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 KENZHONG LIN aka KENNETH ZHONGLIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONGLIN, an individual, and LIWEHELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MANCHAU 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.

SC Case No. 82835 / 83051
DC Case No.: A-18-785917-C

From the Eighth Judicial District Court
The Honorable Adrianna Escobar, District Judge
District Court Case No. A-18-785917-C

RESPONDENT'S ANSWERING BRIEF

Michael B. Lee, Esq. (NSB 10122)

Michael Matthis, Esq. (NSB 14582)
MICHAEL B. LEE, P.C.

NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed.

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Respondents: TKNR, INC., a California Corporation, and CHI ON WONG aka CHI KUEN WONG, an individual, and KENNY ZHONG LIN, aka KENZHONG LIN aka KENNETH ZHONGLIN aka WHONG K. LIN aka CHONG KENNY LIN aka ZHONGLIN, an individual, and LIWEHELEN CHEN aka HELEN CHEN, an individual and YAN QIU ZHANG, an individual and INVESTPRO LLC dba INVESTPRO REALTY, a Nevada Limited Liability Company, and MANCHAU 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

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/ / / /

There are no parent corporations and/or publicly held companies owning 10 percent or more of the party's stock to be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 23rd day of December, 2021.

MICHAEL B. LEE, P.C.

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WHETHER APPELLANT SHOULD BE SUBJECT TO SANCTIONS FOR THE FRIVOLOUS NATURE OF IT'S LAWSUIT AGAINST DEFENDANTS.

II. STATEMENT OF THE CASE

This Appeal revolves around the court's Order Granting Respondents' Motion for Summary Judgment, or in the alternative, Partial Summary Judgment that was filed with the Court on April 7, 2021 ("Amended MSJ Order"). (AA VII, 1367-1409). The court, on its own accord and unbeknownst to Respondents, filed the Amended MSJ Order after the original order had already been filed. (AA VI, 1210-1253). Notably, the only difference in between the orders is that the Amended MSJ Order removed the portion of the Order related to the scheduling of an order to show cause hearing for the Rule 11 violation. (AA VII, 1367-1409).

The court based its ruling on the undisputed evidence that WLAB waived due diligence (twice), purchased the 64-year-old Property "as-is" and had no interest of having a professional property inspection, despite the seller's real property disclosure form advising of all known defects and seller's encouragement to conduct an inspection. (AA VII, 1438-1441). Ultimately, the court decided that "there is no genuine issue of material fact with respect to Appellant's claims under

Chapter 113 [because] Respondents disclosed all of the known defects." (AA VII, 1440). Also, that "Plaintiffs have failed to create a genuine issue of material fact by introducing any evidence that the Respondents were aware of the nondisclosed defects." (AA VII, 1440-1441). And, all the complained "defects were discoverable with due diligence, which plaintiffs failed to do." (Id.).

WLAB also appealed the Order Granting in Part and Denying in Part Plaintiff's Motion for Reconsideration and Judgment Against Plaintiff and Previous Counsel that was filed on May 25, 2021. (AA IX, 1836-1843).

III. STATEMENT OF FACTS

1. *Appellant is Sophisticated Buyer*

Appellant is a sophisticated purchaser of real property. (AA III, 0608-0611). Since 2008, Mr. Miao, Ms. Zhu, and/or Appellant have been involved in the purchase of approximately twenty residential properties. (AA V, 0931, 0933). In Clark County alone, Ms. Zhu and Mr. Miao were involved with the purchase of at least eight rental properties starting in 2014. (AA V, 0923-0924). Appellant understands the importance of reading contracts. (AA V, 0920). Additionally, Mr. Miao specified that he understands that he needs to check public records when conducting his due diligence. (AA V, 0921).

As to the Property, Appellant purchased it as part of a 1031 exchange with four other properties at that time. (AA V, 0924, 0939). Appellant had an issue with

financing and the appraisal for the Property, which threatened the 1031 Exchange. (AA V, 0940). Interestingly, although the Property failed the appraisal for a value of $200,000, Appellant still pressed forward with the sale. Appellant has not provided the appraisal or the basis why it did not apprise for $200,000. Prior to purchasing it, Appellant was aware that TKNR had purchased it as a foreclosure. (AA V, 0973).

2. *Requirement to Inspect was Known*

Appellant's due diligence requirement and duty to inspect was well known to Appellant's on the face of the agreements. (AA III, 0509-0510, 0512, 0531-0532, 0534). Mr. Miao agreed that the terms of the residential purchase agreement ("RPA") related to buyer's due diligence were clear to Appellant. (AA V, 0941, 0946). As to Paragraph 7(A), Mr. Miao specified that he believed that his inspection and conversations with the tenant constituted the actions necessary to deem the Property as satisfactory for Appellant's purchase. (AA V, 0947-0948). At all times relevant prior to the purchase of the Property, Appellant had access to inspect the entire property and conduct non-invasive, non-destructive inspections. (AA V, 0949-0952).

Prior to the purchase, Mr. Miao was always aware that the Seller "strongly recommended that buyer retain licensed Nevada professionals to conduct inspections". (AA V, 0959). Appellant was also aware of the language in the RPA

under Paragraph 7(D) that limited potential damages that could have been discovered by an inspection. (AA V, 0531, 0960-0961). Finally, as to the RPA, Mr. Miao agreed that all the terms in it were conspicuous and understandable, and it was a standard agreement similar to the other agreements he had used in purchasing the other properties in Clark County, Nevada. (AA V, 0962-0964).

Not only did Appellant waive inspections in the first purchase agreement, (AA III, 0507-0516), but also waived them in the second purchase agreement, (AA III, 0529-0540), despite having received seller's real property disclosure form advising of all known defects. (AA III, 0518-0522).

3. *Mr. Miao Does Inspections for Appellant Although he is not a Licensed, Bonded Professional Inspector*

As to all the properties purchased by Appellant, Mr. Miao always does the inspections and does not believe a professional inspection is necessary. (AA V, 0926-0927, 0934). Based on his own belief, he does not believe that a professional inspection is necessary for multi-tenant residential properties. (AA V, 0926-928, 0934). Notably, he does not have any professional license related to being a general contractor, inspector, appraiser, or project manager. (AA V, 0930, 0952-0957). Importantly, he has never hired a professional inspector in Clark County, (AA V, 0934), so does not actually know what a professional inspection would encompass here. (AA V, 0936-0937). The main reason Appellant does not use a professional inspector is because of the cost. (AA V, 0938).

On or about August 10, 2017, Mr. Miao did an inspection of the Property. (AA V, 0942-0943). During that time, he admitted that he noticed some issues with the Property that were not up to code, finishing issues, GFCI outlets, and electrical issues. (Id.). Similarly, he also specified that there was an issue with exposed electrical in Unit C. (AA V, 0958). He also noted that there could have been a potential asbestos issue as well. (AA V, 0944). Additionally, he noted that there were cracks in the ceramic floor tiles, (AA V, 0985-0986), and he was aware of visible cracks in the concrete foundation, (AA V, 1000), which were open and obvious. (AA V, 1001). He also admitted that he could also have seen the dryer vent during his inspection. (AA V, 1000). As to those issues, Mr. Miao determined that the aforementioned issues were the only issues that TKNR needed to be fixed after his inspection. (AA V, 0954, 0974-0976).

Moreover, Mr. Miao received the Seller's Real Property Disclosure Form ("SRPDF") prior to the purchase of the Property. (AA V, 0965). As to SRPDF, Appellant was aware that TKNR was an investor who had not resided in the Property, and there were issues with the heating systems, cooling systems, and that there was work done without permits. (AA V, 0965-0966). Similarly, it was aware that the Property was 63 years old at that time, (AA V, 0967), and all the work was done by a handyman other than the HVAC installation. (AA V, 0932, 0968, 0983). Despite these disclosures, Mr. Miao admitted that he never followed up on them.

(AA V, 0967-0968). However, Mr. Miao also admitted that he could have followed up on the issues identified in the SRPDF that included the HVAC and the permits. (AA V, 0969, 0971-0972, 0984).

Similarly, Mr. Miao was aware that he should have contacted the local building department as part of his due diligence. (AA V, 0995-0996). Appellant was also on notice of the potential for mold and the requirement to get a mold inspection. (AA V, 0972-0973). Despite actual knowledge of these issues, Appellant did not elect to have a professional inspection done. (AA V, 0944). Moreover, Appellant would have refused to get a professional inspection because it believed that Mr. Miao had already performed one. (AA V, 0945-0946).

Finally, Appellant was also acutely aware of the requirement of Nevada law to protect itself by getting an inspection. (AA V, 0971).

4. *No Dispute a Professional Inspection Could Have Revealed the Alleged Issues*

The alleged defects identified by both parties' experts could have been discovered at the time of the original purchase. (AA III, 0542-0576). As to the ability to inspect, Mr. Miao admitted that he had access to the entire building. (AA V, 0986). He had access to the attic and looked at it. (AA V, 0987). Mr. Miao admitted that Appellant's expert examined the same areas that he did. (AA V, 1009). Notably, Appellant's expert did not do any destructive testing, so the expert's access was exactly the same as Mr. Miao's original inspection. (Id.). Mr.

Miao admitted that Appellant's expert's inspection of the HVAC, (AA V, 1010-1011), and the plumbing system, (AA V, 1013-1014), would have been the same as his inspection in 2017. He also admitted that the pictures attached to Appellant's expert report were areas that he could have inspected in 2017. (AA V, 1015).

Additionally, Mr. Miao accompanied Respondents' expert during his inspection. (AA V, 1022). As before, Mr. Miao had the same access to the Property in 2017 for the areas inspected by Respondents' expert. (AA V, 1023). Mr. Miao agreed with Respondents' expert that the alleged conditions identified by Appellant's expert were "open and obvious". (AA V, 1020-1021). He also agreed with Respondents' expert's finding that there was no noticeable sagging in the roof. (AA V, 1033).

Incredibly, Mr. Miao also recognized the deficiency in Appellant's expert's report that failed to differentiate between conditions prior to when TKNR owned the Property, while it owned it, and those afterwards. (AA V, 1023-1024). This would have also included any issues with the dryer vent and ducts, (AA V, 1026), as he recognized that most rentals do not include washer / dryer units. (AA V, 1027-1028).

5. *No Permits Required for Cosmetic Work by TKNR*

No dispute exists that TKNR did not need permits for the interior work it had done to the Property, as admitted by Appellant. (AA V, 0997-0999).

6. *Appellant Desperate to Close on Property to Complete 1031 Exchange*

Appellant needed to close on the Property to complete the 1031 Exchange. (AA V, 1006). Thus, when it could not close on the first RPA, it agreed to the second RPA and waived all inspections. (AA V, 1004, 1007-1008). Appellant could not meet the close of escrow because its financing fell through for the Property, so it amended the first RPA and agreed to guaranty the purchase price of $200,000 and put down $60,000 as earnest money to get TKNR to agree to the second RPA. (AA V, 1005-1006).

7. *Appellant Does not Disclose the Alleged Issues to Potential Tenants*

Since the date it purchased the Property, Appellant has always been trying to lease it. (AA V, 1030-1031). According to Mr. Miao, the landlord must provide safe housing for the tenant. (AA V, 0928-0929, 0934). However, Appellant has not done any of the repairs listed by Appellant's expert despite attempting to lease it. (AA V, 1030-1031). Moreover, Appellant does not provide any notice to the tenants about its expert's report or this litigation. (AA V, 1035-1036).

Notably, during Mr. Miao's due diligence period, he spoke with the tenants of the Property. (AA V, 0946-0947). This included a conversation with the long-term tenant of Unit A, who still resided in the Property at the time the deposition was taken. (Id.). At that time, the tenant reported being very happy with the

Property and had no complaints. (Id.) In fact, the tenant reported still being very happy with the Property. (AA V, 0953).

8. *Squatters or Tenants Could Have Damaged the Property*

The Property has a historic problem with squatters during the time that Appellant owned it. (AA V, 0922). Appellants admitted that tenants could have damaged the Property while they were occupying it. (AA V, 1016, 1030). This could also account for the cracking on the walls. (AA V, 1018). Tenants could have also damaged the Property if they hit it with their cars. (AA V, 1032).

9. *No Evidence That Respondents Knew of Alleged Conditions*

Appellant's case is based on speculation that Respondents knew about the alleged conditions in the Property; however, Mr. Miao admitted that there is no evidence that shows Respondents knew about them. (AA V, 0984). The entire case is based on Mr. Miao's personal belief and speculation. (AA V, 0988).

Mr. Miao admitted that he has no evidence Respondents knew about the alleged moisture conditions. (AA V, 1011-1012). Additionally, he also admitted that there is no evidence that Respondents knew about the alleged issues with the plumbing system. (AA V, 1014). He also admitted that he did not know if Respondents knew about the alleged issues with the duct work when they owned the Property. (AA V, 1019). Mr. Miao also recognized the deficiency in Appellant's expert's report that failed to differentiate between conditions prior to

when TKNR owned the Property, while it owned it, and those afterwards. (AA V, 1023-1024). Appellant also recognized that a 63-year-old property could have issues that were not caused by Respondents. (AA V, 1025). This would have also included any issues with the dryer vent and ducts, (AA V, 1026), and when the duct became disconnected. (AA V, 1029).

Moreover, nowhere in Appellant's Expert Report does it state that any alleged condition was known, or should have been known, by Respondents at the time of sale. (AA IV, 0753-0782).

10. *No Basis for Claims for RICO and/or Related to Flipping Fund*

The Flipping Fund had nothing to do with Appellant's decision to purchase the Property. (AA V, 1002). He also admitted that he never received any pro forma, private placement information, calculations of profit and loss, capital contribution requirements, member share or units, or any such information about the Flipping Fund. (AA V, 1003). Mr. Miao solely made his statements in the Declaration related to the Flipping Fund based on information he reviewed on a website and alleged conversations at a holiday party. (AA V, 0978). He also specified that he does not know the structure between the Investpro Respondents and the scope of each's purpose. (AA V, 977, 0979-0980).

11. *Plaintiff Admitted it Inflated its Cost of Repairs*

Initially, Mr. Miao contacted contractors to bid the potential cost of repair

for the Property and determined that it would have been $102,873.00. (AA V, 1017). However, Plaintiff's expert opined that the cost of repair would have been $600,000, although he did not provide an itemized cost of repair. (AA V, 1034). This illustrates that the bad faith purposes of this lawsuit was to simply harass Respondents. Mr. Miao perjured himself in his Declaration. (AA V, 0710-714). He denied, under the penalty of perjury, that he never made an offer to settle this matter for $10,000. (AA V, 0714). However, during his deposition he admitted that he did make this offer. (AA V, 0994).

IV. STANDARD OF REVIEW

This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court. See *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029, 121 Nev. 724, 729 (2005).

V. SUMMARY OF ARGUMENTS

As stated by the district court judge, "this is one of the clearest cut cases" for summary judgment that the court has seen. (AA VII, 1441). Appellant failed to provide evidence that either refutes material facts presented by Respondents or introduces material facts. (Id.). The residential purchase agreements illustrate that Appellant was purchasing the Property "as-is" despite knowing it was a 64-year-old rental property. (AA III, 0507-0516 and 0529-0540). Moreover, Respondents provided Appellant with a statement of all known defects, (AA III, 0518-0522),

satisfying any/all obligations under Nevada Revised Statutes Chapter 113. However, Appellant still chose not to conduct a professional inspection.

Additionally, Respondents' expert report provides that all of the alleged defects claimed by Appellant were open and obvious and would have been discovered had Appellant undertaken a professional inspection of the Property. (AA III, 0542-0576). The expert report also illustrates that Appellant has failed to differentiate prior conditions in existence before any work took place by the Respondents and those arising after. (Id.). Also noting, that that the given the age and nature of the Property, it was likely the property was subject to renter abuse. (Id.). Moreover, nowhere in Appellant's Expert Report does it state that any alleged condition was known, or should have been known, by Respondents at the time of sale. (AA IV, 0753-0782).

Ultimately, summary judgment was appropriate because Appellant's own actions and admissions bely the existence of a genuine issue of material fact that would preclude summary judgment. Appellant waived its due diligence, failed to perform a professional inspection, and did not even tell its tenant(s) about the defects it is alleging in this litigation. This Honorable Court needs to look no further than the purchase agreements, SRPDF, Respondents' expert report, and the deposition testimony of Mr. Miao to understand that summary judgment was clearly appropriate in this matter. Additionally, the evidence on the record

illustrates that this was a frivolous action brought by Appellant intended to abuse the court process to harass Respondents.

VI. LEGAL ARGUMENTS

A. Legal Standards

Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the Court demonstrate that no genuine issue of material fact exist, and the moving party is entitled to judgment as a matter of law. *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). Substantive law controls whether factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Valley Bank v. Marble*, 105 Nev. 366, 367, 775 P.2d 1278, 1282 (1989).

This Honorable Court has held that the non-moving party may not defeat a motion for summary judgment by relying "on gossamer threads of whimsy, speculation and conjecture." *Wood v. Safeway*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). This Honorable Court has also made it abundantly clear when a motion for summary judgment is made and supported as required by Nevada Rule of Civil Procedure 56, the non-moving party must not rest upon general allegations

and conclusions but must by affidavit or otherwise set forth specific facts demonstrating the existence of a genuine factual issue. *Id.*

Under Nevada Rule of Civil Procedure 56(a), the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The court may rely upon the admissible evidence cited in the moving papers and may also consider other materials in the record as well. *Id*. at 56(c).

"Under NRS Chapter 113, residential property sellers are required to disclose any defects to buyers within a specified time before the property is conveyed." *Nelson v. Heer*, 163 P.3d 420, 425 (Nev. 2007) (citing NRS 113.140(1)). "NRS 113.140(1), however, provides that a seller is not required to 'disclose a defect in residential property of which [she] is not aware.' A 'defect' is defined as "a condition that materially affects the value or use of residential property in an adverse manner." *Id*. (citing NRS 113.100(1)). This Honorable Court Court clarified that:

> [a]scribing to the term "aware" its plain meaning, we determine that the seller of residential real property does not have a duty to disclose a defect or condition that "materially affects the value or use of residential property in an adverse manner," if the seller does not realize, perceive, or have knowledge of that defect or condition. Any other interpretation of the statute would be unworkable, as it is impossible for a seller to disclose conditions in the property of which he or she has no realization, perception, or knowledge. The determination

> of whether a seller is aware of a defect, however, is a question of fact to be decided by the trier of fact.

Id. at 425 (citations omitted). Thus, in the context where the plaintiff cannot demonstrate an omitted disclosure that caused damage, the seller is entitled to summary judgment as a matter of law. *Id*. at 426.

Generally, "[n]ondisclosure by the seller of adverse information concerning real property . . . will not provide the basis for an action by the buyer to rescind or for damages when property is sold 'as is.' " See *Mackintosh v. Jack Matthews & Co*., 109 Nev. 628, 633, 855 P.2d 549, 552 (1993). Moreover, "[l]iability for nondisclosure is generally not imposed where the buyer either knew of or could have discovered the defects prior to the purchase." *Land Baron Invs., Inc. v. Bonnie Springs Family LP*, 131 Nev. 686, 696, 356 P.3d 511, 518 (2015). The general rule foreclosing liability for nondisclosure when property is purchased as-is does not apply when the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to [the seller] and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer. *Mackintosh*, 109 Nev. at 633, 855 P.2d at 552 (alteration in original) (internal quotation marks omitted).

A buyer waives its common law claims of negligent misrepresentation, fraudulent or intentional misrepresentation, and/or unjust enrichment when it expressly agreed that it would carry the duty to inspect the property and ensure that

all aspects of it were suitable prior to close of escrow, and the information was reasonably accessible to the buyer. *Frederic and Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 427 P.3d 104, 111 (Nev. 2018). Accordingly, this Honorable Court concluded that an agreement to purchase property as-is foreclosed the buyer's common law claims, justifying the granting of summary judgment on common law claims. *Id*. (citation omitted).

> The terms and conditions of the purchase agreement do not create a duty to disclose. Rather, these disclosures are required by NRS Chapter 113, which sets forth specific statutory duties imposed by law independent of the purchase agreement's terms and conditions. Additionally, the terms of the purchase agreement do not require [the seller] to do anything other than provide the listed disclosures.

See *Anderson v. Ford Ranch, LLC*, 78684-COA, 2020 WL 6955438, at *5 (Nev. App. Nov. 25, 2020).

Nevada Revised Statute ("NRS") § 113.140 clearly provides that the Seller Disclosures does not constitute a warranty of the Subject Property and that the Buyer still has a duty to exercise reasonable care to protect himself. NRS § 113.140 also provides that the Seller does not have to disclose any defect that he is unaware of. Similarly, NRS § 113.130 does not require a seller to disclose a defect in residential property of which the seller is not aware. A completed disclosure form does not constitute an express or implied warranty regarding any condition of residential property. See NRS § 113.140(2). Chapters 113 and "645 of Nevada

Revised Statutes do not relieve a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself." *Id*. at § 113.140(2).

B. Summary Judgment was Appropriate based on the Lack of Genuine Issue of Material Fact Presented to Contradict the Overwhelming Evidence in Support of Respondents' Motion.

Here, Appellant has not provided any evidence to establish the genuine existence of a material fact. Appellant's Opening brief relies on blind assertions that the factual findings made by the court are still in contention, despite failing to provide citation to any evidence in the record that would illustrate a factual dispute exists. See *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not presented by cogent argument and supported by salient authority). Appellant cannot merely rely on self-serving conjecture and unsupported speculation from its previous declarations that are contradictory to its deposition testimony (AA IV, 0710-0714 and AA VIII, 1492-1517).

The Motion for Summary Judgment clearly outlined that Respondents provided disclosure of all known defects, (AA III, 0518-0522), everything that was not disclosed would have been discovered had Appellant's inspected the property, (AA III, 0542-0576), and Appellant unequivocally waived due diligence, (AA III, 0507-0516 and 0529-0540). Moreover, the deposition testimony illustrates that there is no genuine issue of material facts. Appellant is a sophisticated and

experienced purchaser of real property. (AA III, 0608-0611); (AA V, 0931, 0933); and (AA V, 0923-0924). Appellant knew that the Property failed appraisal at $200,000 but pressed forward with the sale anyway because it was a part of a 1031 exchange that Appellant had engaged in. (AA V, 0924, 0939, 0940, and 0973). Appellant agreed that all terms of the purchase agreements were conspicuous and understandable, and that it was a standard agreement similar to others he had used to purchase property in Clark County, Nevada. (AA V, 0962-0964).

Appellant further admitted that he knew the seller strongly recommended a licensed professional conduct the inspection of the Property and that the terms of the residential purchase agreement limited the potential damages that could have been discovered through an inspection. (AA V, 0959-0961). However, Appellant admitted he did not have the Property inspected by a licensed professional; instead, arguing that his own inspection would suffice, despite his lack of qualifications. (AA V, 0926-928, 0930, 0934, 0936-37, 0952-0957). Incredibly, Appellant admitted that, to save costs, it does not use a professional inspector. (AA V, 0938).

Additionally, Appellant admitted that it received the SRPDF prior to the purchase of the Property, and it could have followed up on those issues mentioned, including the HVAC and permits, but chose not to. AA V, 0969-0971, 0984). Appellant admitted that it should have contacted the local building department as part of its due diligence. (AA V, 0995-0996). Appellant also admitted that it was

aware of requirement in Nevada law for buyers to protect themselves by getting an inspection when purchasing real property. (AA V, 0971). Astonishingly, despite admitting that as a landlord he has a duty to provide safe housing, (AA V, 0928-0929), Appellant did not advise tenants of the Property of the alleged issues found by Appellant's expert, nor has Appellant attempted to make any of those repairs. (AA V, 1031, 1035-1036).

Here, Appellant's Opening Brief fails to illustrate a genuine issue of material fact because a genuine issue, as intended by NRCP 56, "cannot be created by conflicting sworn statements of the party against whom summary judgment was entered." See *Bank of Las Vegas v. Hoopes*, 84 Nev. 585, 586, 445 P.2d 937, 938, 1968 Nev. LEXIS 414, 3 (Nev. 1968). Appellant relies exclusively on citations to the declarations made by Mr. Miao in response to the motion for summary judgment, (AA IV, 710-714), and in support of the motion for reconsideration, (AA VIII, 1492-1517), both of which contradict his deposition testimony. (AA V, 0913-1039). Those declarations were generated for the improper purpose of trying to cure the deficiencies created by Appellant's deposition testimony and the other evidence in the record related to the SRPDF and Appellant's waiver of due diligence, and must not be considered. See *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) quoting *Foster v. Arcata Associates*, 772 F.2d 1453, 1462 (9th Cir.1985), cert. denied, 475 U.S. 1048, 106 S.Ct. 1267, 89 L.Ed.2d 576

(1986) (“if a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact”).

Moreover, as to the representations in the Declaration to the Opposition to the Motion for Summary Judgment, Mr. Miao based them on his speculation, (AA V, 0981), and hearsay statements from third parties. (AA V, 0982). In terms of the allegations he made as to Respondents’ alleged knowledge of any issue with the Property, those are only based on his personal belief.

> 11· · · Q.· ·So you're -- when you say your experience,
> 12 it's based on you speculating based on your own
> 13 belief; correct?
> 14· · · A.· ·Based on my experience.
> 15· · · Q.· ·Okay.· So you're still speculating; right?
> 16· · · A.· ·Okay.· Yes.

(AA V, 0981).

> 17· · · Q.· ·So no one ever told you that.· It's just
> 18 based on your own personal belief?
> 19· · · A.· ·Yes.
> 20· · · Q.· ·Okay.· And then, "Removal of natural gas
> 21 supply line was, which occurred with no permit or
> 22 inspection and was not performed by active licensed
> 23 contractor as required by law," this is also based
> 24 on your personal belief?
> 25· · · A.· ·Yeah

(AA V, 0988-0989).

> 24· · · · · ·So as it relates to all these items here,

25 no defendant ever came up to you and said, Yes,
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1 we're actually aware of these issues; right?
·2· · · A.· ·No.

(AA V, 0989-0990).

19· · · Q.· ·This is the first time it ever became an
20 issue known to you; right?
21· · · A.· ·Yeah, for the roof.
22· · · Q.· ·How do you know that the Respondents knew
23 about this issue?
24· · · A.· ·I don't know -- I don't know the
25 defendant -- no.· I don't know the defendant know
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1 this issue or not.

(APP V, 0991-0992).

9· · · Q.· ·Like, the violations were hidden behind
10 the drywall, like, what information do you have that
11 the Respondents hid it behind the drywall?· You know
12 or you don't know?
13· · · A.· ·I just know behind the drywall that put
14 the vent without -- that is a violation, but I don't
15 know who did that.
16· · · Q.· ·Okay.· So you don't know who did it?
17· · · A.· ·Yeah, yes.
18· · · Q.· ·Okay.· So it's possible that the
19 Respondents did not know about it or hide it; is that
20 fair?
21· · · A.· ·Yes.

(AA V, 0993).

22· · · Q.· ·Okay.· And then you have this other thing
23 about the wood paneling.· Same question.· How do you
24 know the Respondents knew about it?
25· · · A.· ·I don't know Respondents know about it. I
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·1 only found out this one.

·2· · · Q.· ·So it's possible they didn't know about
·3 this issue as well; correct?
·4· · · A.· ·Yes.

(AA V, 0993-0994).

·1· · · Q.· ·So "It's impossible that Respondents, at
·2 least the ones involved in the sale, which are
·3 Respondents TKNR, et cetera, did not know about the
·4 renovations."
·5· · · · · ·So you're basically speculating; right?
·6· · · A.· ·Yeah, yeah, yeah.

(AA V, 0995).

Not only does the aforementioned testimony illustrate that this entire case is based on Appellant's speculation, but the overall lack of evidence provided by Appellant illustrates summary judgment was appropriate. Appellant opposed reopening discovery prior to Respondents filing for summary judgment, (AA I, 0181-0193), believing it had all evidence necessary, largely relying on its expert's report. However, as illustrated above the only evidence outside of Appellant's speculation is Appellant's expert's report. Incredibly, Appellant's expert report fails to provide any argument or allegation that Respondents knew or should have known of the alleged issues. (AA V, 0753-0782). This further establishes that summary judgment was appropriate in this matter.

Summary Judgment was unequivocally necessary based on Appellant's admissions that it has no evidence to illustrate Respondents had realized, perceived, or had knowledge of any alleged condition with the Property. See

Nelson v. Heer, 163 P.3d 420, 425-426 (Nev. 2007) (citing NRS 113.140(1)). Additionally, the undisputed fact that Appellant is a sophisticated and experienced purchaser—who knows of a buyer's duty to protect itself through due diligence but chose not to have professional inspection in order to save money—further supports the finding of summary judgment. Respondents' expert report clearly establishes that all of the conditions alleged by Appellant were open and obvious and could have been discovered by Appellant at the time Mr. Miao claims he inspected the Property, which Appellant admits. As there is no genuine issue as to Appellant's duty to inspect, Appellant's waiver of its due diligence and failure to adequately inspect the Property, that an inspection would have discovered the complained conditions, and the lack of evidence illustrating Respondents knew of any alleged condition, the finding for summary judgment must be affirmed.

C. Appellant's Decision to File and Maintain this Frivolous Lawsuit was an Abuse of Process allowing for Award of Attorneys' Fees.

The elements of an abuse of process claim are: "(1) an ulterior purpose by the Respondents other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding." See *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441 42 (1993). Abuse of process can arise from both civil and criminal proceedings. See *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002). Malice, want of probable cause, and termination in favor of the person initiating or instituting proceedings are not

necessary elements for a prima facie abuse of process claim. See *Nevada Credit Rating Bur. v. Williams*, 88 Nev. 601, 606, 503 P.2d 9, 12 (1972); Restatement (Second) of Torts § 682 cmt. a (1977). Although the mere filing of a complaint is insufficient to establish the tort of abuse of process, the failure to present proper evidence can be indicative of an abuse of process claim. See *Laxalt v. McClatchy*, 622 F. Supp. 737, 751 (1985). Here, Appellant continuously used the legal process to harass Respondents without sufficient legal or factual basis for bringing the claims, as indicated by the lack of evidence presented by Appellant to support their claims in this matter.

On January 7, 2019, Respondents' then-counsel, Burdick Law PLLC ("Burdick") filed a motion to dismiss. (AA I, 0009-0052). Burdick identified obvious issues denoted by the district court related to Appellant's lack of a meritorious lawsuit because of the clear language in the Residential Purchase Agreement and the waiver of the inspections, the issues related to Appellant's actual knowledge from the seller's disclosures, and the lack of basis for the alleged fraud claims. (AA I, 0011-0012). The motion also walked through the issues with Appellant's failure to do an inspection in light of his actual knowledge gained from the seller's disclosures. (Id.). However, Appellant's opposition to the motion to dismiss presented bluster arguments that completely failed to address the issue related to Appellant's actual knowledge and failure to inspect. (AA I, 0060-0061).

Notably, Appellant also presented a declaration from Mr. Miao that admitted Mr. Miao was aware of alleged code violations at the time he examined the property, had discussions with the current tenant, and elected to waive the professional inspection based on his belief he was qualified to inspect. (AA I, 0064-0066).

Incredibly, Mr. Miao admitted during his deposition, that Appellant: had access to inspect the entire property and conduct non-invasive, non-destructive inspections, (AA V, 0949-0952, 0986-0987, 1009, 1023); was aware of the strong recommendation to hire a licensed Nevada professional to do the inspection, (AA V, 0959); the clear language in Paragraph D of the Residential Purchase Agreement, (AA III, 0509-0510, 0512, 0531-0532, 0534); the terms of the Residential Purchase Agreement were conspicuous and understandable, and a standard agreement similar to the other agreements Appellant had used in purchasing the other properties in Clark County, Nevada, (AA V, 0962-0964); knew there was an issue with exposed electrical in Unit C, (AA V, 0958); suspected that there could have been a potential asbestos issue as well, (AA V, 0944); had actual knowledge there were cracks in the ceramic floor tiles, (AA V, 0985-0986), visible cracks in the concrete foundation, aware of slab cracks, all of which were open and obvious (AA V, 1000-1001); and saw the dryer vent during Mr. Miao's inspection (AA V, 1000).

Further, Appellant also admitted that it received the SDRPF prior to the

purchase of the Property (AA V, 0965), was aware that TKNR was an investor who had not resided in the Property, and there were issues with the heating systems, cooling systems, and that there was work done without permits. (AA V, 0965-0966). Similarly, it was aware that the Property was 63 years old at that time and all the work was done by a handyman other than the HVAC installation. (AA V, 0932, 0967-0968, 0983). Appellant was also on notice of the potential for mold and the requirement to get a mold inspection. (AA V, 0972-0973).

Here, the evidence presented by Respondents, including the deposition testimony of Mr. Miao, and the lack of evidence set forth by Appellant in opposing the motion for summary judgment, illustrates the overall bad faith nature of its prosecution of the underlying action. Rather than do a competent inquiry, Appellant argued at the hearing that there were permits and inspections required, and that Respondents had not disclosed issues to Appellant. (AA I, 0109-0110). Thereafter, after misleading the district court, Appellant filed the first amended complaint on March 4, 2019 and included more Respondents and more frivolous claims. (AA I, 0111-0140).

After Respondents moved to amend its pleading to include a claim of abuse of process by Appellant, Appellant vexatiously moved to amend the pleading to include (15) Abuse of Process [As To All Respondents] as a claim in Appellant's second amended complaint. (AA II, 0361-0398; RA I, 0001-0004). Incredibly,

Appellant claimed damages of $16.25 Million. (RA I, 0005-0011). This petty action embodies the conduct of Appellant in frivolously presenting baseless causes of action and needlessly increasing the cost of litigation for the improper purposes identified in Rule 11, NRS 18.010(2)(b), and Respondents' claims for abuse of process.

On November 19, 2020, Respondents propounded an offer of judgment on Appellant specifying the issues identified by Respondents in the motion to dismiss (AA I, 0009-0052, 0194-0198). The lack of merit of Appellant's claims related to those issues was further supported Mr. Miao's admissions from his deposition. Consistent with Appellant's vexatious prosecution of this matter to harass Respondents, Appellant propounded irrelevant discovery requests unlikely to lead to admissible / relevant evidence, clearly engaging in harassment of Respondents by requesting irrelevant documentation simply for the purpose of increasing Respondents' legal costs. (AA VI, 1129-1158).

On November 26, 2020, Appellant submitted discovery requests to Cheng, Investments, Realty, Wong, and TKNR. (AA II, 0399-0449 – AA III, 0450-470). On December 29, 2020, Respondents submitted their responses to Appellant's discovery requests (collectively, "Responses"). (AA III, 0612-0685). However, Appellant continued with his vexatious litigation practices and initiated a baseless discovery dispute. Appellant even admitted that several of the disputed documents

should be in the possession of Appellant, although Appellant had not disclosed any of them, illustrating the overall baselessness of the discovery requests and actual bad faith conduct by Appellant. (AA VI, 1150-1156).

Appellant always knew that this matter was frivolous considering its waiver of due diligence, the disclosures made by the sellers at the time of sale, and the lack of evidence related to Respondents' alleged knowledge of defects with the Property. However, despite being put on notice of these issues multiple times throughout the case, Appellant not only chose to maintain the frivolous lawsuit but unreasonably and vexatiously increased the scope of the litigation by adding new parties and new causes of action. Moreover, Appellant created bogus discovery disputes to harass Respondents and increase their attorneys' fees and costs. Appellant's choice to continue the litigation and harass Respondents, despite knowing it has no evidence and the claims are based on speculation, (AA V, 0984, 0988-0995), amounts to abuse of process allowing for finding of attorneys' fees.

D. Decision Not to Hold Separate Evidentiary Hearing was Harmless Error as Sanctions were Appropriate Pursuant to Statute

Justice requires the imposition of sanctions related to Appellant's conduct in this matter. Appellant filed and maintained a baseless lawsuit with absolutely no evidence to support its claims. (AA V, 0984, 0988-0995). Not only does Appellant's claims suffer from lack of supporting evidence—as illustrated in Section VI(B) of this Respondent's Brief—but the evidence on record in this

matter actually contradicts the claims brought by Appellant. Ultimately, the district court found that, "this is one of the clearest cut cases [for summary judgment] that I've seen." (AA VII, 1441). Further holding that, "when you're looking at the residential purchase agreement and signed disclosure, it's clear in my view that this is a baseless lawsuit[.]" (Id.).

Nevada Rule of Civil Procedure 61 provides:

> [u]nless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Under Nevada law, Rule 11 prevents a party from bringing a lawsuit for an improper purpose, which includes: (1) harassment, causing unnecessary delay, or needless increasing the cost of litigation; or (2) making frivolous claims. Nev. R. Civ. Pro. § 11(b)(1)-(2). The court understands that Rule 11 sanctions should be imposed for frivolous actions. See *Marshall v. District Court*, 108 Nev. 459, 465, 836 P.2d 47, 52 (1992). Notably, the Court can impose sanctions under Nevada Revised Statutes § 7.085 and/or 18.010(2)(b). See Nev. Rev. Stat. §§ 7.085 and 18.010(2)(b). Both statutes relate to Rule 11 and expressly advise that it is the Legislature's intent to allow the court to award attorneys' fees as sanctions "in all appropriate situations to punish for and deter frivolous or vexatious claims and

defenses[.]" *Id.* Additionally, both statutes advise that the court should "liberally construe the provisions of this section in favor of awarding costs, expenses and attorney's fees in all appropriate situations." *Id.* However, neither statute expressly requires the same rigorous procedural requirements as Rule 11, i.e., 21-day safe harbor and/or a Show Cause Hearing.

This Honorable Court has previously held that persuasive authority and Nevada's rules for statutory interpretation strongly support treating NRCP 11, NRS 7.085, and NRS 18.010(2)(b) as independent sanctioning mechanisms. *Watson Rounds v. Eighth Jud. Dist. Ct.*, 131 Nev. 783, 788, 358 P.3d 228, 232 (2015). Further holding that, "federal authority strongly indicates that NRCP 11 does not supersede NRS 7.085." *Id.* at 790, 232. In determining such, the Court has advised that the Rule and the Statute should be treated "as independent methods for district courts to award attorney fees for misconduct." *Id.* In that light, Section 7.085 does not require the same procedural requirements of safe harbor or an order to show cause, as included in Rule 11, prior to the court imposing sanctions for filing and maintaining frivolous actions. *Id.* The same can be said for Section 18.010(2)(b) as the statutory interpretation and persuasive authority analysis included in *Watson* would be the same. Therefore, the Interested Parties believe that the imposition of sanctions in this matter—despite the failure to strictly adhere to the procedural requirements of Rule 11—was not an abuse of discretion, and the failure to

designate the sanctions under Nevada Revised Statutes §§ 7.085 or 18.010(2)(b), which relate to Rule 11, amounts to harmless error.

Notably, the Amended MSJ Order includes citation to Section 18.010(2)(b). (AA VII, 1405-1406 at ¶¶ 60, 80). Appellant's substantial rights are not affected because the sanctions would have been imposed under Section 7.085 or 18.020(2)(b). Regardless of whether Appellant was provided safe harbor, the frivolous nature of the entire action would not have changed. Moreover, *Watson* holds that the sanctions will be upheld if the court makes sufficient finding for the same. *Watson Rounds*, 131 Nev. at 790, 358 P.3d at 233. Here, the findings of fact and conclusions of law contained in the Amended MSJ Order sufficiently establish the evidentiary basis for the court's determination that Appellant's claims were frivolously brought and maintained, illustrating that imposition of sanctions in this matter was appropriate. (AA VII, 1367-1409). As such, any failure to provide safe harbor or to hold a show-cause hearing would amount to harmless error as the Amended MSJ Order provides clear and sufficient factual basis to allow for the sanctions imposed. *Watson Rounds*, 131 Nev. at 790, 358 P.3d at 233.

Similarly, a show-cause hearing would be superfluous to the summary judgment hearing wherein the district court, as illustrated in the preceding section, was able to garner the requisite facts and information to make its decision that the action was frivolously brought and maintained. Even as a practical matter, the 21-

day safe harbor would have been futile because Appellant would not have agreed to let summary judgment be taken against it. Appellant had already been placed on notice of the issues after the filing of motion to dismiss, (AA I, 0009-0052), and the offer of judgment (AA, I, 0194-0198). However, Appellant continued to move ahead, ignoring the glaring issues related to waiver and lack of evidence, doubling down to include more causes of action against more Respondents, and illustrating that safe harbor would have been futile in this context.

CONCLUSION

Based on the foregoing, Respondents respectfully request the Amended MSJ Order be affirmed, as well as the Judgment against Appellant for the frivolous nature of its action under NRS 18.020(2)(b), NRS 7.085, and/or for abuse of process.

Dated this 23 day of December, 2021.

MICHAEL B. LEE, P.C.

/ s/ Michael Matthis

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VERIFICATION

Under penalty of perjury, of the laws of Nevada, the undersigned declares that he is the attorney for the Respondents named in the foregoing Respondents' Brief and knows the contents thereof; that the pleading is true of his own knowledge, except as to those matters stated on information and belief, and that as to such matters he believes them to be true. This verification is made by the undersigned attorney, pursuant to NRS § 15.010, on the ground that the matters stated, and relied upon, in the foregoing Respondent's Brief are all contained in the prior pleadings and other records of this Court and/or the District Court.

Dated this 23 day of December, 2021.

/s/ Michael Matthis
MICHAEL MATTHIS, ESQ.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Respondents' Answering Brief complies with the formatting, type-face, and type-style requirements of NRAP 32(a)(4-6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

I further certify that this Respondents' Answering Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 7,660 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages..

DATED this 23 day of December, 2021.

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CERTIFICATE OF MAILING

I hereby certify, under penalty of perjury, that I am an employee of Michael B. Lee, P.C., and that I caused to be electronically filed on this date, a true and correct copy of the foregoing document with the Clerk of the Court using the ECF system, which will automatically e-serve the same on the attorneys of record set forth below.

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