IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

TODD SWANSON, an individua TODD SWANSON, Trustee of the SHIRAZ TRUST; SHIRAZ TRUST, A Trust of unknown origins; LYONS DEVELOMENT, LLC, a Nevada Limited Liability Company; DOES I Through X and ROES I through X,

Respondents.

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District Court Case No. A-18-782494-C

Reply in Support of Motion to Strike Volumes I and II of Appellants' Joint Appendix[1] and Portions of Appellants' Opening Brief

MEMORANDUM OF POINTS & AUTHORITIES

I.
Introduction

Rather than justify the inappropriate documents filed as the "Joint Appendix," the Appellants' devote several pages restating their primary appellate argument -

[1] Respondents' motion to strike requested striking Volumes I and II of the joint appendix. However, Respondents do not request striking *all* of Volumes I and II, but only JA00001-000248 which comprise the *Nelson* appendix. The rest of the appendix filed by the Appellants appears to be compliant with our appellate rules.

that the district court misapplied *Nelson v. Heer*.[2] The Appellants' use of the *Nelson* appendix, which the Appellants rely on as factual support for their principal argument that the district court misapplied *Nelson*, should not be considered by this Court.

Respondents' motion to strike is specifically directed to Appellants' inappropriate inclusion of documents in the appendix which were never presented to the district court and which never became part of the district court record. Consequently, the district court never had the opportunity to consider those documents and arguments in issuing the rulings which are the subject of the instant appeal. The documents and the arguments supported by those documents must be stricken because, in short, Appellants improperly attempt to present them for the first time on appeal.[3]

II.

Legal Argument

A. The *Nelson v. Heer* Appendix is Not Part of the District Court Record.

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[2] *Nelson v. Heer*, 123 Nev. 26, 163 P.3d 420 (2007).

[3] In addition to being off-point, Appellants' Response is wrong on at least six issues, which will be addressed in greater detail in Respondent's Answering Brief. First, Respondents did not make any "demonstrably false representation." Second, any changes in the Sellers Real Property Disclosure form ("SRPD") at issue in this case do not affect the holding in *Nelson*. Third, Chapter 113 has not changed since the *Nelson* decision and, together with the *Nelson* ruling, is still good law in Nevada. Fourth, Fifth and Sixth, the NRAP 10, NRS 41.130 and NRAP 28(f)) do not authorize inclusion of the *Nelson* appendix in this appeal.

Appellants make the misguided argument that the *Nelson* appendix falls outside the description of and limits to a district court record as defined by NRAP 10. But Appellants utterly disregard the bedrock appellate rule that documents never made part of the district court record are strictly precluded. With little (or any) analysis, the Appellants conclude the *Nelson* appendix is not comprised of "ancillary documents outside the record." *See* Response, p. 5.

Under NRAP 10(a), the trial court record consists of "papers and exhibits filed in the district court, the transcript of the proceedings, if any, the district court minutes, and the docket entries made by the district court clerk." Documents from another case do not fall within these specific parameters. The *Nelson* appendix is ancillary and an improper supplementation of the record that was not before the district court.

B. Appellants Raise the Issue That Changes to the Sellers Real Property Disclosure Form Would Change the Outcome of *Nelson v. Heer* – and the Instant Case.

The most important reason this Court should strike the *Nelson* appendix and those portions of the Opening Brief which rely on the documents in the *Nelson* appendix, is that the Appellants never provided any part of the *Nelson* appendix to the district court. Neither the district court nor Respondents had the opportunity to consider the new argument raised by Appellants on appeal – that the SRPD signed

by Nelson and the SRPD signed by Swanson are materially different.[4]

Appellants also mislead this Court regarding the Nelson holding and use the *Nelson* appendix as support. According to the Appellants, the Nelson defendant, Judy Nelson, did not make any misrepresentations because the SRPD form limited the location as "Basement/Crawl space." That was not the reason for the holding in *Nelson*. This Court's holding in *Nelson* explicitly relied on the unambiguous language of NRS 113.100(1), which defines "defect" as "a condition that materially affects the value or use of residential property in an adverse manner." *Nelson*, 163 P.3d at 425. According to this Court, "[o]nce the water damage was repaired, however, it no longer constituted a condition that materially lessened the value or use of the cabin. Accordingly, Nelson did not have a duty to disclose the prior water damage." *Id.*[5]

The Appellants avoid addressing these arguments. In the district court Appellants relied entirely on the contention that Swanson "lied" in the SRPD. In Appellants' words, the district court's "interpretation of *Nelson v. Heer* [permits] the seller of residential property to make demonstrably false representations." *See* Response, pp. 2, 4. Appellants did not raise the argument that a change in the

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[4] The differences in the SRPD forms that Appellants attempt to highlight – "Basement/Crawl space" versus "Structure"– is immaterial. Indeed, both forms refer to "Previous or current moisture conditions." If necessary, Swanson will expand this argument in its Answering Brief.

[5] Further, Ms. Nelson argued that the damages claimed by Mr. Heer were not proximately caused by any omissions and were not supported by sufficient evidence. *Nelson*, 163 P.3d at 424. The Nevada Supreme Court agreed.

language of the SRPD was relevant to the *Nelson* opinion, or the case against Swanson. Therefore, they waived the argument, and it cannot be considered in this appeal under *Old Aztec Mine* and its progeny.

C. Judicial Notice of the *Nelson v. Heer* Appendix is Not Warranted.

Appellate courts generally do not take judicial notice of materials included in an appellate appendix which are not filed in the district court record. "We do not take judicial notice of documents that were not provided to the trial court." *The Termo Co. v. Luther*, 86 Cal.Rptr.3d 687, 169 Cal.App.4th 394, 403 (2008) (citing *County of Orange v. Smith,* 132 Cal.App.4th 1434, 1450, 34 Cal.Rptr.3d 383 (2005)). Items not included in the record are not properly before the reviewing court, and the presentation of such evidence constitutes an improper supplementation of the record.

Typically, "this court will not take judicial notice of facts in a *different* case." *In re AMERCO Derivative Litigation,* 127 Nev. Adv. Op. 17 n.9, 252 P.3d 681, 699 n.9 (2011) (emphasis added) (citing *Mack v. Estate of Mack,* 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) (appellate courts do not take judicial notice of records in other matters); and *Carson Ready Mix v. First Nat'l Bk.,* 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (Supreme Court will not consider evidence not appearing in the record on appeal). This caveat may be relaxed to allow judicial notice of a prior proceeding, but only when the cases are related – and the party seeking such notice demonstrates

a valid reason for doing so. *Occhiuto v. Occhiuto,* 97 Nev. 143, 145, 625 P.2d 568, 569 (1981). Neither of the *Occhiuto* precursors are present here.

NRS 47.130 applies to the district court taking judicial notice of facts "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." NRS 47.130(2)(b). The Nevada Rules of Appellate Procedure do not contain an analogous exception to the district court's evidentiary rule.

Further, this Court noted in *AMERCO Derivative Litigation* that other courts may "take judicial notice of a document filed in another court" 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *Id.* (emphasis added) (citing *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.,* 969 F.2d 1384, 1388 (2d Cir.1992); *Kramer v. Time Warner Inc.,* 937 F.2d 767, 774 (2d Cir.1991); *Lee v. City of Los Angeles,* 250 F.3d 668, 690 (9th Cir.2001); *Southern Cross Overseas v. Wah Kwong Shipping,* 181 F.3d 410, 426 (3d Cir.1999)).[6]

This case is unlike *Bank of New York Mello as Tr. to JPMorgan Chase Bank, N.A. v. CKVC Invs., LLC,* 461 P.3d 158 (2020), where the district court took judicial notice of a publicly recorded document in the first instance. Additionally,

[6] The fact that this Court once reviewed the appendix from the *Nelson* case is not in dispute. The "authenticity" of the documents in the *Nelson* appendix cannot be confirmed, however.

Respondents do not concede – and this Court cannot conclude - that the Appellant's interpretation of the documents cited by them have any impact in this case. In particular, the parties here cannot test or examine the underlying facts contained in the documents from the *Nelson* case.[7]

Taking judicial notice of that appendix also will not necessarily aid in the efficient disposition of this case.[8] The purported change in the SRPD forms is not relevant to the decision rendered by the *Nelson* Court, and the additional documents from that appendix will not aid in the disposition of this appeal.

The request to take judicial notice of the document should be denied, and this Court should order the *Nelson* appendix and arguments dependent on those documents be stricken.

D. Nevada Rule of Appellate Procedure 28(f) Does Not Apply Here.

Finally, Appellants cite to the "etc." in NRAP 28(f) as giving them the right to supplement the record on appeal without any real restriction. They claim the Rule

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[7] For instance, did the Nelson cabin have a basement or crawl space? We cannot know for sure. Nelson's SRPD seems to suggest that the cabin did have a basement or crawl space – or she would have marked the question concerning previous moisture issues as "NA." Logically, flooding of the magnitude described in the *Nelson* case likely would have affected a basement/crawl space.

[8] Appellants claim Swanson is being "heavy handed." The impropriety here comes from Appellants' attempt to present new arguments for the first time on appeal – more on the "whack-a-mole" theory of litigation (as characterized by the district court) which Appellants have pursued throughout this case. This issue will be discussed in detail in Respondent's Answering Brief.

"suggests . . . the inclusion of etc." to apply to all documents "related to Nevada law, part of the public record, and their review is prudent. . . ." *See* Response, p.7. The plain meaning of the Rule and the law does not support Appellants' interpretation. A cursory review of Federal case law shows what might fall within the ambit of Rule 28(f)'s "etc." These would include: (i) statutes with legislative history – *Gonzales v. City of Castle Rock*, 535 F.3d 1210, 1266 n.2 (10th Cir. 2008) (rev'd on other grounds, 545 U.S. 748 (2005)); (ii) a city ordinance – *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1217 n. 2 (10th Cir. 2008); (iii) a city charter – *Stinson v. City of Craig*, 202 F.3d 283 (10th Cir. 1999); and (iv) orders from administrative agencies – *Nowick v. Strickland*, 182 F.3d 932 (10th Cir. 1999).

Appellants cite no authority for expansion of the list beyond statutes, rules, regulations, and other written law "governing the outcome of the dispute." *Cf. In re Concrete Pumping Service*, 943 F.2d 627, 631 n. 1 (6th Cir. 1991). Simply put, the inclusion of the "etc." in Rule 28(f) was not meant to cover the record or evidence from other cases. Indeed, if NRAP 28(f) has the broad meaning ascribed by the Appellants, the appellate rule precluding documents outside those filed in the district court would have no meaning.

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III.

Conclusion

For the reasons stated above and in Respondents' motion, the requested relief to strike volumes I and II (through JA000248) of Appellants' Joint Appendix and to strike portions of Appellants' Opening Brief, must be granted.

DATES this 1st day of April 2021.

CHRISTOPHER M. YOUNG, PC

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CERTIFICATE OF SERVICE

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

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the Nevada Supreme Court by using the appellate CM/ECF users and that service will be accomplished by the appellate CM/ECF system on April___, 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 1st day of April 2021.

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