IN THE SUPREME COURT OF THE STATE OF NEVADA

W L A B INVESTMENT GROUP, LLC,

Appellant,

v.

TKNR, INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KEN ZHONG LIN aka KENNETH ZHONG LIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONG LIN, an individual, and LIWE HELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MAN CHAU CHENG, an individual, and JOYCE A. NICKRANDT, an individual, and INVESTPRO INVESTMENTS LLC, a Nevada Limited Liability Company, and INVESTPRO MANAGER LLC, a Nevada Limited Liability Company and JOYCE A. NICKDRANDT, an individual and does 1 through 15 and roe corporation I-XXX,

Respondents.

Supreme Court Case No: 82835
District Court Case No: A785917

APPEAL

from the Eighth Judicial District Court, Clark County

The Honorable Adriana Escobar, District Judge
District Court Case No. A-18-785917-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

Appellant WLAB Investment Group, LLC is a Nevada limited liability company. Its managing member is Marie Zhu. WLAB has been represented by Benjamin Childs, Esq. and Steven L. Day of Steven L. Day PC, dba Day & Nance.

DATED this 18th day of November, 2021.

DAY & NANCE

/s/ Steven L. Day

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JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The district court entered its orders on April 7, 2021 and May 25, 2021. WLAB timely filed its appeals on April 26, 2021 and June 8, 2021, respectively. The orders were consolidated by order on August 30, 2021.

ROUTING STATEMENT

This case does not fall under the Supreme Court or Court of Appeals presumptions. Appellant would ask that the Supreme Court retain jurisdiction of this matter considering the significant Rule 11 sanctions assessed in this case.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, type-face, and type-style requirement of NRAP 32(a)(4)-(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because it does not exceed 30 pages.

3. I certify that I have read this appellate brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 18th day of November, 2021.

DAY & NANCE

/s/ Steven L. Day

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CERTIFICATE OF SERVICE

I certify that on November 18th 2021, I submitted the foregoing APPELLANT'S OPENING BRIEF for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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STATEMENT OF THE CASE

WLAB Investment, LLC, appeals from an April 7, 2021 amended order granting summary judgment in favor of Defendants/Respondents which included sanctions against WLAB and its prior counsel and a May 25, 2021 order denying WLAB's Motion for Reconsideration.

The underlying case arises out of the August, 2017, purchase of an investment rental property, a triplex apartment located at 2132 Houston Drive in Las Vegas. WLAB alleged that the sellers fraudulently concealed various defective conditions in the property all to WLAB's damage. Causes of action include fraud, fraudulent concealment, breach of contract, breach of the covenant of good faith and fair dealing and an NRS Chapter 113 action.

STATEMENT OF FACTS

TKNR, Inc., an InvestPro "flipping fund" group won the auction and bought the property located at 2132 Houston Drive in Las Vegas for $95,100.00 on September 25, 2015, at a foreclosure auction. (4 App. 725-27). The property secured a $291,608.90 balance on a bank note. (4 App. 725). The foreclosure auction opening bid was only $50,000.00 as land value due to the many defective conditions of the building. Though

the balance on the debt was 291,608.90,TKNR, Inc. only paid $95,100.00 for the property as land value. *Id.* The building on this property should have been condemned.

WLAB Investment Group, LLC, is a California LLC with members Marie Zhu and Frank Miao (wife and husband). Both Mr. Miao and Ms. Zhu have PhDs engineering. (8 App. 1522-23). Mr. Miao's background was designing, engineering and building plants. (8 App. 1522, p. 33, ll. 14-19). Over his career, he has worked for the Institute of Gas Technology, the Gas Research Institute, Westinghouse, Siemens, ABB, Alstiom and Parsons Engineering & Construction. (8 App. 1522-23, pp. 34-37). In addition to designing, engineering and building plants, he was involved in the construction and maintenance of his many homes and apartments. 8 App. 1525-26, pp. 45-46).

WLAB contacted InvestPro, the listing agent for a triplex located at 2132 Houston Dr. in Las Vegas. (8 App. 1493: ¶¶2-3, 1576-85) WLAB entered into a residential purchase agreement with TKNR, Inc. on August 11, 2017, to purchase the triplex which was to be part of Mr. Miao's and Ms. Zhu's retirement plan. *Id.* A subsequent agreement was entered into September 5, 2017, for the sole purpose of extending

the closing date. (8 App. 1493: ¶3, 1564-73) Prior to Ms. Zhu signing the August 11, 2017, agreement, Mr. Miao inspected the property on August 10, 2017, with Mr. Kenny Lin, the InvestPro owner. (8 App. 1492: ¶3) During this initial inspection, Mr. Lin explained to Mr. Miao that he was the listing agent and that he was the owner of InvestPro. (4 App. 710). Lin further explained during the inspection that the entire property had been renovated. (8 App. 1492: ¶3) During this initial inspection, Mr. Miao pointed out to Mr. Lin that the units had many code-violation issues such as needing to have proper GFCI outlets in the kitchen, bathroom and laundry and smoke, combustible gas and CO detectors. (8 App. 1493: ¶3, 4 App. 712) There was a broken window in one unit and drywall was not complete around the window air conditioning unit installed in Unit A. (4 App. 712). There were electrical wires exposed and ceramic floor tiles were cracked, etc. (4 App. 712). Mr. Lin agreed to take care of the code violations. *Id.* After Mr. Miao's initial inspection of the property, he told his wife to go ahead and sign the purchase agreement. The agreement was e-signed on August 11, 2017, with the help of Kenny Lin and Ms. Le Wei Chen, an agent from Mr. Lin's InvestPro office. (8 App. 1492-93: ¶3). The form

had previously been prepared by InvestPro agents. *Id.* As seen in the August 11, 2017, Residential Purchase Agreement, there was no waiver of due diligence. (8 App. 1578: ¶7). Due diligence was waived in the 2nd September 4, 2017, purchase agreement as Mr. Miao had already completed multiple inspections of the property. (8 App. 1493: ¶3, 1566: ¶7). Mr. Miao, with his wife and through various business entities, owned at the time of this transaction 7 apartments in Las Vegas and more than 10 properties in California. (8 App. 1528: p. 138, ll. 10-17).

After the August 11, 2017, agreement was signed, Mr. Miao conducted additional inspections of the property. (8 App. 1493: ¶4). Ceramic tile had been laid in the kitchen, living room, hallway, and bathrooms. *Id.* Laminated wood flooring had been installed in all bedrooms. *Id.* Mr. Miao did not notice any issues with the flooring except for a few small cracks in the ceramic tile in unit C. *Id.* The floor was not buckling and no cracks were observed on the walls inside the building. *Id.* The units did look as though they had been recently renovated as Mr. Lin had represented. *Id.* Mr. Miao had initially asked Mr. Lin to also be his buyer's agent but after the August 11, 2017, agreement was signed, Mr. Miao learned that Mr. Lin had assigned Ms.

Helen Chen from his office to be buyer's agent. (8 App. 1493: ¶5). Mr. Miao later learned that the renovations had been conducted only by InvestPro's unlicensed worker. (8 App. 1494, ¶ 5).

After the closing, Mr. Miao hired InvestPro as the property manager as they had been for the seller since TKNR purchased the property in 2015. (8 App. 1494: ¶6). Mr. Miao was invited to the InvestPro Christmas party during December of 2017. (4 App. 714, 8 App. 1491: ¶6). At the party, Mr. Lin explained to Mr. Miao that his group was buying properties at auction, rehabilitating properties and "flipping" them making large amounts of money. *Id.* A number of Mr. Lin's investors were present during the party and confirmed that they were in fact making lots of money. *Id.* Mr. Lin further explained that he put the investors together to buy the properties. *Id.* He invited Mr. Miao to join his "flipping fund." *Id.* Mr. Lin explained that Miao only needed to invest some money and that InvestPro would do everything from buying and remodeling the properties to "flipping" them to make a profit. *Id.* Mr. Lin described the investment as a sort of mutual fund where Mr. Miao could get a very good return. *Id.* Mr. Lin mentioned that the 2132 Houston Drive property was one of the projects in the

"flipping fund." *Id.* (4 App. 710) The vesting deed when the property was purchased by WLAB had an address for TKNR as 3553 S. Valley View Boulevard, InvestPro's office address instead of TKNR's California address. (4 App. 710)

Not long after WLAB's purchase of the property, Mr. Miao began to notice many problems with the property while InvestPro was the property manager. (4 App. 713, 8 App. 1494: ¶7). Tenants in Unit A complained that an electrical fuse kept burning out during the summer months. *Id.* The tenant reported the issue to InvestPro who sent their unlicensed worker to fix the problem. *Id.* The worker's fix was to disconnect other circuits to the fuse which resulted in the tenant not being able to use all outlets. *Id.* After complaining to Mr. Miao about the problem, Mr. Miao hired a licensed electrical contractor, Penny Electric, to look at the issue. *Id.* The contractor discovered that InvestPro's unlicensed worker had disconnected circuits behind the wall from the fuse. (8 App. 1495: ¶7). When the window air conditioning units were installed, InvestPro's unlicensed worker had piggybacked the AC circuit onto other circuits causing an overload on the fuse which is a building code violation. *Id.* The electrical panel did not have

sufficient wattage to power the residential unit with the additional air conditioners. *Id.* WLAB had to install a 100 amp panel for Unit A which more than doubled what was previously there. (4 App. 713). Lin had not disclosed the electrical code violation issue to Mr. Miao during the inspections or prior to closing. *Id.* Mr. Miao approached Mr. Lin about paying the $10,000.00 bid to fix the problem. *Id.* Mr. Lin responded that it was Mr. Miao's problem. *Id.* Mr. Miao ended up paying for the repair. *Id.*

During approximately October of 2018 on a sunny day, the tenant notified Mr. Miao that there was water dripping from the ceiling. (4 App. 1495, ¶ 8). Upon opening the ceiling drywall, Mr. Miao learned that the dryer duct was vented to the attic in violation of the building code. *Id.* Mr. Miao also found that the air conditioning ductwork inside the ceiling was not insulated which is also code violation. *Id.* Mr. Miao discovered that when Defendants replaced the swamp cooler with the heat pump, they left the uninsulated swamp cooler duct in the attic which is also a code violation. *Id.* When the highly moist gas from the dryer exhaust cooled with cool air coming from the uninsulated AC duct, condensation occurred causing water dropping onto the unit C

ceiling. *Id.* The wet insulation in the attic was black and no longer working. *Id.* Mr. Miao hired ACLV to put in new insulated ducting and hired Home Depot to reinsulate the attic. *Id.* Mr. Miao found that Unit B had the same issue with the dryer vent dumping into the attic. *Id.* In Unit A, the dryer vented into the wall between two studs which eventually entered the attic. *Id.* None of this was reported by Lin prior to WLAB closing on the triplex. *Id.*

During litigation, Mr. Miao learned that in early March, 2016, InvestPro had installed a 5 ton heat-pump package on top of the roof to replace three swamp coolers. (4 App. 711). This done in violation of the building code which required load and wind calculation as well as permit and inspections. In doing so, they did not apply for a permit to upgrade the electrical system and there was no inspection of the electrical system as the code requires. *Id.* As part of the process, InvestPro's unlicensed worker dismantled the old natural gas wall furnaces and disconnected the natural gas supply lines again without permit or inspection or work by a licensed contractor and then covered the mess with drywall, texture and paint. *Id.* InvestPro also added larger electrical lines in the ceiling to serve the 5 ton unit again without

permit, inspection or a licensed contractor. *Id.* The 5 ton heat-pump was too heavy for the roof which caused substantial vibration shaking noise. *Id.* When the tenant in Unit A complained and threatened to call code enforcement, InvestPro's unlicensed worker installed two new window air conditioners, again without permit or inspection, and ran new electrical lines also without permit or inspection as the code required.[1] *Id.* One 5 ton heatpump was removed and two 3 ton heatpumps were installed. *Id.* There were roof penetrations with the installation of the two new heat pumps servicing units B & C which caused roof leaks. (4 App. 711, 773) Wood paneling was removed December of 2020 which revealed a substantial crack in the exterior wall. *Id.*

The laminate flooring installed by InvestPro had been buckling. (8 App. 1496, ¶9). The ceramic flooring had also been cracking. *Id.* On February 16, 2021, Mr. Miao pulled up the laminate flooring in one of the Unit B bedrooms to find that the foundation concealed by the flooring had severely deteriorated. *Id.* (8 App. 1531-39). The

[1] NRS requires improvements to rental properties to be made by licensed contractors.

deteriorated condition of the foundation explained the severe cracks in walls that had been appearing through InvestPro's pre-sale renovations. (8 App. 1496: ¶9).

Prior to moving out August of 2020, the tenant in Unit C complained of slow drainage issues, particularly in the kitchen and bathroom. (8 App. 1496: ¶10). When Nicholas Quioz, the tenant in Unit A, moved out, he explained that he had reported to InvestPro during April of 2017 that sewage water had overflowed unto Unit A. *Id.* InvestPro's unlicensed worker had spent several weeks attempting to open up the sewer line. *Id.* Attached as Exhibit 7 to Plaintiff's/Appellant's Motion for Reconsideration is a photograph of sewage backed up into Unit C's bathtub. (8 App. 1562). The worker explained to Mr. Quioz that the sewer line was broken. (8 App. 1496: ¶10). Mr. Lin had not reported anything to Mr. Miao prior to or after closing about the broken sewer line. *Id.* Since learning about the broken sewer line, Mr. Miao has left the building unrented because of the danger to tenants of being exposed to sewage and sewer gases. *Id.*

Seller's Disclosures.

Examination of Seller's Real Property Disclosure Form reveals the inadequacy of Seller's disclosures in light of what Defendants knew at the time. Defendants represented that there were no problems with the electrical system, plumbing, sewer system and line, structure, foundation, wastewater disposal and expansive soil. (3 APP. 518-19). Under "explanations", sellers represent that new AC units had been installed, bathrooms redone and that the AC units were installed by a licensed contractor. (3 APP. 520). To distance themselves from the property, seller represented that it did not reside at or visit the property. *Id.* This representation is made in spite of the fact that the seller was part of Kenny Lin's "flipping fund" and that it was Lin and his company, InvestPro, who had made the repairs. (4 App. 710).

WLAB filed its complaint December 11, 2018, including causes of action for violation of NRS Chapter 113 (as to TKNR and Wong), Constructive Fraud (InvestPro and Nickrandt), Common Law Fraud (InvestPro, Nickrandt and Lin), Fraudulent Inducement (all defendants/respondents).

Pleadings History

Defendants/Respondents filed their Motion for Summary Judgment or in the Alternative Motion for Partial Summary Judgment on December 15, 2020. (3 App. 471-503). Plaintiff/Appellant filed its Opposition to Motion for Summary Judgment on December 29, 2020. (4 App. 686-851). Defendants/Respondents' Reply was filed January 21, 2021. (4 App. 852-889). The district court granted Defendants/Respondents' Motion for Summary Judgment on March 11, 2021. The district court filed the original order March 30, 2021. (6 App. 1252) The district court filed the amended order April 7, 2021. (7 App. 1407) WLAB filed its Motion for Reconsideration on April 16, 2021. (8 App. 1451-1629). WLAB's Notice of Appeal of Amended Order was filed April 26, 2021. (8 App. 1630-1631). Defendants/Respondents filed their Reply to Motion for Reconsideration April 30, 2021. (8 App. 1636-1662). The district court's Order Granting in Part and Denying in Part Plaintiff's Motion for Reconsideration was filed May 25, 2021. (9 App. 1836-1843). WLAB filed its Notice of Appeal (Order Granting in Part and Denying in Part Plaintiff's Motion for Reconsideration) on June 8, 2021. (9 App. 1844-1845). This Court consolidated both appeals on August 30, 2021.

ARGUMENT

A. Standard for Summary Judgment.

The purpose of the summary judgment procedure is to obviate trials when they would serve no useful purpose. *Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 378 P.2d 979 (1963); *Coray v. Hom*, 80 Nev. 39, 389 P.2d 76 (1964).

The function of summary judgment is not to test the legal sufficiency of the complaint to state a claim. *Force v. Peccole*, 74 Nev. 64, 322 P.2d 307 (1958). Rather, it is to pierce the pleadings and to test whether, under the uncontroverted facts, one party is entitled to judgment as a matter of law. NRCP 56(c); *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, 89 L. Ed 2d 538, 106 S. Ct. 1348 (1986) (Emphasis added).

It is axiomatic that the party moving for summary judgment has the burden of demonstrating clearly that there are no genuine issues of material fact to be determined. *City of Boulder City v. State*, 106 Nev. 390, 793 P.2d 845 (1990).

Nevada has adopted the summary judgment standards of the federal courts. *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026

(2005) adopting the summary judgment enunciated in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed. 265 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and *Matushita Electric Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The moving party has the initial burden of identifying the portions of the materials on file that it believes demonstrate the absence of a genuine issue of material fact. *Id.*; *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (C.A.9, 1987). The responding party must then show by probative evidence what material facts are genuinely in dispute and require trial. NRCP 56(e); *Van Cleave v. Kietz-Mill Minute Mart*, 97 Nev. 414, 633 P.2d 871 (1980).

B. <u>The Court's Amended Order References Facts Which Are Clearly In Dispute</u>.

The district court's amended order contains 26 pages of facts which the district court asserts are uncontested. ¶ 9 of the district court's amended order references NRS 113.130 stating that the seller does not have a duty to disclose defects of which it is unaware. (7 APP. 1397, ll. 2-4). **<u>That is the point of this case</u>.** Numerous issues of fact exist as to what Defendants knew, what they disclosed and what they

covered up. The district court's amended order further states in ¶ 10: "It is undisputed that the alleged deficiencies were either disclosed by Defendants, could have been discovered by an inspection, were open and obvious whereby Plaintiff/Ms. Zhu/Mr. Miao had notice of them at the time Plaintiff purchased the Property, or were unknown to Defendant at the time of the sale." (7 APP. 1397). This statement in the district court's amended order completely misstates the evidence in the case.

April 7, 2021, Amended Order (Findings of Fact).

1. **"Under Paragraph 7(c) of the RPA, Ms. Zhu waived the Due Diligence condition."** (8 APP. 1589, ll. 4-5). WLAB did not waive the right to inspect as evidenced by the August 11, 2017 and September 4, 2017 Purchase Agreements. (3 APP. 509, ll. 24-25; 532, ll. 18-19). WLAB reserved the right to inspect and, in fact, Ms. Miao initially inspected the subject property with Mr. Kenny Lin on August 10, 2017, one day prior to the purchase agreement being signed by Ms. Zhu. (8 App. 1492: ¶3) It was only after Mr. Miao's initial inspection of the property that he told his wife to go ahead and sign the purchase agreement. *Id.* The agreement was e-signed on August 11, 2017, with the help of Kenny Lin and Ms. Le Wei Chen, an

agent from Mr. Lin's Investpro office. *Id.* After the August 11, 2017, agreement was signed, Mr. Miao conducted additional inspections of the property. (8 App. 1493: ¶4). For the district court to contend that WLAB waived due diligence is simply not true and a factual issue for the jury to address.

2. **"On August 2, 2017, TKNR submitted Seller's Real Property Disclosure Form ("SRPDF" or "Seller's Disclosures") timely indicating all known conditions of the Subject Property."** (8 APP. 1589, ll. 19-21).

There is nothing in Seller's disclosures referencing the broken sewer line or the structurally unsound foundation caused by earth movements. (8 App. 1496, ¶9; 1531-39). In fact, Sellers fraudulently represented that they were not aware of any issues with the foundation. (3 APP. 518-19). Seller's disclosure said nothing about dryers being ducted into the attic, about AC wiring being piggy backed onto other electrical circuits, about inadequate electrical service to the units or about uninsulated AC ducting.

3. **"Despite these disclosures, Plaintiff chose not to inspect the Subject Property, request additional information and/or conduct any reasonable inquires."** (8 APP. 1589, ll. 25-27).

This "undisputed fact" is false as Mr. Miao inspected the property prior to closing on a number of occasions. Kenny Lin informed Mr. Miao that after they won the auction, they did a complete rehabilitation of the property. Because of Lin's representations prior to closing, Mr. Miao believed that Investpro had fixed all defects during rehabilitation. (8 APP. 1503, ¶ g).

4. **"Although Ms. Zhu had actual knowledge of the Seller's Disclosures, and the Parties agreed to extend the COE to January 5, 2018, Ms. Zhu still never did any professional inspections."** (8 App. 1590, ll. 24-26).

The court seems to imply that Ms. Zhu was required to hire a "professional inspection" to fulfill her due diligence requirements. There is nothing in the law that required Ms. Zhu to hire "professionals" to conduct the inspection nor was there anything in the RPA requiring buyer to retain a "professional" to conduct the inspection. In fact, Mr. Miao had more than sufficient experience in construction and engineering to conduct his own inspection. The question of fact is what a "professional inspection" would have revealed considering most of the defects were covered up and the buyer was not allowed to conduct a destructive inspection pursuant to paragraph 7(A) of the Purchase Agreement.

> During such Period, buyer shall have the right to conduct, **non-invasive/non-destructive inspections** of all structural, roofing, mechanical, electrical, plumbing, heating/air conditioning, water/well/septic, pool/spa, survey, square footage, and any other property or systems, through licensed and bonded contractors or other qualified professionals.

(8 App. 1566, ll. 36-39, emphasis added). In other words, an inspection would not have allowed pulling up the new flooring installed which covered up the condition of the foundation or digging up the sewer line. Again, what the condition of the foundation was at the time of sale, whether seller was aware of the condition, whether seller had covered up the condition intending to hide the condition from a prospective buyer and whether seller had a duty to disclose the condition of the foundation are all issues of fact. Sellers were aware of these conditions as Kenny Lin and InvestPro, their representatives and "flipping fund" participants, covered them up. (8 App. 1496, ¶9; 1531-39)

5. **"Additionally, Wong, Lin, Chen, Zhang, Cheng, and Nickrandt (collectively, "Broker" or "Broker Defendants") had "no responsibility to assist in the payment of any repair, correction or deferred maintenance on the Property which may have been revealed by the above inspections, agreed upon by the Buyer and Seller or requested by one party."** (8 App. 1589, ll. 15-18).

These individuals are the actual sellers of the property. They are the true sellers behind alterations and "flipping. Attached as Exhibit "5" to Plaintiff's Motion for Reconsideration is the Flipping Fund's web page found by Mr. Miao. (8 App.1545-1556). InvestPro's web page identifies InvestPro as a participant in the Property purchases and not just from a realtor standpoint. *Id.* The second page of the website talks about splitting profits with the manager LLC. (8 App. 1547). Lin and his company, InvestPpro, put the deal together, sold units to investors, for a 75/25 split at the end. *Id.* It was InvestPro's Kenny Lin who participated at the auction and bought the subject property. It was InvestPro's Kenny Lin who hired the InvestPro unlicensed worker to "rehabilitate" the property. It was InvestPro's unlicensed worker who discovered that the sewer line was broken. Not only did Lin push representation for the buyer to another InvestPro agent but at no time did Lin actually tell Mr. Miao that he had an interest in the subject property; i.e., he was the seller.

6. **"On August 2, 2017, TKNR submitted Seller's Real Property Disclosure Form ("SRPDF" or "Seller's Disclosures") timely indicating all known conditions of the Subject Property."** (8 App. 1589, ll. 19-21).

Mr. Miao did not meet Lin until August 10, 2017, at the time of Mr. Miao's initial inspection of the Property. There was no communication prior to August 10 with Lin or anyone from InvestPro. Mr. Miao did not decide to go through with the purchase of the Property until August 11, 2017. There is nothing in Seller's disclosures referencing a broken sewer line or the structurally unsound foundation caused by earth movements. Sellers were aware of these conditions as Kenny Lin, their representative, covered them up. Again, at issue is what Defendants covered up as compared to what they disclosed.

7. **". . . , Plaintiff had access to inspect the entire property and conduct non-invasive, non-destructive inspections: . . ."** (8 App. 1591, ll. 22-23).

The serious foundational, structural and sewage line issues, which were covered up with laminate wood and ceramic floor tile, would have only been discovered with a destructive and invasive inspection which was not allowed at the time of the sale in 2017.

C. <u>Factual Issues Exist as to each of WLAB's causes of action</u>.

1. First Cause of Action – Recovery Under NRS Chapter 113. (1 App. 126)

NRS 113.130 requires the seller and seller's agent to disclose defects in the subject property prior to conveyance of the property. In

this case, the seller and seller's agents were aware of issues with the property foundation, appliance venting, electrical system and sewage line, none of which were disclosed to the buyer prior to conveyance. It was InvestPro's unlicensed worker who covered the faulty foundation and walls with flooring and wall coverings, vented appliances to the attic, piggy-backed the heat pump electrical wiring to another fuse and investigated and discovered the broken sewage line. Factual issues exist as to what Defendants knew with respect to the subject property, what they should have disclosed and what they did disclose. It is WLAB's contention that Defendants violated NRS 113.130 entitling it to treble damages in accordance with NRS 113.150(4). Determination of whether a seller was aware of a defect which would trigger the statutory duty to disclose "is a question of fact to be decided by the trier of fact." *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007).

2. Second, Third and Fourth Causes of Action – Constructive Fraud, Common Law Fraud and Fraudulent Inducement. (1 App. 126-129)

Constructive fraud arises out of the breach of a duty arising out of a fiduciary or confidential relationship. *Perry v. Jordan*, 110 Nev. 943, 946, 900 P.2d 335, 337 (1995). A confidential relationship exists "when

one reposes a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence." *Id.* (citing *Long v. Towne,* 98 Nev. 11, 13, 639 P.2d 528, 529-30 (1982))

Common law fraud amounts to a false representation made by the defendant; defendant's knowledge or belief that the representation is false, defendant's intention to induce the plaintiff to act or refrain from acting, plaintiff's justifiable reliance upon the misrepresentation and damage to the plaintiff resulting from such reliance. *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 446-7, 956 P.2d 1382, 1386 (1998).

Defendants/respondents InvestPro, Kenny Lin (broker and member of TKNR flipping fund), Helen Chen (WLAB's agent working under Kenny Lin/InvestPro brokerage), were clearly in a fiduciary relationship with WLAB. Defendants were aware of defective conditions in the property which they failed to disclose. In sellers' disclosures, sellers, and their agents, represented that there were no issues with the electrical system, plumbing, sewer system and line, structure, foundation. Defendants' represented the property to be free of defect. Said representations were intended to induce WLAB to

purchase the property, all to WLAB's damage. Certainly, factual issues exist with respect to what Defendants knew at the time of sale, what representations were made by Defendants, WLAB's reliance upon those representations and WLAB's resulting damages.

3. Fifth Cause of Action, Fraudulent Concealment. (1 App. 129-30).

The elements of fraudulent concealment are (1) defendant's concealment of a material fact, (2) defendant was under a duty to disclose the fact, (3) defendant intentionally concealed or suppressed the fact, (4) plaintiff was unaware of the fact and (5) plaintiff sustained damage as a result of the suppressed fact. *Immobiliare, LLC v. Westcor Land Title Insurance Company*, 424 F.Supp.3d 882, 888 (E.D. Cal. 2019); *Midwest Supply, Inc. v. Waters*, 89 Nev. 210, 510 P.2d 876, 878 (1973). Defendants, as sellers, brokers and agents, had a duty to disclose defective conditions in the property of which they were aware. Because the conditions were covered up or were contained within the renovated walls of the structure, WLAB was not aware of the defective conditions after carefully inspecting the property. Because the conditions were concealed, WLAB had no opportunity to learn of the conditions through a reasonable non-destructive inspection. It was

Defendant/Respondents who in fact concealed the defective conditions. Certainly, a factual issue exists as to what Defendants concealed or did not conceal, what WLAB should have discovered through a reasonable inspection and WLAB's damage as a result of the concealment.

4. Eighth (NRS 645.257(1), Twelfth (civil conspiracy), Thirteenth (breach of contract), Fourteenth (breach of covenant of good faith and fair dealing) causes of action. (1 App. 132-38).

NRS 645.257(1) gives Plaintiff a cause of action against a real estate licensee who fails to perform any duties required by NRS 645.252, et seq. NRS 645.252(1)(a) requires an agent in a real estate transaction to disclose to each party: "Any material and relevant facts, data or information which the licensee knows, or which by the exercise of reasonable care and diligence should have known, relating to the property which is the subject of the transaction." There are issues of fact relating to what agents/broker Lin, Chen, Nickrandt and InvestPro knew at the time of the transaction and what they disclosed and failed to disclose. It was InvestPro and Lin who "renovated" the subject property, hid the electrical issues and covered up the degraded foundation and walls. It was InvestPro and Lin's unlicensed worker who investigated and discovered the broken sewer line. InvestPro/Lin

was the broker in the transaction. Chen was the agent assigned by Lin/InvestPro to represented WLAB, the buyer. WLAB alleges that Lin/InvestPro and Chen had a duty to disclose these issues.

There are factual issues as to whether InvestPro breached its contractual duties to WLAB by failing to disclose material defects and conditions with the property. There are factual issues concerning whether TKNR, InvestPro Investments LLC and InvestPro Manager LLC acted in concert to defraud WLAB. There are issues of fact relating to InvestPro's duty to act in good faith with WLAB and whether InvestPro breached the implied covenant of good faith and fair dealing when it failed to disclose significant defective conditions in the property.

D. Plaintiff's pleadings are not worthy of Rule 11 sanctions nor did Defendants follow any of the procedural requirements of NRCP 11.

In the district court's amended order and order denying WLAB's Motion for Reconsideration, the court sanctioned WLAB Investments, LLC and counsel Benjamin Childs, Esq., $128,166.78. for "bringing a lawsuit for an improper purpose." (8 App. 1625, ll. 1-2; 9 App. 1838, ll. 20-21. The district court has characterized WLAB's claims as "frivolous" and brought without reasonable grounds. (8 App. 1626, ll. 4-

5, 20-22). This Court recently granted attorney Benjamin Child's writ or mandamus while also ordering the case's reassignment to another district court judge. (10 App. 1850-60). This Court specifically found that "real parties in interest did not serve notice of their motion at least 21 days before they filed the motion with the district court and the motion was not made separately from their summary judgment motion as required by NRCP 11(c)(2)." (10 App. 1050). Appellant WLAB also requests that the district court's sanction against it be set aside.

In this case, the Plaintiff, an LLC, was represented by counsel, Benjamin Childs, Esq. In signing the pleadings, Mr. Childs represented to the Court that Plaintiff's claims were warranted by existing law and were not frivolous and that the factual contentions had evidentiary support and would likely have evidentiary support after a reasonable opportunity for further discovery. (*See* NRCP 11(b)(2)(3)).

Rule 11 requires any motion for sanctions to be made "separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b)." NRCP 11(c)(1)(a). The motion must describe the specific conduct that allegedly violates section 11(b). *Id.* The motion must be served on opposing counsel but not filed with the

court. *Id.* This is the 21 day "safe harbor" provision which allows the targeted attorney and party the opportunity to correct or withdraw the alleged wrongful claim or assertion. If the opposing counsel or party fails or declines to make the correction within the safe harbor provision, the moving party may then file the Rule 11 motion and present it to the court. The court must make express findings of fact and law to establish why there is a violation of Rule 11. If the court determines there is a Rule 11 violation, the sanction is limited by subpart (c)(4) to that which deters the attorney and/or party from the conduct. It can include only those attorney fees and expenses directly related to the violation. The trial court has authority under subpart (c)(3) to issue a Show Cause Order why Rule sanctions should be imposed on an attorney or party for violating Rule 11. The Show Cause Order must describe the specific conduct that violates Rule 11(b). The trial court cannot impose a sanction prior to issuing the Order to Show Cause and completing the required proceeding. In assessing sanctions against Mr. Childs and WLAB, the district court followed none of the required proceedings.

The overwhelming majority of federal appellate courts have held that the conditions of Rule 11 must be strictly followed and that Rule 11 should be rarely used. In *Operating Engineers Pension Trust v. AC Co.*, 859 F.2d 1336, 1343-44 (9th Cir. 1988), the court not only reversed Rule 11 sanctions but admonished lower courts to show more restraint because "Rule 11 is an extraordinary remedy, one to be exercised with extreme caution."

The requirement of a separate Rule 11 motion is mandatory. *Radcliffe v. Rainbow Constr. Co.*, 254 F.3d 772, 789 (9th Cir. 2001). A request for Rule 11 sanctions cannot be contained within any other motion. *Id.* The only reference to Rule 11 is found in Defendants' Summary Judgment Motion is at pages 30-31. (1 App. 36-37). There is no separate Rule 11 motion. The court in *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 94 (2d Cir. 1999), rejected defendants' argument to treat their affidavit of service and reply affidavit as a motion for Rule 11 sanctions because a motion must "be made separately from other motions or requests." (citations omitted). In *Barber v. Miller*, 146 F.3d 707, 710 (9th Cir. 1998), the court acknowledged that defendant gave plaintiff multiple warnings but

concluded that such warnings were not motions "and the Rule requires service of a motion."

The 21-day safe harbor provision is also considered a mandatory step. *Radcliffe* at 788. Other federal appellate courts concur. *Tompkins v. Cyr*, 202 F.3d 770, 788 (5th Cir. 2000); *Elliott v. Tilton*, 64 F.3d 213, 216 (5th Cir. 1995); *Penn, LLC v. Prosper Bus. Dev. Corp.*, 773 F.3d 764 (6th Cir. 2014. In *Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1058 (7th Cir. 1998), the defendants conceded that rule 11 sanctions were improper where they had failed to comply with the separate motion and safe harbor provisions of Rule 11.

Due process is heavily involved in Rule 11 proceedings. Subsection (c)(2) of the Rule requires notice of the specific claims that are alleged to be improper. The targeted attorney/party must be given an opportunity to respond. No such opportunity was provided for in this case.

Finally, a rule 11 sanction should only be imposed "to deter repetition of the conduct or comparable conduct by other similarly situated." NRCP 11(c)(4). There are further limitations on monetary

sanctions as the court has ordered in this case "against a represented party for violating Rule 11(b)(2).

As stated in this appeal, Plaintiff's case is based on its belief that it was fraudulently induced into buying a triplex building that should have been condemned. Plaintiff's argument is that Defendants hid defective conditions in the property. Plaintiff's claims as argued above are not frivolous and certainly not worthy of Rule 11 sanctions. Plaintiff asks this Court to set aside the Rule 11 sanctions ordered by the district court.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's April 7, 2021 and May 25, 2021 orders.

DATED this 18th day of November, 2021.

DAY & NANCE

/s/ Steven L. Day

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