wasn't fully occupying it all the time. That's what
24 I'm trying to get at, is that I don't know if he was
25 physically in the house or if he just needed to house

1 his furniture.

2 Q. Okay.

3 But in terms of having -- the purpose of this
4 e-mail is to make sure that he removes his stuff from
5 the master bedroom?

6 A. Correct.

7 Q. Okay.

8 A. Correct.

9 Q. All right.

10 (Exhibit 21 marked.)

11 THE WITNESS: Thank you.

12 BY MR. GRAF:

13 Q. You've been handed what's been marked as
14 Exhibit 21 for purposes of this deposition. On the
15 first page, which is Defendant 69 through Defendant 72,
16 which is the whole document.

17 Do you recognize this e-mail chain?

18 A. I -- I recall it happening, but I'm
19 rediscovering it as I read it.

20 Q. Okay.

21 None of this information or none of the
22 topics discussed in here revolve around or discuss the
23 leak; correct?

24 A. Yeah. So far, I think, yeah.

25 I don't recall exactly, but I think there

1 were some concessions made upon the move out. I don't
2 remember if it was in the form of payment that we
3 made -- or, I mean, that the seller made or something,
4 because the buyers were dissatisfied at move out.

5 I don't recall exactly what happened. I
6 could be mistaken.

7 Q. Okay.

8 MR. GRAF: I think I have one out of order.
9 Sorry.

10 (Exhibit 22 marked.)

11 THE WITNESS: Thanks.

12 BY MR. GRAF:

13 Q. So we've handed you what's been marked as
14 Exhibit 22 for purposes of this deposition. It
15 purports to be some e-mail -- an e-mail string between
16 Nicky Whitfield and Dr. Swanson.

17 Do you recall ever seeing these e-mails?

18 A. I don't.

19 Q. Do you recall ever talking to Dr. Swanson
20 about having a mold expert come out and inspect the
21 house?

22 A. Yes.

23 Q. Dr. Linda Stetzenbach, does that ring any
24 bells?

25 A. No.

1 Q. What do you remember about the conversation
2 with Dr. Swanson about the mold expert?

3 A. I -- I don't remember the specific
4 conversation. It's just always my go-to, that if
5 there's water damage, we get somebody out to identify
6 the problem, prove that there's no mold, and move
7 forward.

8 Q. Okay.

9 If you look back on Exhibit 5, which are the
10 addendums, and, in particular, 4-A, this addendum
11 notification doesn't mention mold, does it?

12 A. Correct.

13 Q. Who prepared this document?

14 A. It looks like it came from us. Hold on. I'm
15 sorry.

16 Q. Well, it says at the bottom, "prepared by
17 Ivan Sher."

18 A. Oh, yes. Then it would be my team.

19 Q. I just want to make sure that we're clear,
20 though, here.

21 It says, "prepared by Ivan Sher."

22 Did you prepare this document?

23 A. No. I don't -- I don't prepare the
24 contracts.

25 Q. Who in your office would have prepared this

1 document?

2 A. It could have been any number of the people
3 we discussed.

4 Q. Okay. All right.

5 A. It doesn't mean they didn't take instruction
6 from me, because most likely I gave them -- you know,
7 I -- I would have outlined. They're not qualified, in
8 my mind, to prepare an addendum in a contract.

9 Q. Okay.

10 MR. GRAF: What time do you have, Jeff?

11 MR. GALLIHER: 5:45, 46-ish.

12 MR. GRAF: Let's go off the record just for a
13 second, and I'll call Kelly and tell her we should be
14 done in about -- how long do you have?

15 MR. GALLIHER: I probably have about two to
16 three minutes.

17 MR. GRAF: Okay. So let's go off the record.

18 VIDEOGRAPHER: Off the video record at 5:46.

19 (Off the record.)

20 (Exhibit 23 marked.)

21 VIDEOGRAPHER: Back on the video record at
22 5:49.

23 BY MR. GRAF:

24 Q. Mr. Sher, you've been handed what's been
25 marked as Exhibit 23 for purposes of this deposition.

1 It purports to be a December 15, 2017, e-mail from
2 Dr. Swanson to yourself.

3 Do you see that?

4 A. I do.

5 Q. Do you recognize this document?

6 A. I don't, but I'm reading it now.

7 Q. Okay.

8 A. I see it.

9 Q. Okay.

10 So this e-mail says, "Ivan, can you call me
11 to discuss a new issue at 42 Meadowhawk?"

12 Do you know what new issue he's talking
13 about?

14 A. I mean, it sounds like the problem was worse
15 than he'd expected.

16 Q. Okay.

17 It says, "It appears that because of the
18 water leaks at the residence, the water line
19 manufacturer is going to replace all the water lines in
20 the entire house. This is good and bad news. I'm glad
21 they're going to hopefully prevent future water leaks
22 in the house, but I talked to Rakeman Plumbing, who
23 will be doing the work, and he said that it will be
24 major job, taking one month with multiple greater than
25 200 drywall holes.

1 Apparently, the buyer had a meltdown when he
2 told her and began talking about a lawsuit for not
3 disclosing the problem to her prior to the disclosing.
4 I think we need to discuss. I don't want another
5 lawsuit, and I'm sure you don't either. Call me at
6 your convenience."

7 Do you see that?

8 A. I do.

9 Q. Did you call Dr. Swanson in response to this
10 e-mail?

11 A. I'm sure I did.

12 Q. Do you recall the content of the
13 conversation?

14 A. I don't at all.

15 Q. You don't recall what he discussed with you?

16 A. Correct.

17 Q. And it says, in that last paragraph, "I don't
18 want another lawsuit, and I'm sure you don't either."

19 Do you know what he was referring to there as
20 to you?

21 A. I'm --

22 MR. WELSH: Speculation.

23 THE WITNESS: Yeah. I've never -- I've not
24 had a lawsuit; so I don't know. I think he's just
25 lumping me in with the problem, I would guess.

1 BY MR. GRAF:

2 Q. Okay.

3 I think we went over this.

4 Do you see that?

5 A. Wow, unbelievable.

6 Q. It's like what I tell my people in the
7 office: You know what? If you have an elephant
8 sitting on your desk, you still just have to eat it one
9 bite at a time.

10 A. One bite at a time.

11 Q. There you go.

12 Let's talk about this.

13 (Exhibit 24 marked.)

14 THE WITNESS: Thank you.

15 MR. GRAF: Twenty --

16 MADAM REPORTER: -- four.

17 THE WITNESS: Yes, this is the letter I was
18 referencing.

19 BY MR. GRAF:

20 Q. Okay.

21 So you've been handed what's been marked
22 Exhibit 24 for purposes of this deposition. It
23 purports to be an e-mail between yourself and
24 Dr. Swanson, dated July 5, 2018. There's no string of
25 e-mails or anything else.

1 Did Dr. Swanson call you and ask you to
2 prepare this type of letter or e-mail or what?

3 A. This -- this call I remember. This
4 call -- which is shocking to me, but this call
5 was -- just because my recollection's never good. But
6 this call was Todd calling me, catching me up on
7 everything. Or maybe I called him because I -- I stay
8 in touch with my clients, and I wanted to hear how
9 things were progressing.

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.

6 Q. What was the source of the water loss in
7 those instances?

8 A. One was a construction defect in several
9 different locations, and the other one was a -- I think
10 it was like a toilet valve that broke and flooded the
11 house.

12 Q. It was a sudden onset --

13 A. Yes.

14 Q. -- of the release of water?

15 A. Correct. That sat -- that sat for a while.

16 Q. And on the construction defect was --

17 A. Roof, balcony, basement that was done
18 incorrectly. Water would pour into the basement when
19 it ran -- rained. It was serious.

20 Q. And those defects were remediated before the
21 sale that you're referencing?

22 A. Correct.

23 Q. Okay.

24 A. And disclosed. I mean, they had a -- they
25 had a hotel -- a commercial remediation company come

1 in, because it was so sophisticated, seven figures in
2 attorney's fees, and they got it handled and -- and
3 finally found the problem, because it took them years
4 to figure out where the source of the problem was, and
5 then they basically -- we built the defective parts of
6 the home, and it sold for a premium.

7 Now, that being said, if I were to sell that
8 house today, it wouldn't get the same -- same price
9 that it did back then, not because of the water damage,
10 but because of the -- it's no longer in style. It's no
11 longer got the look and feel.

12 Q. When was that house sold after the water
13 loss?

14 A. I want to say a couple of years.

15 Q. No, no, no. I mean when, like was it 2018?
16 2016?

17 A. I can get that for you. I don't -- '16.
18 Just a guess, I'd say '16.

19 Q. Okay.

20 Do you think the market today is better or
21 worse than 2016?

22 A. It depends. Ask the guy with the \$18 million
23 home, selling it for \$4, or ask the guy up the street
24 that's got the home designed right and they're selling
25 it for \$6 and they're in it for \$3. So I think it's

1 better. I mean, the market, in general, is better.

2 Q. Market, okay.

3 A. And so I offered to present this letter, is
4 the reason why it came about. I said, "If this will
5 help you, I'm happy to present my opinion on the
6 market."

7 Q. But as we discussed at the beginning of your
8 deposition, you've never provided a VPO?

9 A. And I wouldn't. It's not my job.

10 Q. Okay.

11 So even in this letter, you're not providing
12 a value of the 42 Meadowhawk home; correct?

13 A. I wasn't asked to.

14 Q. And you're not a licensed appraiser?

15 A. Correct.

16 Q. And you haven't given appraisals of
17 houses -- strike that.

18 You haven't given a brokerage price opinion
19 of houses in the past?

20 A. I haven't.

21 Q. Okay.

22 A. It's possible in the last 15 years, maybe
23 when the market turned back to, you know, in the 2008
24 through '12 range, that I may have done one or two
25 or -- I just don't recall.

1 Q. Okay.

2 So at any point in time when any of this was
3 going on up to and including, say, the December e-mails
4 from Dr. Swanson to you about the problems, like
5 Exhibit 23, the December 15th e-mail from Dr. Swanson,
6 did he ever tell you that there were other water losses
7 in the house prior to the one that were being
8 remediated at the time of close of escrow?

9 A. Never.

10 Q. So did Dr. Swanson ever tell you that the
11 recirculating pumps had to previously both be removed
12 and replaced --

13 A. No.

14 Q. -- and that they leaked?

15 A. No.

16 Q. What about the fact that he had a water loss
17 under the sink in the master bathroom in 2015?

18 A. No.

19 Q. Okay.

20 Do you think you should have known that
21 information?

22 A. No.

23 MR. GALLIHER: Objection. Speculation.

24 BY MR. GRAF:

25 Q. Okay. Why not?

1 A. How could I have?

2 Q. No, no, no. I'm saying: Is that information
3 that you would have wanted to have known?

4 A. Oh, had that information been known to me, if
5 that's actually what happened, I would have -- yes, I
6 would have wanted to know.

7 Q. Would you have added that information to
8 Addendum 4-A?

9 A. It -- not to 4-A, no. It would have
10 been -- it would have been to the seller of the
11 property. I would have had a conversation with the
12 seller about -- about that.

13 Q. So if Dr. Swanson would have told you I had
14 these four or five other water losses in the house
15 previously, including February of 2017, just prior to
16 this loss, you would have instructed him that he should
17 change his Seller's Real Property Disclosure form?

18 A. I would have -- listen, it's his house. He's
19 the one that has to present the fact about his home. I
20 would have just gone over what the seller's real
21 property is and maybe the -- the negative results of
22 not filling it out with everything that he knows.

23 Q. If, in fact, he had those water losses
24 previously, should he have marked that he did have
25 previous water moisture in his home?

1 MR. GALLIHER: Speculation. Foundation.
2 Incomplete hypothetical. Calls for legal conclusion.

3 THE WITNESS: Join.

4 BY MR. GRAF:

5 Q. You can still answer. I keep almost calling
6 you "Doctor."

7 A. Yeah.

8 Q. Just FYI.

9 A. Yeah, okay.

10 I think it would have been a smart move if
11 that is -- if that was the case, to put them in
12 the -- in the disclosure statement.

13 Q. Did you ever talk to Kelly Contenta about any
14 prior water losses or anything at this residence?

15 A. No.

16 Q. So this property, it's my understanding, was
17 held in the name of Lyons Development.

18 Did you have that understanding?

19 A. I don't recall.

20 Q. Do you care --

21 A. I don't --

22 Q. -- in terms of your sale or anything like
23 that?

24 A. No, no.

25 Q. Okay.

1 A. It's -- it's common for homes in this price
2 range not to be held in the names of the principals.

3 Q. But you ascertained that Dr. Swanson had the
4 authority to sign on behalf of whoever was the listed
5 owner?

6 A. Correct.

7 Q. Okay.

8 And you had that understanding; correct?

9 A. Correct.

10 Q. That he was the owner or could act on behalf
11 of whatever entity was the owner?

12 A. We would have to have known that at the time
13 or believed that.

14 Q. Somebody on your team would have ascertained
15 that?

16 A. Correct.

17 Q. And I think I already asked this, but let me
18 ask it again because it's in my notes.

19 Did Dr. Swanson ever ask you how to fill
20 anything out on the SRPD?

21 A. No. I don't even remember if he was in town.
22 He may have been out of state. In fact, I think it was
23 DocuSigned.

24 Q. Are you aware of any other litigation that
25 Dr. Swanson was involved in?

1 A. No.

2 Q. So -- and the reason why I ask is in that --

3 A. That letter?

4 Q. -- that one e-mail it says, "I don't want
5 another lawsuit," on Exhibit 23, the December 15th
6 e-mail.

7 Did you ever say: Hey, what other lawsuit
8 were you involved in?

9 A. He may have shared it. I just don't recall.

10 Q. Did he ever talk to you about being involved
11 in a mold lawsuit --

12 A. No.

13 Q. -- in a prior house?

14 A. No.

15 Q. Did he ever talk to you about personal
16 injuries, including infections and that sort of thing,
17 regarding his nasal cavities?

18 A. No.

19 Q. Were you ever made aware that Rakeman
20 Plumbing had made previous repairs at 42 Meadowhawk?

21 A. I think later -- I think later on, there
22 was -- when he had the relationship, I think
23 some- -- somehow that came up later. I don't remember
24 when.

25 Q. Okay.

1 And when you say "later," you're saying after
2 the close?

3 A. Correct.

4 MR. GRAF: That's it.

5 MR. GALLIHER: Okay.

6

7 EXAMINATION

8 BY MR. GALLIHER:

9 Q. Good evening, Mr. Sher.

10 My name, again, is Jeff Galliher, and I
11 represent Dr. Swanson in this litigation. I just have
12 a few follow-ups from Mr. Graf. And, first of all,
13 I'll start with the discussion that the two of you just
14 had.

15 You told us earlier that you would never
16 advise a client with regard to completion of the SRPD.

17 Do you recall that testimony?

18 A. I do.

19 Q. And just now you just said, "Well, I might
20 have had a discussion with -- with Dr. Swanson about
21 the SRPD; so I'm trying to reconcile those two
22 statements." Can you do that for me?

23 A. Sure.

24 I -- I said that -- I guess the question was
25 the fictitious question, like in the event of, had you

1 known about water damage previously, would you have
2 encouraged Dr. Swanson to -- to be authentic in that,
3 and the answer is yes. Although, I -- when I say I'm
4 not involved, I'm not going to physically sign; I'm not
5 going to physically do things for the seller.

6 The only recommendation I make is to be
7 honest and upfront.

8 Q. And Mr. Graf asked you specifically about a
9 couple of leaks in 2015.

10 Do you recall that testimony?

11 A. Right now? Yes.

12 Q. Okay.

13 Now, if those leaks were repaired by a
14 licensed contractor to a like-new condition, would that
15 affect your opinion about whether or not those leaks
16 needed to be disclosed on the SRPD or not?

17 A. It's a good question, and it depends on the
18 leak and -- like if it's a drip under the sink versus
19 having to remove the left part of the house. I'd have
20 to know a little bit more about it.

21 Q. Okay.

22 And -- and isn't it true that you don't
23 really know anything about this right now --

24 A. I don't know anything about it.

25 Q. -- right?

1 A. Correct.

2 Q. So I just want to make sure we're clear that
3 you're not suggesting, are you, that Dr. Swanson didn't
4 meet any of his obligations in this transaction? Are
5 you?

6 A. Correct. I know nothing about the previous
7 leaks.

8 Q. Okay.

9 Now, there's no -- well, let me ask this:
10 Did Dr. Swanson disclose the November 2017 leak to your
11 office prior to the closing of the sale to the Folinos
12 at 42 Meadowhawk?

13 A. Only when we receive -- only in the e-mails
14 that you saw.

15 Q. Okay. Is that a "yes"?

16 A. I guess that would be a yes.

17 Q. Okay.

18 And your office prepared Addendum 4-A --

19 A. Correct.

20 Q. -- prior to closing?

21 A. Correct.

22 Q. And you sent that to the buyer's agent before
23 closing?

24 A. Correct.

25 Q. I think it's Exhibit 14, but I apologize,

1 because I -- I'll be honest, I didn't have a pen; so I
2 was marking these just in my head.

3 But the -- the e-mail from Ms. Oakes-Lazosky
4 that's dated November 16th, at 9:00 p.m., do you have
5 that? I think it's No. 14.

6 MR. WELSH: Don't worry about it.

7 THE WITNESS: Okay.

8 No. 14? I'm sorry?

9 BY MR. GALLIHER:

10 Q. Do you have that?

11 A. Yeah.

12 Q. All right.

13 So my understanding -- and I want you to
14 correct me if I'm wrong or if I mistake this. My
15 understanding is that in this e-mail Ms. -- can we just
16 call her Ashley, and you'll know who we are talking
17 about?

18 A. (Witness nods.)

19 Q. Okay.

20 Ashley is -- is discussing the leak of
21 November 2017; isn't that correct?

22 A. Correct. I believe so.

23 Q. All right.

24 A. Yes. That's correct.

25 Q. Okay.

1 In fact, she does mention the potential for a
2 mold remediation holdback; right?

3 A. Correct.

4 Q. Do you have a recollection of whether or not
5 the Folinos demanded a mold remediation holdback in
6 this transaction?

7 A. No, they didn't because they closed.

8 Q. In fact, Ashley proposes specific remedies in
9 this e-mail to the disclosure of the leak, doesn't she?

10 A. Where are we -- what are we looking at here?

11 Q. Well, I mean, she's saying, Hey --

12 A. Well, yeah, but here's some options.

13 Q. Yeah. This is what we can do; right?

14 A. Correct.

15 Q. This are potential ways to fix this problem.

16 A. Correct.

17 Q. And, in fact, she also acknowledges in
18 the -- the first paragraph after those two options are
19 presented, she acknowledges that the buyers have the
20 recourse to walk, didn't she?

21 A. She does.

22 Q. And, in fact, the buyers, at this point,
23 could have decided not to close based on -- as a
24 response to this disclosure, could they?

25 A. I believe so.

1 Q. But they didn't, did they?

2 A. No, they didn't.

3 Q. Do you have an understanding of whether the
4 request for mold tests and a letter from Rakeman
5 Plumbing, whether that request originated with the
6 buyers?

7 MR. GRAF: Objection. Calls for speculation
8 and lacks foundation.

9 BY MR. GALLIHER:

10 Q. That's why I'm asking. Do you know?

11 A. I -- I think -- I think it comes from -- I'm
12 sorry. I want you to ask that again.

13 Q. Sure.

14 I'm trying to find out if you know -- let me
15 just lay a little foundation.

16 So we know that a mold test was requested
17 prior to close; correct?

18 A. Correct.

19 Q. Okay.

20 Do you know who asked for that mold test?

21 A. I don't. I assume it's the buyer.

22 Q. Well, who potentially in the universe could
23 have asked for that?

24 A. Right.

25 Q. No. I need to you answer that question.

1 A. The buyer.

2 Q. Well, the buyers -- the buyers' agent?

3 A. The buyers' agent, yeah.

4 Q. You could have; right?

5 A. I could have advised -- yeah. It could have
6 been any of us.

7 Q. Was it you?

8 A. I don't know.

9 Q. You don't remember?

10 A. I don't.

11 Q. Okay.

12 And same thing with the request that Rakeman
13 provided a letter?

14 A. Can I -- can I interrupt for one second?

15 Q. Sure.

16 A. I'm sorry.

17 Had I been representing the buyer, I would
18 have requested and insisted upon one.

19 Q. And you told us earlier that -- at least by
20 reputation, Ashley and her husband were -- have -- have
21 a good --

22 A. Sure.

23 Q. -- reputation; right?

24 A. Yes.

25 Q. They're -- they're -- to your knowledge,

1 they're licensed?

2 A. They are, yes.

3 Q. They do a substantial amount of business in
4 town?

5 A. A decent amount, yes.

6 Q. And there's a lot of realtors in town; right?

7 A. Yes, there are.

8 Q. And there's not a lot of them making a lot of
9 money; right?

10 A. Right.

11 Q. Okay.

12 And to your knowledge, they're successful?

13 A. Yes.

14 Q. And this letter dated November 16th from
15 Mr. Hawley at Rakeman that's addressed to Dr. Swanson,
16 do you recall looking at that?

17 And I apologize. I don't remember which
18 number.

19 A. I do.

20 Q. Okay.

21 Again, do you have an understanding of who
22 requested these representations from Rakeman that they
23 were going to be paying -- that they were
24 being -- being -- strike that.

25 That they were going to cover the cost of the

1 damages?

2 MR. GRAF: Objection. Lacks foundation.

3 Calls for speculation.

4 THE WITNESS: I feel that -- I feel that it
5 was -- I mean, to say that it was one person or
6 another, I feel like as a -- as an accumulative
7 understanding -- accumulative understanding, if we were
8 going to close and the buyers were going to move
9 forward, these were the things that they needed, and
10 this was just a basic understanding.

11 The seller -- seller couldn't say, Hey
12 listen. It's a great -- you know, trust me. The buyer
13 couldn't say I'm going to close without it; so it had
14 to be something that we had a conversation about and
15 came up with the terms. And this is something that the
16 buyer would need to feel comfortable, which in my mind
17 means it would have come from the buyer.

18 BY MR. GALLIHER:

19 Q. And in -- and did you have an understanding
20 of whether the transaction would likely have closed
21 without this information?

22 A. I doubt it would have.

23 Q. Okay.

24 But it closed?

25 A. It did close.

1 Q. Maybe a few hours later or a day later or
2 something?

3 A. Right.

4 Q. Okay.

5 A. The buyers were satisfied.

6 Q. Have you had any conversations with Ashley or
7 her husband or any other representative of the Folinos
8 since the close of escrow?

9 A. Very briefly, if at all, just in passing,
10 like superficial topics, nothing serious.

11 Q. Do you know if the -- the damages from the
12 leak in November of 2017, whether the cost of any of
13 those damages were paid for by the Folinos out of
14 pocket?

15 A. I -- I know nothing --

16 MR. GRAF: Objection. Lacks foundation.

17 THE WITNESS: I know nothing about anything
18 that happened from beyond these e-mails.

19 BY MR. GALLIHER:

20 Q. Okay.

21 You said that you've been involved in
22 transactions before where -- where water damage, and
23 even mold, was an issue; is that accurate?

24 A. Correct.

25 Q. Okay.

1 And so you're familiar with environmental
2 studies that show the presence?

3 A. Correct.

4 Q. Have you seen one in this case that showed
5 that?

6 A. I haven't.

7 Q. Okay.

8 Have you -- and you've never seen that in
9 another case?

10 A. Yes. But not to study, more just to know
11 that I have it to supply it to a buyer.

12 Q. And have you had a situation where there's a
13 mold test that comes back with a positive result and
14 then there's remediation conducted and then another
15 mold test shows that -- the property to be cleaned?

16 A. Yes.

17 Q. And is -- is that typically -- does that --

18 A. Satisfy.

19 Q. -- does that typically --

20 A. It satisfies the situation.

21 Q. Okay.

22 A. It's impossible -- no.

23 At some point, any home is going to have a
24 leak over time. Whether it's a big leak or a little
25 leak, there's going to be leaks. And as long as

1 the -- as long as the leaks are addressed and satisfied
2 and represented to the new buyer, I think -- I think
3 we're good.

4 Q. Now, I want to make sure. Is it your
5 testimony that every leak in every house needs to be
6 disclosed every time the property is sold subsequently?

7 A. No. A leak of what we're talking about here,
8 with regard to the -- the -- the complete re-plumbing
9 is -- is what we're talking about here.

10 Q. Now, you don't have any information that
11 Dr. Swanson knew that this house needed to be replumbed
12 prior to December of 2017?

13 A. Correct, I don't.

14 Q. Okay.

15 And we already talked about those earlier
16 leaks. If -- if those were repaired to a professional
17 standard with a licensed contractor to like-new
18 condition, likewise those wouldn't necessarily need to
19 be disclosed?

20 A. It's very personal and substantive. I mean,
21 it's -- it's not a clear answer. I don't have a clear
22 answer for you.

23 Q. Well, you are familiar with the SRPD?

24 A. I am.

25 Q. Why don't you see if you can find it there.

1 And I apologize. I don't know the exact number.

2 A. I got it. It's No. 7.

3 Q. Okay.

4 You are going to beat me to it, so give me a
5 second.

6 MR. GALLIHER: Do you want to hand me one?

7 MR. WELSH: I have got one right here.

8 MR. GALLIHER: Thanks.

9 BY MR. GALLIHER:

10 Q. So you're a licensed Realtor in Nevada. And
11 have you ever read through this form?

12 A. I have.

13 Q. Okay.

14 And -- and so you've read the purpose of the
15 statement?

16 A. At the top, you mean?

17 Q. Well, it's -- it's not quite at the top.

18 A. Yeah.

19 Q. It's there in the middle; right?

20 A. Yes.

21 Q. And so it says that "the statements are a
22 disclosure of the condition and information concerning
23 the property known by the seller which materially
24 affects the value of the property."

25 A. Correct.

1 Q. So if there's a leak from a couple years
2 before that's been professionally repaired by a
3 licensed contractor to a like-new condition, does that
4 leak, in your opinion, materially affect the value of
5 the property?

6 A. It doesn't.

7 MR. GALLIHER: That's all that I have.

8 MR. GRAF: I have a couple of follow-ups.
9

10 FURTHER EXAMINATION

11 BY MR. GRAF:

12 Q. What if there were two leaks prior, would
13 that materially affect the value of the property?

14 A. It's a tough call. Because, in my mind, if
15 they're repaired, it doesn't affect the value of the
16 property.

17 Q. So if there's a leak that wasn't repaired, it
18 wouldn't materially affect the value of the property?

19 A. Correct.

20 Q. Okay.

21 So if we have one leak that wasn't repaired,
22 then Dr. Swanson should have reported that on the SRPD;
23 right?

24 MR. WELSH: Objection. It calls for a legal
25 conclusion.

1 MR. GALLIHER: I'll join.

2 THE WITNESS: And I -- what I would say is it
3 really depends on the leak, as I said, the little
4 dripping under the sink versus what we're talking about
5 here.

6 If it's something that's -- that's -- that's
7 not -- clearly, it hasn't been repaired or a leak like
8 this that is still active, so it needs to be addressed
9 if he knows about it. But to my knowledge, he didn't
10 know about it.

11 BY MR. GRAF:

12 Q. So if Dr. Swanson notes on a document that
13 he's aware of it, but that it was never resolved and he
14 notates that, then you think he should have made a
15 notation on the SRPD?

16 MR. GALLIHER: Incomplete hypothetical.
17 Lacks foundation. Calls for speculation.

18 BY MR. GRAF:

19 Q. You can answer.

20 A. Listen. If there's an ongoing problem that
21 is not repaired, you disclose it. If it's -- if
22 it's -- if he thinks it's fixed, then he doesn't
23 believe it's ongoing.

24 Q. Sure. And if he notes on a document that it
25 was never found or that that leak that's identified in

1 a report was never found, then he knows that that has
2 not been repaired; right?

3 A. That I don't know.

4 MR. GALLIHER: Same objection.

5 BY MR. GRAF:

6 Q. Okay.

7 A. That I don't know.

8 Q. So going back to my other hypothetical: What
9 if there's three leaks, do you think he needs to report
10 that even if they've been repaired?

11 A. It's -- you know, where's the cutoff? Is it
12 one or two or half or ten or --

13 Q. What about four --

14 A. Yeah.

15 Q. -- or five or six? That's what I'm trying to
16 figure out, Mr. Sher --

17 A. Yeah.

18 Q. -- and that is: If a homeowner in a span of
19 less than two years purchases a brand new newly
20 constructed home that's worth \$3 million, do you think
21 that a purchaser -- say in the scenario you're
22 representing the buyer and you come to find out that in
23 the span of about 18 months, a home that's brand new
24 and being sold for \$3 million has had six water leaks,
25 do you want to know that? Do you want to tell your

1 buyer about that --

2 MR. GALLIHER: Same objections.

3 BY MR. GRAF:

4 Q. -- and do you think that materially affects
5 the value of that home?

6 MR. GALLIHER: Same objections.

7 BY MR. GRAF:

8 Q. Is that a "yes"? You seem to be nodding yes.

9 A. I'm contemplating.

10 Q. Okay.

11 A. Listen. It's better to disclose than not to
12 disclose.

13 Q. We're not talking about a \$100,000 home --

14 A. Even if you were --

15 Q. -- that's on D Street --

16 A. Even if you were --

17 Q. -- and whatever; right? This is a \$3 million
18 house.

19 A. Yeah. It's better to disclose than not to
20 disclose. I don't know the circumstances behind the
21 leaks or what's -- what was involved with them.

22 It -- it doesn't -- it doesn't really even matter.

23 I believe if he did not disclose them, he
24 felt that it was resolved.

25 Do I think it would affect the value? I

1 don't.

2 If it -- clearly, it's -- it's indicative of
3 a bigger problem here, is what it sounds like. That's
4 a different story, but I don't think he believed that.

5 If your toilet leaks and then your sink leaks
6 and then water gets in from the rain outside -- I mean,
7 I'm giving different -- different scenarios here
8 that -- that doesn't necessarily mean that your house
9 is going to fall apart. And that's probably what it
10 looks like to somebody like -- like Dr. Swanson because
11 he's a perfectionist. He's always trying to do -- in
12 my mind, trying to do the right thing.

13 So I guess that's my statement.

14 Q. So the perfectionist that Dr. Swanson is, if
15 he's notated on a document that he did not resolve a
16 leak that he was aware of in 2015, then that should
17 have been notated on the Seller's Real Property.
18 That's not something that we're talking about that got
19 repaired and is like new or anything else. If he knew
20 about a leak and didn't repair it, he should have
21 notated it on the Seller's Real Property; right?

22 MR. GALLIHER: Same objection.

23 MR. WELSH: It really does call for a legal
24 conclusion, no matter -- however way you keep asking
25 it.

1 MR. GRAF: No, no, no.

2 BY MR. GRAF:

3 Q. You can still answer, though.

4 A. It would be better if it was.

5 MR. GRAF: Thank you, Mr. Sher.

6

7 FURTHER EXAMINATION

8 BY MR. GALLIHER:

9 Q. One thing: Did the Folinos get a home
10 inspection in this transaction?

11 A. They did.

12 Q. Did you review that?

13 A. I did.

14 Q. Did you note any leaks in the basement
15 bathroom that was adjacent to the workout room?

16 A. No.

17 Q. Okay.

18 So have you -- so that inspection by the
19 Folinos didn't find any leak in that bathroom?

20 A. Correct.

21 MR. GALLIHER: Okay. Thank you.

22 THE WITNESS: And I also want to add one last
23 thing, and that is that I still don't believe -- I'm
24 going to stand by my -- my e-mail, that it does not
25 affect the value of the home. That's it.

1 MR. GRAF: I disagree with you, but that's
2 fine.

3 THE WITNESS: Well, I know that I can sell
4 it, and I know what I could -- I know I can sell it for
5 a premium, and I know that -- that if we did -- if we
6 take -- show them what we did and that you've got a
7 brand new house, that it would -- that it would get a
8 premium because I did it.

9 MR. GRAF: I don't doubt that.

10 THE WITNESS: I appreciate your time.

11 MR. GRAF: Yeah. Thank you.

12 THE WITNESS: Thank you.

13 VIDEOGRAPHER: Off the video record at 6:23.

14 (Thereupon, the videotaped deposition
15 concluded at 6:23 p.m.)
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1	CERTIFICATE OF DEPONENT			
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15	I, IVAN SHER, deponent herein, do hereby certify and			
16	declare under the penalty of perjury the within and			
17	foregoing transcription to be my deposition in said			
18	action; that I have read, corrected and do hereby affix			
19	my signature to said deposition.			
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23	_____ IVAN SHER, Deponent			
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1 CERTIFICATE OF REPORTER

2 STATE OF NEVADA)
COUNTY OF CLARK)

3 I, Michelle R. Ferreyra, a Certified Court

4 Reporter licensed by the State of Nevada, do hereby

5 certify: That I reported the videotaped deposition of

6 IVAN SHER, commencing on MONDAY, FEBRUARY 3, 2020, at

7 3:04 p.m.; that prior to being deposed, the witness was

8 duly sworn by me to testify to the truth; that I

9 thereafter transcribed my said stenographic notes into

10 written form; that the typewritten transcript is a

11 complete, true, and accurate transcription of my said

12 stenographic notes; and that a request has not been

13 made to review the transcript.

14 I further certify that I am not a relative,

15 employee, or independent contractor of counsel or of

16 any of the parties involved in the proceeding, nor a

17 person financially interested in the proceeding, nor do

18 I have any other relationship that may reasonably cause

19 my impartiality to be questioned.

20 IN WITNESS WHEREOF, I have set my hand in my

21 office in the County of Clark, State of Nevada, this

22 5th day of February, 2020.

23 

24 MICHELLE R. FERREYRA, COR No. 876

25

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17 make every reasonable effort to protect and secure patient health

18 information, and to comply with applicable Privacy Law mandates,

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21 applying "minimum necessary" standards where appropriate. It is

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