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Elizabeth A. Brown
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IN THE SUPREME COURT OF NEVADA

JOSEPH FOLINO, an individual, and)	
NICOLE FOLINO, an individual)	
)	Supreme Court Case # 81252
Appellants,)	Related Case #81831
)	
vs.)	Dist. Ct. Case # A-18-
)	782494-C
)	
TODD SWANSON, an individual; TODD)	
SWANSON, Trustee of the SHIRAZ TRUST;)	
SHIRAZ TRUST, A Trust of unknown origins;)	
LYONS DEVELOPMENT, LLC, a Nevada)	
limited liability company,)	
)	
Respondents.)	
)	

MOTION TO FILE SURREPLY

Pursuant to NRAP 28(c), after an appellant files its reply brief, “no further briefs may be filed” unless the Court grants a motion for further briefing. This motion is brought by Respondents pursuant to NRAP 27, and seeks leave from this Court to file a brief Surreply to

correct impermissible argument made by Appellants in violation of this Court's April 16, 2021 Order. Doc. 21-10991. The Respondents' proposed Surreply is attached as Exhibit A to this motion.

DATED this 15th day of July, 2021.

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EXHIBIT A

RESPONDENTS' PROPOSED SURREPLY

I. Introduction and Background

On March 18, 2021, Respondents moved to strike pages 1 through 248 in Volumes I and II of Appellants' Appendix because the documents were not part of the district court record. See Doc. 21-07860. On April 16, 2021, this Court granted Respondents' request. See Doc. 21-10991.

In their Opening Brief, the Appellants argued that the Seller's Real Property Disclosure form (SRPD) in Nelson v. Heer was different from the SRPD in this case, thus negating the Heer ruling. See Opening Brief at 12-14. See Nelson v. Heer, 123 Nev. 217, 163 P.3d 420 (2007). However, the only support for the Appellants' argument came from the facts contained in the documents this Court struck. Therefore, in the March 18, 2021 motion, Respondents asked this Court to strike those portions of Appellants' Opening Brief which were based on and supported only by the inappropriate documents which the Court ultimately struck.

This Court ruled that "[t]o the extent appellants argue in the brief that the facts of Heer were different from those at issue in the instant

appeal, such argument may stand.” See Doc. 21-10991 at 2.

In their Reply Brief, Appellants’ blatantly misapplied this Court’s ruling. Respondents request in this Surreply that this Court compare pages 12-14 of Appellants’ Opening Brief with pages 16-17 of Appellants’ Reply Brief. What the Court will find is that Appellants simply cut-and-pasted their argument in their Opening Brief at pages 12-14 - which included citations to the stricken record - into their Reply Brief at pages 16-17 - which omitted the inappropriate citations but contained the same argument.

Appellants arguments at pages 16-17 of their Reply Brief have no factual support. Appellants’ actions appear to be their clever way to twist this Court’s ruling to - again - try to include facts which are not a part of the record.

II. Argument

“Matters outside the record on appeal may not be considered by an appellate court and reference to such matters is improper.” Peke Resources, Inc. v. Fifth Judicial Dist. Court in and for County of Esmeralda, 113 Nev. 1062, 1068-1069 n. 5, 944 P.2d 843, 848-849 n. 5 (1997), citing Grey v. Grey, 111 Nev. 388, 390 n. 1, 892 P.2d 595, 597 n.

1 (1995) and State, Emp. Sec. Dep't v. Weber, 100 Nev. 121, 123, 676 P.2d 1318, 1319 (1984).

NRAP 28(a)(10(A) specifically requires that every factual assertion supporting an argument contain a citation to the record. See Thomas v. City of N. Las Vegas, 122 Nev. 82, 95, 127 P.3d 1057, 1066 (2006). A party violating this rule is subject to sanctions. See Barry v. Lindner, 119 Nev. 661, 671, 81 P.3d 537, 544 (2003), Smith v. Emery, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993) and Allianz Ins. Co. v. Gagnon, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993).

Here, Appellants make the same argument they made in their Opening Brief regarding whether the SRPD in Heer and the SRPD in this case are different. The only support for that argument in their Opening Brief was from matters outside the district court record. In addition, the argument and facts asserted by the Appellants cannot be found in the Heer case itself.

In making the identical argument in their Reply Brief, the Appellants did not (and indeed could not) cite any authority. This Court should disregard the Appellants' argument at pages 16-17 which are bald, unsupported assertions.

III. CONCLUSION AND REQUESTED RELIEF

Appellants violated this Court's April 16, 2021 Order and Nevada law. Respondents respectfully request that this Court strike Appellants' argument at pages 16-17 of their Reply Brief which assert the SRPDs are different. Further, in the Court's discretion, sanctions are appropriate to deter similar behavior in the future.

Dated this 15th day of July, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2021, the foregoing
RESPONDENTS' MOTION TO FILE SURELY was electronically
submitted for filing and transmitted via email to the following
interested parties:

Rusty Graf, Esq.
Rgraf@blackwadham.com

Dated this 15th day of July, 2021.

/s/ Jay T. Hopkins, Esq.