

IN THE SUPREME COURT OF THE STATE OF NEVADA

FIRST STREET FOR BOOMERS &
BEYOND, INC.; AITHR DEALER,
INC.;

Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT
COURT, IN AND FOR THE COUNTY
OF CLARK, STATE OF NEVADA,
AND THE HONORABLE CRYSTAL
ELLER, DISTRICT JUDGE,

Respondents,

And

ROBERT ANSARA, as Special
Administrator of the Estate of SHERRY
LYNN CUNNISON, Deceased;
ROBERT ANSARA, as Special
Administrator of the Estate of
MICHAEL SMITH, Deceased heir
to the Estate of SHERRY LYNN
CUNNISON, Deceased; and DEBORAH
TAMANTINI individually, and heir to
the Estate of SHERRY LYNN
CUNNISON, Deceased; HALE
BENTON, Individually; HOMECLICK,
LLC; JACUZZI INC., doing business as
JACUZZI LUXURY BATH;
BESTWAY BUILDING &
REMODELING, INC.; WILLIAM
BUDD, Individually and as BUDDS
PLUMBING; DOES 1 through 20; ROE
CORPORATIONS 1 through 20; DOE
EMPLOYEES 1 through 20; DOE

CASE NO.

Electronically Filed
Aug 17 2021 01:32 p.m.

District Court No. Elizabeth A. Brown
A-16-731244-C Clerk of Supreme Court
Dept. No. XIX

MANUFACTURERS 1 through 20;
DOE 20 INSTALLERS 1 through 20;
DOE CONTRACTORS 1 through 20;
and DOE 21 SUBCONTRACTORS 1
through 20, inclusive,

Real Parties in Interest.

**From the Eighth Judicial District Court
The Honorable Crystal Eller District Judge**

APPENDIX VOLUME 1 TO PETITION FOR WRIT OF MANDAMUS

Philip Goodhart
Nevada Bar No. 5332
Meghan M. Goodwin
Nevada Bar No. 11974
THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER
1100 East Bridger Avenue
Las Vegas, NV 89101-5315
Mail To:
P.O. Box 2070
Las Vegas, NV 89125-2070
Tel.: (702) 366-0622
png@thorndal.com
mmg@thorndal.com

*Attorneys for Petitioner, firstSTREET For Boomers & Beyond, Inc.; AITHR
Dealer, Inc.;*

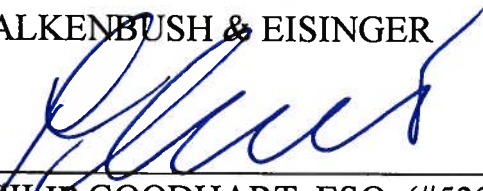
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DATED this 16th day of August, 2021.

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER



PHILIP GOODHART, ESQ. (#5332)
MEGHAN M. GOODWIN, ESQ. (#11974)
1100 East Bridger Avenue
Las Vegas, Nevada 89101
Attorneys for Petitioners firstSTREET For
Boomers & Beyond, Inc. and AITHR Dealer, Inc.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On August 16, 2021, I caused to be served a true and correct copy of the foregoing APPENDIX VOLUME 1 TO PETITION FOR WRIT OF MANDAMUS upon the following by the method indicated:

- × **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

Honorable Crystal Eller
Eighth Judicial District Court, Dept. XIX
Regional Justice Center
200 Lewis Avenue
Las Vegas, NV 89155

- × **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

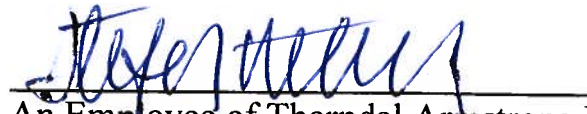
Benjamin P. Cloward, NV Bar No. 11087
RICHARD HARRIS LAW FIRM
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444
Benjamin@RichardHarrisLaw.com
catherine@richardharrislaw.com
Attorneys for Plaintiffs

Graham Reese Scofield, Esq., *Admitted Pro Hac Vice*
CHARLES ALLEN LAW FIRM
3575 Piedmont Road NE
Building 15, Suite L-130

Atlanta, GA 30305
(404) 419-6674
graham@charlesallenlawfirm.com
Attorneys for Plaintiff Robert Ansara

D. Lee Roberts, Jr., NV Bar No. 8877
Brittany M. Llewellyn, NV Bar No 13527
Johnathan T. Krawcheck, *Admitted Pro Hac Vice*
WEINBERG, WHEELER, HUDGINS,
GUNN & DIAL, LLC
6385 South Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
(702) 938-3838
lroberts@wwhgd.com
bllewellyn@wwhgd.com
jkrawcheck@wwhgd.com
Attorneys for Defendant Jacuzzi Inc. dba
Jacuzzi Luxury Bath

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER CHRISTIE LLP
3993 Howard Hughes Pkwy, Suite 600
Las Vegas, NV
(702) 949-8200
DPolsenberg@LRRC.com
JHenriod@LRRC.com
ASmith@LRRC.com
Attorneys for Defendant Jacuzzi Inc. dba
Jacuzzi Luxury Bath


An Employee of Thorndal Armstrong Delk
Balkenbush & Eisinger



**THORNDAL
ARMSTRONG**
DELK BALKENBUSH & EISINGER
A PROFESSIONAL CORPORATION
ATTORNEYS
www.thorndal.com

PETITIONERS' APPENDIX TAB 1

DISTRICT COURT CIVIL COVER SHEET

A-16-731244-C

County, Nevada

Case No.

I

(Assigned by Clerk's Office)

I. Party Information (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):

ROBERT ANDARA, as Special Administrator of the Estate of SHERRY LYNN CUMMISON, Deceased

MICHAEL SMITH individually, and heir to the Estate of SHERRY LYNN CUMMISON, Deceased;

DEBORAH TAMANTINI individually, and heir to the Estate of SHERRY LYNN CUMMISON, Deceased.

Defendant(s) (name/address/phone):

FIRST STREET FOR BOOMERS & BEYOND, INC

AITHR DEALER, INC.; HALE BENTON, HOMELICK, LLC.

JACUZZI BRANDS LLC; BESTWAY BUILDING & REMODELING, INC.;

WILLIAM BUDD, BUDDS PLUMBING

Attorney (name/address/phone):

BENJAMIN P. CLOWARD, ESQ.

CLOWARD HICKS & BRASIER, PLLC

721 South 6th Street Las Vegas, NV 89101

Telephone: (702) 628-9888

Attorney (name/address/phone):

II. Nature of Controversy (please select the one most applicable filing type below)**Civil Case Filing Types**

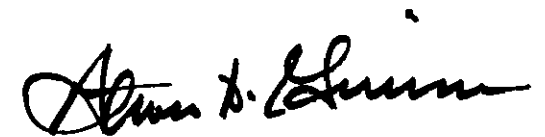
Real Property	Negligence	Torts
Landlord/Tenant <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant Title to Property <input type="checkbox"/> Judicial Foreclosure <input type="checkbox"/> Other Title to Property Other Real Property <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<input type="checkbox"/> Auto <input type="checkbox"/> Premises Liability <input type="checkbox"/> Other Negligence Malpractice <input type="checkbox"/> Medical/Dental <input type="checkbox"/> Legal <input type="checkbox"/> Accounting <input type="checkbox"/> Other Malpractice	Other Torts <input checked="" type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
Probate <i>(select case type and estate value)</i> <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate Estate Value <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	Construction Defect & Contract Construction Defect <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect Contract Case <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract	Judicial Review/Appeal Judicial Review <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency Nevada State Agency Appeal <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency Appeal Other <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
Civil Writ <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	Other Civil Filing <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters	

Business Court filings should be filed using the Business Court civil coversheet.

2/3/16
Date

Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

1 COMP
2 BENJAMIN P. CLOWARD, ESQ.
3 Nevada Bar No. 11087
4 **CLOWARD HICKS & BRASIER, PLLC**
5 721 South 6th Street
6 Las Vegas, NV 89101
7 Telephone: (702) 628-9888
8 Facsimile: (702) 960-4118
9 Bcloward@chblawyers.com
10 *Attorneys for Plaintiff*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

11 ROBERT ANSARA, as Special
12 Administrator of the Estate of SHERRY
13 LYNN CUNNISON, Deceased; MICHAEL
14 SMITH individually, and heir to the Estate of
15 SHERRY LYNN CUNNISON, Deceased;
and DEBORAH TAMANTINI individually,
and heir to the Estate of SHERRY LYNN
CUNNISON, Deceased;

16 Plaintiffs,

17 vs.
18

19 FIRST STREET FOR BOOMERS &
20 BEYOND, INC.; AITHR DEALER, INC.;
21 HALE BENTON, Individually,
22 HOMECLICK, LLC.; JACUZZI BRANDS
23 LLC.; BESTWAY BUILDING &
24 REMODELING, INC.; WILLIAM BUDD,
25 Individually and as BUDDS PLUMBING;
26 DOES 1 through 20; ROE CORPORATIONS
27 1 through 20; DOE EMPLOYEES 1 through
28 20; DOE MANUFACTURERS 1 through 20;
DOE 20 INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE
21 SUBCONTRACTORS 1 through 20,
inclusive

Defendants.

CASE NO. A-16-731244-C
DEPT. NO. I

COMPLAINT

1 COME NOW, Plaintiffs ROBERT ANSARA, as Special Administrator of the Estate of
2 SHERRY LYNN CUNNISON, Deceased; MICHAEL SMITH individually, and heir to the Estate of
3 SHERRY LYNN CUNNISON, Deceased; and DEBORAH TAMANTINI individually, and heir to the
4 Estate of SHERRY LYNN CUNNISON, Deceased by through their attorneys BENJAMIN P.
5 CLOWARD, ESQ. and for their causes of action against all Defendant's, and each of them, alleges as
6 follows:
7

8 I.

9 **PARTIES AND JURISDICTION**

10
11 1. That at all times relevant to these proceedings, Plaintiff, ROBERT ANSARA the
12 Special Administrator of the Estate of SHERRY LYNN CUNNISON, was and is a resident of
13 Nevada.

14 2. That at all times relevant to these proceedings, SHERRY LYNN CUNNISON,
15 deceased (hereinafter "SHERRY") was a resident of Clark County, Nevada.
16

17 3. That at all times relevant to these proceedings, Plaintiff, ROBERT ANSARA, as
18 Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased was and is a resident
19 of Clark County, Nevada.

20 4. That at all times relevant to these proceedings, Plaintiff, MICHAEL SMITH
21 (hereinafter "MICHAEL") individually, and heir to the Estate of SHERRY LYNN CUNNISON, was
22 and is a resident of Nevada.
23

24 5. That at all times relevant to these proceedings, Plaintiff, DEBORAH TAMANTINI
25 (hereinafter "DEBORAH") individually, and heir to the Estate of SHERRY LYNN CUNNISON, was
26 and is a resident of the state of California.
27
28

1 6. That at all times relevant hereto, upon information and belief, Defendant, FIRST
2 STREET FOR BOOMERS & BEYOND, INC., (hereinafter "FIRST STREET") is and was a foreign
3 Corporation doing business in the State of Nevada.
4

5 7. That at all times relevant hereto, upon information and belief, Defendant, AITHR
6 DEALER, INC., (hereinafter "AITHR") is and was a foreign Corporation doing business in the State
7 of Nevada.
8

9 8. That at all times relevant hereto, upon information and belief, Defendant HALE
10 BENTON, was and is a resident of Clark County, Nevada.
11

12 9. That at all times relevant hereto, upon information and belief, Defendant
13 HOMECLICK, LLC., (hereinafter "HOMECLICK") is and was a foreign Corporation doing business
14 in the State of Nevada,
15

16 10. That at all times relevant hereto, upon information and belief, Defendant JACUZZI
17 BRANDS LLC., (hereinafter "JACUZZI") is and was a foreign Corporation doing business in Clark
18 County, Nevada,
19

20 11. That at all times relevant hereto, upon information and belief, Defendant, BESTWAY
21 BUILDING & REMODELING, INC., a Domestic Limited-Liability Company; (hereinafter
22 "BESTWAY"), doing business in the State of Nevada.
23

24 12. At all times mentioned, Defendant WILLIAM BUDD was and is a resident of Clark
25 County, Nevada and was the business owner of Defendant, BUDD'S PLUMBING an unincorporated
26 business, (hereinafter "BUDD and BUDD'S PLUMBING"), and doing business in the State of
27 Nevada.
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II.

GENERAL FACTUAL ALLEGATIONS

13. At all times mentioned, Defendant FIRST STREET FOR BOOMERS & BEYOND, INC. upon information and belief was and is a retailer of home improvement products and unique gifts and the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence.

14. At all times mentioned Defendant, AITHR DEALER, INC., upon information and belief was and is was a general contractor supplier and/or installer of the Jacuzzi walk- in tub, being utilized by the deceased, SHERRY in her residence.

15. At all times mentioned Defendant, HALE BENTON was an employee of AITHR DEALER, INC., and upon information and belief was the consultant and/or sales person of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence.

16. At all times mentioned, Defendant, HOMECLICK, LLC., upon information and belief was an online retailer of home improvement products primarily as a retailer of bath and kitchen products and the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence.

17. That Defendant JACUZZI BRANDS LLC., through its subsidiaries, upon information and belief was a global manufacturer and distributor of branded bath and plumbing products for the residential, commercial and institutional markets. These include but are not limited to whirlpool baths, spas, showers, sanitary ware and bathtubs, as well as professional grade drainage, water control, commercial faucets and other plumbing products, and the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence, and who marketed its product to the elderly and individuals who were overweight or had physical limitation.

1 18. At all times mentioned Defendant BESTWAY BUILDING & REMODELING, INC.,
2 was a general contractor and the manufacturer, supplier and/or installer of the Jacuzzi walk in tub,
3 being utilized by the deceased, SHERRY in her residence
4

5 19. That Defendant, WILLIAM BUDD, individually and as BUDDS PLUMBING upon
6 information and belief was the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being
7 utilized by the deceased, SHERRY in her residence.

8 20. That the true names and capacities, whether individual, corporate, association or
9 otherwise of the Defendants, DOES 1 through 20 and/or ROE CORPORATIONS I through 20, and/or
10 DOE EMPLOYEES 1 through 20, and/or DOE MANUFACTURERS 1 through 20 and/or DOE
11 INSTALLERS 1 through 20, and/or DOE CONTRACTORS 1 through 20, and or ROE
12 SUBCONTRACTORS 1 through 20, inclusive, are unknown to Plaintiff, who therefore sues said
13 Defendants by such fictitious names. Plaintiff is informed and believes, and thereupon alleges, that
14 each of the Defendants designated herein as DOES and/or ROES is responsible in some manner for
15 the events and happenings herein referred to, and in some manner caused the injuries and damages
16 proximately thereby to the Plaintiff, as herein alleged; that the Plaintiff will ask leave of this Court to
17 amend this Complaint to insert the true names and capacities of said Defendants, DOES 1 through 20
18 and/or ROE CORPORATIONS 1 through 20, and/or DOE EMPLOYEES 1 through 20, and/or DOE
19 MANUFACTURERS 1 through 20 and/or DOE INSTALLERS 1 through 20, and/or DOE
20 CONTRACTORS 1 through 20, and or ROE SUBCONTRACTORS 1 through 20, inclusive, when the
21 same have been ascertained by Plaintiff, together with the appropriate charging allegations, and to join
22 such Defendants in this action.
23
24
25

26 21. That said DOE and ROE Defendants are the employees, manufacturers, designers,
27 component part manufacturers, installers, owners, distributors, repairers, maintainers, warned for use,
28 retailers, and/or warrantors of said defective product as set forth herein.

1 22. Plaintiff is informed and believes, and based upon such information and belief, alleges
2 that each of the Defendants herein designated as DOES and ROES are in some manner responsible for
3 the occurrences and injuries sustained and alleged herein.
4

5 23. Plaintiff is informed and believes and thereon alleges that at all relevant times herein
6 mentioned Defendants, and each of them, were the agents and/or servants and/or employees and/or
7 partners and/or joint venture partners and/or employers of the remaining Defendants and were acting
8 within the course and scope of such agency, employment, partnership or joint venture and with the
9 knowledge and consent of the remaining Defendants.
10

11 24. On or about February 19, 2014, deceased SHERRY was in the Jacuzzi walk-in tub,
12 when she attempted exit the Jacuzzi walk-in tub by pulling the plug to let the water drain, allowing her
13 to open the Jacuzzi walk in tub's door and exit. The drain would not release trapping SHERRY in the
14 tub for 48 hours.
15

16 25. On or about February 21, 2014 and after several unanswered telephone calls to the
17 deceased SHERRY, a well check was performed to ensure the deceased SHERRY'S safety. Upon
18 which, SHERRY was discovered trapped in the Jacuzzi walk-in tub.
19

20 26. That SHERRY had been trapped in the Jacuzzi walk-in tub for at least forty-eighty (48)
21 hours.
22

23 27. That all the facts and circumstances that give rise to the subject lawsuit occurred in the
24 County of Clark, Nevada.
25

26 **FIRST CAUSE OF ACTION**
27 ***Negligence as to All Defendants***
28

29 28. That Plaintiffs incorporate by reference each and every allegation previously made in
30 this Complaint, as if fully set forth herein.

1 29. Defendants owed a duty to Plaintiffs, and others similarly situated, to ensure that their
2 product, and particularly the Jacuzzi walk-in tub was properly functioning and safe for use by the end
3 consumer.

4 30. Defendants, and each of them, while in the course and scope of their employment
5 and/or agency with other Defendants, negligently failed to failed to warn Plaintiff of safety hazards
6 which resulted in SHERRY'S injuries and resulting death.

7 31. Defendants, and each of them, knew or should have known that unreasonably
8 dangerous conditions existed with the Jacuzzi walk-in tub, being used by Plaintiff, namely the
9 defective plug and drain system.

10 32. Defendants owed a duty of due care to Plaintiffs, and others similarly situated, in the
11 design, testing, manufacture, installation, assembly, marketing, instructions for use and warnings for
12 the subject Jacuzzi walk-in tub.

13 33. Defendants breached their duty of due care by their negligent, careless, wanton,
14 willful, and indifferent failure to act including, but not limited to:

- 15 a. The negligent and improper design, testing, manufacture, installation assembly,
16 instructions for use and warnings for the Jacuzzi walk-in tub; and
17 b. The failure to provide adequate, accurate, and effective warnings and instructions to
18 owners, operators, and users of the subject Jacuzzi walk-in tub.

19
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23 **SECOND CAUSE OF ACTION**
24 ***Strict Product Liability Defective Design,***
25 ***Manufacture and/or Failure to Warn***
26 ***as to all Defendants***

27 34. That Plaintiffs incorporate by reference each and every allegation previously made in
28 this Complaint, as if fully set forth herein.

1 35. That upon information and belief, Defendants, and/or DOE/ROE Defendants, are and
2 were a component part manufacturer, installer, owner, distributor, repairer, maintainer, warned for use,
3 retailer, and/or warrantor of said defective product as set forth herein.
4

5 36. That the true names and capacities, whether individual, corporate, agents, association or
6 otherwise of the DOE and ROE, are unknown to Plaintiff, who therefore sues said Defendants by such
7 fictitious names. Plaintiff is informed and believes, and thereupon alleges, that each of the Defendants
8 designated herein as DOE and/or ROE are responsible in some manner for the events and happenings
9 herein referred to, and in some manner caused the injuries and damages proximately thereby to the
10 Plaintiff as herein alleged; that the Plaintiff will ask leave of this court to amend this Complaint to
11 insert the true names and capacities of said DOE and/or ROE Defendants, when the same have been
12 ascertained by the Plaintiff, together with appropriate charging allegations, and to join such Defendants
13 in this action.
14

15 37. That said DOE and ROE Defendants are the manufacturers, designers, component part
16 manufacturers, installers, owners, distributors, repairers, maintainers, retailers, warned for use,
17 warrantors of said defective product as set forth herein.
18

19 38. That upon information and belief, Defendants, and each of them, sold the subject
20 product and failed to warn Plaintiffs of the hazards of the use of the subject product.
21

22 39. At the time of this incident, the product had a design and/or manufacturing defect that
23 rendered the product unreasonably dangerous and potentially deadly.

24 40. The defect, which rendered it unreasonably dangerous, existed at the time the subject
25 product and its component parts left the care, custody and control of the above named Defendants
26 and/or ROE/DOE Defendants
27

28 41. The Defendants and/or ROE/DOE Defendants, knew or should have known of the
subject product's defect which rendered it unreasonably dangerous at the time of placing the subject

1 product into the stream of commerce and failed to undertake measures to prohibit it from entering into
2 the stream of commerce and into the hands of users in the State of Nevada, including warnings of the
3 risks for product failure, proper use and maintenance of the product and proper inspection of the
4 product for potential hazards and/or defects.
5

6 42. That the subject product was defective due to Defendants, and each of their failure to
7 warn of the potential dangers associated with using said product.

8 43. That said product was defective due to a manufacturers' defect, design defect, or defect
9 due to lack of adequate warnings.
10

11 44. That Defendants, and each of their failure to warn was a proximate cause of
12 SHERRY'S injuries and death.

13 45. That said product's manufacturing and/or design defect was the proximate cause of
14 SHERRY'S injuries and resulting death.
15

16 46. The Defendants and/or DOE/ROE Defendant' conduct was the direct and proximate
17 cause of SHERRY'S injuries and damages.

18 47. The Defendants and/or DOE/ROE Defendants are strictly liable to the Plaintiffs jointly
19 and severally for the damages they have sustained.
20

21 That Plaintiffs have been forced to retain the service of an attorney to represent them in this
22 action, and as such is entitled to reasonable attorney's fees and litigation costs

23 WHEREFORE, Plaintiffs respectfully pray that Judgment be entered as set forth below

24 1. General damages for Plaintiffs pain, suffering, disfigurement, emotional
25 distress, shock and agony in an amount in excess of \$10,000.00;

26 2. Compensatory damages in an amount in excess of \$10,000.00;

27 3. Special damages for Plaintiffs medical expenses in an amount to be
28 proven at trial;

4. For punitive damages in excess of \$10,000.00;
5. For reasonable attorney's fees, pre-judgment interest and costs of incurred herein;
6. For such other and further relief as the Court may deem just and proper in the premises.

CLOWARD, HICKS & BRASIER, PLLC

1 IAFD
2 BENJAMIN P. CLOWARD, ESQ.
3 Nevada Bar No. 11087
4 **CLOWARD HICKS & BRASIER, PLLC**
5 721 South 6th Street
6 Las Vegas, NV 89101
7 Telephone: (702) 628-9888
8 Facsimile: (702) 960-4118
9 Bcloward@chblawyers.com

10
11 **DISTRICT COURT**
12
13 **CLARK COUNTY, NEVADA**

14 ROBERT ANSARA, as Special
15 Administrator of the Estate of SHERRY
16 LYNN CUNNISON, Deceased; MICHAEL
17 SMITH individually, and heir to the Estate of
18 SHERRY LYNN CUNNISON, Deceased;
19 and DEBORAH TAMANTINI individually,
20 and heir to the Estate of SHERRY LYNN
21 CUNNISON, Deceased;

22 Plaintiffs,

23 vs.

24 FIRST STREET FOR BOOMERS &
25 BEYOND, INC.; AITHR DEALER, INC.;
26 HALE BENTON, Individually,
27 HOMECLICK, LLC.; JACUZZI BRANDS
28 LLC.; BESTWAY BUILDING &
REMODELING, INC.; WILLIAM BUDD,
Individually and as BUDDS PLUMBING;
DOES 1 through 20; ROE CORPORATIONS
1 through 20; DOE EMPLOYEES 1 through
20; DOE MANUFACTURERS 1 through 20;
DOE 20 INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE
21 SUBCONTRACTORS 1 through 20,
inclusive

Defendants.

CASE NO.
DEPT. NO.

INITIAL APPEARANCE FEE
DISCLOSURE

- 1
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Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are submitted for fees

ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased	\$270.00
--------------------------------------------------------------------------------------------	----------

MICHAEL SMITH individually, and heir to the Estate of SHERRY LYNN CUNNISON	\$30.00
-------------------------------------------------------------------------------	---------

DEBORAH TAMANTINI individually,	
and heir to the Estate of SHERRY LYNN CUNNISON, Deceased	\$30.00

TOTAL REMITTED: \$330.00

DATED this 3rd day of February, 2016

CLOWARD HICKS & BRASIER, PLLC

BENJAMIN P. CLOWARD, ESQ.

Nevada Bar No. 11087

721 South 6th Street

Las Vegas, NV 89101

Attorneys for Plaintiffs



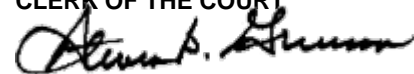
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ATTORNEYS

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PETITIONERS' APPENDIX TAB 2



ACOMP
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
RICHARD HARRIS LAW FIRM
801 South Fourth Street
Las Vegas, NV 89101
Telephone: (702) 444-4444
Facsimile: (702) 444-4458
Benjamin@richardharrislaw.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ANSARA, as Special
Administrator of the Estate of SHERRY
LYNN CUNNISON, Deceased; ROBERT
ANSARA, as Special Administrator of the
Estate of MICHAEL SMITH, Deceased heir
to the Estate of SHERRY LYNN
CUNNISON, Deceased; and DEBORAH
TAMANTINI individually, and heir to the
Estate of SHERRY LYNN CUNNISON,
Deceased;

Plaintiffs,

vs.

FIRST STREET FOR BOOMERS &
BEYOND, INC.; AITHR DEALER, INC.;
HALE BENTON, Individually,
HOMECLICK, LLC.; JACUZZI INC., doing
business as JACUZZI LUXURY BATH;
BESTWAY BUILDING & REMODELING,
INC.; WILLIAM BUDD, Individually and as
BUDDS PLUMBING; DOES 1 through 20;
ROE CORPORATIONS 1 through 20; DOE
EMPLOYEES 1 through 20; DOE
MANUFACTURERS 1 through 20; DOE 20
INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE
21 SUBCONTRACTORS 1 through 20,
inclusive

CASE NO. A-16-731244-C
DEPT. NO. XVIII

FOURTH AMENDED COMPLAINT

Defendants.

COME NOW, Plaintiffs ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased; ROBERT ANSARA, as Special Administrator of the Estate of MICHAEL SMITH Deceased and heir to the Estate of SHERRY LYNN CUNNISON, Deceased; and DEBORAH TAMANTINI individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased by through their attorneys BENJAMIN P. CLOWARD, ESQ. and for their causes of action against all Defendant's, and each of them, alleges as follows:

I.

PARTIES AND JURISDICTION

1. That at all times relevant to these proceedings, Plaintiff, ROBERT ANSARA the Special Administrator of the Estate of SHERRY LYNN CUNNISON, was and is a resident of Nevada.

2. That at all times relevant to these proceedings, SHERRY LYNN CUNNISON, deceased (hereinafter "SHERRY") was a resident of Clark County, Nevada.

3. That at all times relevant to these proceedings, Plaintiff, ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased was and is a resident of Clark County, Nevada.

4. That at all times relevant to these proceedings, Plaintiff, MICHAEL SMITH, Deceased heir to the Estate of SHERRY LYNN CUNNISON, was and is a resident of Nevada.

5. That at all times relevant to these proceedings, Plaintiff, ROBERT ANSARA the Special Administrator of the Estate of MICHAEL SMITH, Deceased, and heir to the Estate of SHERRY LYNN CUNNISON was and is a resident of Nevada.

1 6. That at all times relevant to these proceedings, Plaintiff, DEBORAH TAMANTINI
2 (hereinafter "DEBORAH") individually, and heir to the Estate of SHERRY LYNN CUNNISON, was
3 and is a resident of the state of California.

4
5 7. That at all times relevant hereto, upon information and belief, Defendant, FIRST
6 STREET FOR BOOMERS & BEYOND, INC., (hereinafter "FIRST STREET") is and was a foreign
7 Corporation doing business in the State of Nevada.

8 8. That at all times relevant hereto, upon information and belief, Defendant, AITHR
9 DEALER, INC., (hereinafter "AITHR") is and was a foreign Corporation doing business in the State
10 of Nevada.

11
12 9. That at all times relevant hereto, upon information and belief, Defendant HALE
13 BENTON, was and is a resident of Clark County, Nevada.

14 10. That at all times relevant hereto, upon information and belief, Defendant
15 HOMECLICK, LLC., (hereinafter "HOMECLICK") is and was a foreign Corporation doing business
16 in the State of Nevada,

17
18 11. That at all times relevant hereto, upon information and belief, Defendant JACUZZI
19 INC., doing business as JACUZZI LUXURY BATH (hereinafter "JACUZZI") is and was a foreign
20 Corporation doing business in Clark County, Nevada,

21
22 12. That at all times relevant hereto, upon information and belief, Defendant, BESTWAY
23 BUILDING & REMODELING, INC., a Domestic Limited-Liability Company; (hereinafter
24 "BESTWAY"), doing business in the State of Nevada.

25 13. At all times mentioned, Defendant WILLIAM BUDD was and is a resident of Clark
26 County, Nevada and was the business owner of Defendant, BUDD'S PLUMBING an unincorporated
27 business, (hereinafter "BUDD and BUDD'S PLUMBING"), and doing business in the State of
28 Nevada.

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II.

GENERAL FACTUAL ALLEGATIONS

14. At all times mentioned, Defendant FIRST STREET FOR BOOMERS & BEYOND, INC. upon information and belief was and is a retailer of home improvement products and unique gifts and the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence.

15. At all times mentioned Defendant, AITHR DEALER, INC., upon information and belief was and is was a general contractor supplier and/or installer of the Jacuzzi walk- in tub, being utilized by the deceased, SHERRY in her residence.

16. At all times mentioned Defendant, HALE BENTON was an employee of AITHR DEALER, INC., and upon information and belief was the consultant and/or sales person of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence.

17. At all times mentioned, Defendant, HOMECLICK, LLC., upon information and belief was an online retailer of home improvement products primarily as a retailer of bath and kitchen products and the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence.

18. That Defendant JACUZZI INC. doing business as JACUZZI LUXURY BATH through its subsidiaries, upon information and belief was a global manufacturer and distributor of branded bath and plumbing products for the residential, commercial and institutional markets. These include but are not limited to whirlpool baths, spas, showers, sanitary ware and bathtubs, as well as professional grade drainage, water control, commercial faucets and other plumbing products, and the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being utilized by the deceased, SHERRY in her residence, and who marketed its product to the elderly and individuals who were overweight or had physical limitation.

1 19. At all times mentioned Defendant BESTWAY BUILDING & REMODELING, INC.,
2 was a general contractor and the manufacturer, supplier and/or installer of the Jacuzzi walk in tub,
3 being utilized by the deceased, SHERRY in her residence
4

5 20. That Defendant, WILLIAM BUDD, individually and as BUDDS PLUMBING upon
6 information and belief was the manufacturer, supplier and/or installer of the Jacuzzi walk-in tub, being
7 utilized by the deceased, SHERRY in her residence.

8 21. That the true names and capacities, whether individual, corporate, association or
9 otherwise of the Defendants, DOES 1 through 20 and/or ROE CORPORATIONS I through 20, and/or
10 DOE EMPLOYEES 1 through 20, and/or DOE MANUFACTURERS 1 through 20 and/or DOE
11 INSTALLERS 1 through 20, and/or DOE CONTRACTORS 1 through 20, and or ROE
12 SUBCONTRACTORS 1 through 20, inclusive, are unknown to Plaintiff, who therefore sues said
13 Defendants by such fictitious names. Plaintiff is informed and believes, and thereupon alleges, that
14 each of the Defendants designated herein as DOES and/or ROES is responsible in some manner for
15 the events and happenings herein referred to, and in some manner caused the injuries and damages
16 proximately thereby to the Plaintiff, as herein alleged; that the Plaintiff will ask leave of this Court to
17 amend this Complaint to insert the true names and capacities of said Defendants, DOES 1 through 20
18 and/or ROE CORPORATIONS 1 through 20, and/or DOE EMPLOYEES 1 through 20, and/or DOE
19 MANUFACTURERS 1 through 20 and/or DOE INSTALLERS 1 through 20, and/or DOE
20 CONTRACTORS 1 through 20, and or ROE SUBCONTRACTORS 1 through 20, inclusive, when the
21 same have been ascertained by Plaintiff, together with the appropriate charging allegations, and to join
22 such Defendants in this action.
23
24
25
26

27 22. That said DOE and ROE Defendants are the employees, manufacturers, designers,
28 component part manufacturers, installers, owners, distributors, repairers, maintainers, warned for use,
retailers, and/or warrantors of said defective product as set forth herein.

1 23. Plaintiff is informed and believes, and based upon such information and belief, alleges
2 that each of the Defendants herein designated as DOES and ROES are in some manner responsible for
3 the occurrences and injuries sustained and alleged herein.
4

5 24. Plaintiff is informed and believes and thereon alleges that at all relevant times herein
6 mentioned Defendants, and each of them, were the agents and/or servants and/or employees and/or
7 partners and/or joint venture partners and/or employers of the remaining Defendants and were acting
8 within the course and scope of such agency, employment, partnership or joint venture and with the
9 knowledge and consent of the remaining Defendants.
10

11 25. In October of 2013, SHERRY entered into a contract to for purchase and installation of
12 a Jacuzzi walk-in tub.

13 26. On January 27, 2014, the installation was completed and an installation checklist was
14 completed.
15

16 27. Just over 20 days later on or about February 19, 2014, deceased SHERRY was in the
17 Jacuzzi walk-in tub, when she fell down in the tub.

18 28. Because of the dangerous design of the tub, SHERRY was unable to stand back up.

19 29. Because of the dangerous design of the tub, SHERRY was unable to exit the tub.

20 30. SHERRY struggled valiantly for several days trying to get up or exit the tub, but could
21 not because the tub was so horribly designed.
22

23 31. On or about February 21, 2014 and after several unanswered telephone calls to the now
24 deceased SHERRY, a well check was performed to check on her, which revealed that she was trapped
25 inside the Jacuzzi walk-in tub and could neither get up nor exit the tub.
26

27 32. That SHERRY had been trapped in the Jacuzzi walk-in tub for at least forty-eighty (48)
28 hours.

1 33. That even the firefighters and help that arrived were unable to safely remove her from
2 the tub and broke her arm attempting to pull her up out of the tub.

3 34. Ultimately, because of the tub's horrible design preventing even trained emergency
4 personnel from safely removing SHERRY from the tub, the firefighters had to literally cut off the door
5 to remove SHERRY from the tub.
6

7 35. That SHERRY was transported immediately to Sunrise Hospital where even after
8 lifesaving measures were performed, SHERRY ultimately succumbed to her injuries and died.

9 36. That all the facts and circumstances that give rise to the subject lawsuit occurred in the
10 County of Clark, Nevada.
11

12 **FIRST CAUSE OF ACTION**
13 ***Negligence as to All Defendants***

14 37. That Plaintiffs incorporate by reference each and every allegation previously made in
15 this Complaint, as if fully set forth herein.

16 38. Defendants owed a duty to Plaintiffs, and others similarly situated, to ensure that their
17 product, and particularly the Jacuzzi walk-in tub was properly functioning and safe for use by the end
18 consumer.
19

20 39. Defendants, and each of them, while in the course and scope of their employment
21 and/or agency with other Defendants, negligently failed to failed to warn Plaintiff of safety hazards
22 which resulted in SHERRY'S injuries and resulting death.

23 40. Defendants, and each of them, knew or should have known that unreasonably
24 dangerous conditions existed with the Jacuzzi walk-in tub, being used by Plaintiff, namely the inability
25 to get back up or exit the tub if Plaintiff fell.
26
27
28

1 41. Defendants owed a duty of due care to Plaintiffs, and others similarly situated, in the
2 design, testing, manufacture, installation, assembly, marketing, instructions for use and warnings for
3 the subject Jacuzzi walk-in tub.

4
5 42. Defendants breached their duty of due care by their negligent, careless, wanton,
6 willful, and indifferent failure to act including, but not limited to:

- 7 a. The negligent and improper design, testing, manufacture, installation assembly,
8 instructions for use and warnings for the Jacuzzi walk-in tub; and
9
10 b. The failure to provide adequate, accurate, and effective warnings and instructions to
11 owners, operators, and users of the subject Jacuzzi walk-in tub.

12 **SECOND CAUSE OF ACTION**
13 ***Strict Product Liability Defective Design,***
14 ***Manufacture and/or Failure to Warn***
 as to all Defendants

15 43. That Plaintiffs incorporate by reference each and every allegation previously made in
16 this Complaint, as if fully set forth herein.

17 44. That upon information and belief, Defendants, and/or DOE/ROE Defendants, are and
18 were a component part manufacturer, installer, owner, distributor, repairer, maintainer, warned for use,
19 retailer, and/or warrantor of said defective product as set forth herein.
20

21 45. That the true names and capacities, whether individual, corporate, agents, association or
22 otherwise of the DOE and ROE, are unknown to Plaintiff, who therefore sues said Defendants by such
23 fictitious names. Plaintiff is informed and believes, and thereupon alleges, that each of the Defendants
24 designated herein as DOE and/or ROE are responsible in some manner for the events and happenings
25 herein referred to, and in some manner caused the injuries and damages proximately thereby to the
26 Plaintiff as herein alleged; that the Plaintiff will ask leave of this court to amend this Complaint to
27 insert the true names and capacities of said DOE and/or ROE Defendants, when the same have been
28

1 ascertained by the Plaintiff, together with appropriate charging allegations, and to join such Defendants
2 in this action.

3 46. That said DOE and ROE Defendants are the manufacturers, designers, component part
4 manufacturers, installers, owners, distributors, repairers, maintainers, retailers, warned for use,
5 warrantors of said defective product as set forth herein.
6

7 47. That upon information and belief, Defendants, and each of them, sold the subject
8 product and failed to warn Plaintiffs of the hazards of the use of the subject product.
9

10 48. At the time of this incident, the product had a design and/or manufacturing defect that
11 rendered the product unreasonably dangerous and potentially deadly.

12 49. The defect, which rendered it unreasonably dangerous, existed at the time the subject
13 product and its component parts left the care, custody and control of the above named Defendants
14 and/or ROE/DOE Defendants
15

16 50. The Defendants and/or ROE/DOE Defendants, knew or should have known of the
17 subject product's defect which rendered it unreasonably dangerous at the time of placing the subject
18 product into the stream of commerce and failed to undertake measures to prohibit it from entering into
19 the stream of commerce and into the hands of users in the State of Nevada, including warnings of the
20 risks for product failure, proper use and maintenance of the product and proper inspection of the
21 product for potential hazards and/or defects.
22

23 51. That the subject product was defective due to Defendants, and each of their failure to
24 warn of the potential dangers associated with using said product.

25 52. That said product was defective due to a manufacturers' defect, design defect, or defect
26 due to lack of adequate warnings.
27

28 53. That the Jacuzzi walk-in tub was defective as a result of its design which rendered the
product unreasonably dangerous.

1 54. That the Jacuzzi walk-in tub was unreasonably dangerous and defective because it
2 lacked suitable and adequate warnings concerning its safe and proper use which rendered the product
3 unreasonably dangerous.

4
5 55. That the Jacuzzi walk-in tub failed to perform in the manner reasonably expected in
6 light of its nature and intended function, and was more dangerous than would be contemplated by the
7 ordinary user, including SHERRY having the ordinary knowledge available in the community, which
8 rendered the product unreasonably dangerous.

9
10 56. That Defendants, and each of their failure to warn was a proximate cause of
11 SHERRY'S injuries and death.

12 57. That said product's manufacturing and/or design defect was the proximate cause of
13 SHERRY'S injuries and resulting death.

14 58. The Defendants and/or DOE/ROE Defendant' conduct was the direct and proximate
15 cause of SHERRY'S injuries and damages.

16
17 59. The Defendants and/or DOE/ROE Defendants are strictly liable to the Plaintiffs jointly
18 and severally for the damages they have sustained.

19 60. That Plaintiffs have been forced to retain the service of an attorney to represent them in
20 this action, and as such is entitled to reasonable attorney's fees and litigation costs.

21
22 **THIRD CAUSE OF ACTION**

23 ***Breach of Express Warranties as to as to Jacuzzi Inc., doing business as Jacuzzi Luxury Bath,***
24 ***First Street for Boomers & Beyond, Inc., AITHR Dealer, Inc., and Homeclick, LLC***

25 61. That Plaintiffs incorporate by reference each and every allegation previously made in
26 this Complaint, as if fully set forth herein.

27 62. Defendants JACUZZI INC., doing business as JACUZZI LUXURY BATH, FIRST
28 STREET FOR BOOMERS & BEYOND, INC., AITHR DEALER, INC., and HOMECCLICK, LLC,

1 and/or ROE/DOE Defendants, expressly warranted that the walk-in bathtub was free from defects and
2 was safe for use.

3 63. Defendants breached the express warranties, and these breaches of warranty were the
4 proximate and legal cause of the failure of the walk-in bathtub.
5

6 64. Plaintiffs sustained injuries and damages as a result of the Defendants' breach.

7 **FOURTH CAUSE OF ACTION**

8 ***Breach of Implied Warranty of Fitness for a Particular Purpose as to as to Jacuzzi Inc.,***
9 ***doing business as Jacuzzi Luxury Bath, First Street for Boomers & Beyond, Inc., AITHR***
10 ***Dealer, Inc., and Homeclick, LLC***

11 65. That Plaintiffs incorporate by reference each and every allegation previously made in
12 this Complaint, as if fully set forth herein.

13 66. Defendants JACUZZI INC., doing business as JACUZZI LUXURY BATH, FIRST
14 STREET FOR BOOMERS & BEYOND, INC., AITHR DEALER, INC., and HOMECLICK, LLC,
15 and/or ROE/DOE Defendants, impliedly warranted that the walk-in bathtub was fit to be used for a
16 particular purpose and was safe for use.

17 67. Defendants had reason to know:

- 18 a. The particular purpose for which the walk-in bathtub would be used, and;
19
20 b. That SHERRY was relying on Defendants' skill and judgment to provide a suitable
21 product.

22 68. Defendants implicitly warranted that the walk-in bathtub was fit for the particular
23 purpose for which it was required and that it was safe for SHERRY to use in the manner
24 contemplated.
25

26 69. Defendants breached their implied warranty of fitness for a particular purpose, and the
27 breaches of warranty were the proximate and legal cause of the failure of the walk-in bathtub.

28 70. Plaintiffs sustained injuries and damages as a result of Defendants' breach.

1 **FIFTH CAUSE OF ACTION**

2 ***Breach of Implied Warranty of Merchantability as to as to Jacuzzi Inc., doing business***
3 ***as Jacuzzi Luxury Bath, First Street for Boomers & Beyond, Inc., AITHR Dealer, Inc.,***
4 ***and Homeclick, LLC***

5 71. That Plaintiffs incorporate by reference each and every allegation previously made in
6 this Complaint, as if fully set forth herein.

7 72. Defendants JACUZZI INC., doing business as JACUZZI LUXURY BATH, FIRST
8 STREET FOR BOOMERS & BEYOND, INC., AITHR DEALER, INC., and HOMECLICK, LLC,
9 and/or ROE/DOE Defendants, breached the implied warranty of merchantability, and their breach of
10 warranty was the proximate and legal cause of the failure of the walk-in bathtub.

11 73. Plaintiffs sustained injuries and damages as a result of Defendants' breach.

12 **PUNITIVE DAMAGES**

13 ***As to Jacuzzi Inc., doing business as Jacuzzi Luxury Bath,***
14 ***First Street for Boomers & Beyond, Inc., AITHR Dealer, Inc., and Homeclick, LLC***

15 74. That Plaintiffs incorporate by reference each and every allegation previously made in
16 this Complaint, as if fully set forth herein.

17 75. The Defendants JACUZZI INC., doing business as JACUZZI LUXURY BATH,
18 FIRST STREET FOR BOOMERS & BEYOND, INC., AITHR DEALER, INC., and HOMECLICK,
19 LLC, and/or ROE/DOE Defendants, knew or should have known of the subject product's defect which
20 rendered it unreasonably dangerous at the time of placing the subject product into the stream of
21 commerce and failed to undertake measures to prohibit it from entering into the stream of commerce
22 and into the hands of users in the State of Nevada, including warnings of the risks for product failure,
23 proper use and maintenance of the product and proper inspection of the product for potential hazards
24 and/or defects.
25
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1 76. Defendants conduct was wrongful because Defendants engaged in oppression, malice
2 and with a conscious disregard toward individuals like SHERRY who purchased and used the walk-in
3 bathtub and said conduct was despicable.

4 77. Specifically, Defendants market the walk-in tub to elderly individuals like SHERRY
5 who are weak, feeble and at a significant risk for falling down.

6 78. Defendants advertise that millions of Americans with mobility concerns know that
7 simply taking a bath can be a hazardous experience.

8 79. Defendants advertise that the solution to having a hazardous experience while taking a
9 bath is the Jacuzzi Walk-in Tub.

10 80. Defendants advertise that those who purchase a walk-in tub can feel safe and feel better
11 with every bath.

12 81. Defendants advertise that the Jacuzzi bathtub is an industry leader with regard to safety
13 of those who use the walk-in tub.

14 82. Defendants advertise that the unique bathtubs can make the user's experience a pain
15 and stress reducing pleasure.

16 83. Defendants advertise that the tall tub walls allow neck-deep immersion and the same
17 full body soak as in a natural hot spring or regular hot tub.

18 84. Defendants advertise that getting out of the tub is easy like getting out of a chair and
19 that it is nothing like climbing up from the bottom of the user's old tub.

20 85. Despite knowing that the users of the Jacuzzi walk-in bathtub are weak, feeble and at a
21 significant risk for falling down, Defendants did nothing to plan for the foreseeable event of having a
22 user like SHERRY fall down inside the walk-in bathtub.

23 86. Defendants did not use reasonable care in the design of the bathtub by providing a safe
24 way for users who fell while using the Jacuzzi walk-in bathtub to safely exit the bathtub.

1 87. Defendants knew of the heightened risk of having users like SHERRY fall down inside
2 the Jacuzzi walk-in bathtub, and have difficulties getting back up or out of the bathtub, but did nothing
3 to alleviate that risk.
4

5 88. Defendants knew of the heightened risk of having users like SHERRY fall down inside
6 the Jacuzzi walk-in bathtub, and have difficulties getting back up or out of the bathtub, but did nothing
7 to mitigate that risk.
8

9 89. Defendants knew of the heightened risk of having users like SHERRY fall down inside
10 the Jacuzzi walk-in bathtub, and have difficulties getting back up or out of the bathtub, but did nothing
11 to reduce that risk.
12

13 90. In fact, Defendants knew of alternative designs for a walk-in bathtub that were much
14 safer to users like SHERRY who were at a substantial risk of falling down inside the Jacuzzi walk-in
15 bathtub and were unable to get back up or out of the bathtub but chose against implementing
16 alternative designs for increased profitability.
17

18 91. Because of Defendants conscious choices to put profits before safety, the Jacuzzi walk-
19 in bathtub is a deathtrap for nearly any elderly person who happens to fall down inside the bathtub
20 because there are no grab bars positioned in a way that someone can get back up if they fall down and
21 because the door opens inward and traps the elderly person inside the bathtub.
22

23 WHEREFORE, Plaintiffs respectfully pray that Judgment be entered as set forth below
24

25 1. General damages for Plaintiffs pain, suffering, disfigurement, emotional distress, shock
26 and agony in an amount in excess of \$10,000.00;
27

28 2. Compensatory damages in an amount in excess of \$10,000.00;

 3. Special damages for Plaintiffs medical expenses in an amount to be proven at trial;

 4. For punitive damages in excess of \$10,000.00;

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the RICHARD HARRIS LAW FIRM and that on the 24 day of June 2017, I caused the foregoing **FOURTH AMENDED COMPLAINT** to be served as follows:

☒ pursuant to N.E.F.C.R. 9 by serving it via electronic service

to the attorneys listed below:

Michaele E. Stoberski, Esq.
Daniel Labounty, Esq.
OLSON, CANNON, GORMLEY
ANGULO & STOBERSKI
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
Attorneys for Defendant HOMECLICK, LLC

Elizabeth A. Skane, Esq.
Sarai L. Brown, Esq.
SKANE WILCOX LLP
1120 Town Center Drive, Suite 200
Las Vegas, NV 89144
*Attorneys for Defendant/CrossDefendant/
Cross-Claimant
BESTWAY BUILDING & REMODELING,
INC.*

Vaughn A. Crawford
Joshua D. Cools
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorneys for JACUZZI BRANDS, INC.

Scott R. Cook, Esq.
Jennifer L. Micheli, Esq.
KOLESAR & LEATHAM
400 South Rampart Blvd., Suite 400
Las Vegas, NV 89145
*Attorneys for Third-Party Defendant
THE CHICAGO FAUCET COMPANY*

Christopher J. Curtis, Esq.
Meghan M. Goodwin, Esq.
THORNDAL, ARMSTRONG, DELK,
BALKENBUSH & EISINGER
1100 East Bridger Ave
Las Vegas, NV 89101
*Attorneys for Defendants/Cross-Defendants
FIRST STREET FOR BOOMERS & BEYOND,
INC. and AITHR DEALER, INC.*

Joseph P. Garin, Esq.
LIPSON, NEILSON, COLE, SELZER & GARIN
9900 Covington Cross Drive, Suite 120
Las Vegas, NV 89144
*Attorneys for Defendants
WILLIAM BUDD and BUDDS PLUMBING*


An employee of RICHARD HARRIS LAW FIRM



**THORNDAL
ARMSTRONG**
DELK BALKENBUSH & EISINGER

A PROFESSIONAL CORPORATION

ATTORNEYS

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PETITIONERS' APPENDIX TAB 3

Heather S. Harris
CLERK OF THE COURT

ORDR

BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087

RICHARD HARRIS LAW FIRM

801 South Fourth Street
Las Vegas, Nevada 89101
Phone: (702) 444-4444
Fax: (702) 444-4455
E-Mail: Benjamin@RichardHarrisLaw.com
Attorneys for Plaintiffs

DISTRICT COURT

CLARK COUNTY, NEVADA

ROBERT ANSARA, as Special Administrator of the
Estate of SHERRY LYNN CUNNISON, Deceased;
ROBERT ANSARA, as Special Administrator of the
Estate of MICHAEL SMITH, Deceased heir to the
Estate of SHERRY LYNN CUNNISON, Deceased; and
DEBORAH TAMANTINI individually, and heir to the
Estate of SHERRY LYNN CUNNISON, Deceased,

Plaintiffs,

vs.

FIRST STREET FOR BOOMERS & BEYOND, INC.;
AITHR DEALER, INC.; HALE BENTON, Individually,
HOMECCLICK, LLC; JACUZZI INC., doing business as
JACUZZI LUXURY BATH; BESTWAY BUILDING &
REMODELING, INC.; WILLIAM BUDD, Individually
and as BUDDS PLUMBING; DOES 1 through 20; ROE
CORPORATIONS 1 through 20; DOE EMPLOYEES 1
through 20; DOE MANUFACTURERS 1 through 20;
DOE 20 INSTALLERS I through 20; DOE
CONTRACTORS 1 through 20; and DOE 21
SUBCONTRACTORS 1 through 20, inclusive,

Defendants.

AND ALL RELATED MATTERS

CASE NO.: A-16-731244-C
DEPT NO.: II

ORDER STRIKING
DEFENDANT JACUZZI INC.,
d/b/a JACUZZI LUXURY
BATH'S ANSWER AS TO
LIABILITY ONLY



On June 22, 2018, Plaintiffs ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased; ROBERT ANSARA, as Special Administrator of the Estate of MICHAEL SMITH, Deceased heir to the Estate of SHERRY LYNN CUNNISON, Deceased; and DEBORAH TAMANTINI individually (“**Plaintiffs**”), filed a Motion to Strike Defendant Jacuzzi, Inc. d/b/a Jacuzzi Luxury Bath’s (“**Jacuzzi**”) Answer for Repeated, Continuous and Blatant Discovery Abuses (“**Plaintiffs’ first Motion to Strike**”). This Court denied Plaintiffs’ first Motion to Strike.

On January 10, 2019, Plaintiffs filed a Renewed Motion to Strike Defendant Jacuzzi’s Answer for Repeated, Continuous and Blatant Discovery Abuses (“**Plaintiffs’ Renewed Motion to Strike**”). Plaintiffs’ Renewed Motion to Strike came on for hearing before this Honorable Court on February 4, 2019. This Court denied Plaintiffs’ Renewed Motion to Strike.

On May 15, 2019, Plaintiffs’ filed Plaintiffs’ Motion for Reconsideration re: Plaintiffs’ Renewed Motion to Strike Defendant Jacuzzi Inc.’s Answer (“**Plaintiffs’ Motion for Reconsideration**”). Plaintiffs’ Motion for Reconsideration came on for hearing before this Honorable Court on July 1, 2019. This Court ordered an evidentiary hearing on Plaintiffs’ Motion for Reconsideration. Prior to the Evidentiary Hearing, on August 9, 2019, Plaintiffs filed Plaintiffs’ Motion to Expand Scope of Evidentiary Hearing. On August 22, 2019, via Minute Order, this Court granted Plaintiffs’ Motion to Expand Scope of Evidentiary Hearing.

This Court conducted a four-day Evidentiary Hearing on Plaintiffs’ Motion for Reconsideration on September 16, 2019; September 17, 2019; September 18, 2019; and October 1, 2019. Plaintiffs submitted their Evidentiary Hearing Closing Brief on November 4, 2019. Jacuzzi submitted its Evidentiary Hearing Closing Brief on December 2, 2019. Plaintiffs submitted their Reply to Jacuzzi’s Evidentiary Hearing Closing Brief on December 31, 2019.

On March 5, 2020, after having carefully considered the evidence presented at the Evidentiary Hearing including the live testimony of witnesses, affidavits, admitted exhibits, and documents submitted to the Court for *in camera* inspection; having carefully considered the parties’ Evidentiary Hearing Closing Briefs (including all appendices and exhibits thereto); having carefully considered Plaintiffs’ Motion for Reconsideration and Motion to Expand Scope



1 of Evidentiary Hearing, the Oppositions thereto, and the oral arguments of the parties on such
2 motions; and having also considered the prior pleadings and papers on file in this case,¹ the Court
3 issued a minute order setting forth certain findings and sanctions against Jacuzzi and asked
4 Plaintiffs to prepare a final Order for the Court’s consideration.

5 On May 19, 2020, Plaintiffs submitted a proposed Order. On May 22, 2020, Jacuzzi
6 Objected to the proposed Order and moved the Court “to establish the limited extent of the waiver
7 that would attend any second phase of the evidentiary proceeding” so that Jacuzzi could “make
8 an informed decision as to whether to proceed with a second phase.” On June 29, 2020, the Court
9 temporarily stayed the sanctions against Jacuzzi and Ordered that the evidentiary hearing be
10 reopened for Jacuzzi to present evidence of the “advice of counsel” defense. The Court set aside
11 dates in September, October and November to allow this evidence presentation with the
12 presentation to begin on September 22, 2020. On September 18, 2020, Jacuzzi filed a notice of
13 waiver indicating that it was electing not to proceed with a second phase. On September 22,
14 2020, the parties appeared before the Court and the Court ordered the parties to appear on October
15 5, 2020, to discuss any remaining issues with respect to Plaintiffs’ proposed Order. On October
16 5, 2020, the Court heard additional argument by the parties and Ordered Plaintiffs to submit a
17 revised order that contained specific additional findings by October 9, 2020.

18 After full, thorough, and careful consideration, good cause appearing, the Court makes
19 the following Findings of Fact and Conclusions of Law. The Court substantially adopts the
20 factual and legal analysis presented by Plaintiffs in their Evidentiary Hearing Closing Brief (filed
21 Nov. 4, 2019) and their Reply in Support of Evidentiary Closing Brief (filed Dec. 31, 2019). All
22 findings of fact described herein are supported by substantial evidence.

23 **I. STANDARD OF REVIEW**

24 In reaching this decision, the Court applied the factors outlined in Young v. Johnny

25 _____
26 ¹ The Court notes that, in reaching this decision, the Court analyzed voluminous documentary evidence, numerous
27 prior pleadings, numerous prior hearing transcripts, extensive written discovery (and responses thereto), deposition
28 notices (and amendments thereto), deposition transcripts, *in camera* inspection of voluminous email
communications, four days of live testimony, extensive briefing, and all other evidence and argument presented by
the parties throughout these proceedings. Any lack of specificity in this Order shall not be construed as an omission
of consideration by the Court.



1 Ribeiro Bldg., Inc., 106 Nev. 88 (1990), and its progeny. Under Young, this Court has discretion
2 to impose any sanctions that it deems are appropriate. In fact, in Young, the Nevada Supreme
3 Court noted that “[e]ven if [the Nevada Supreme Court] would not have imposed such sanctions
4 in the first instance, we will not substitute our judgment for that of the district court.” Id.

5 In reviewing the evidence presented and relied upon in reaching this decision, the Court
6 applied the preponderance of the evidence standard. Additionally, the Court only applied Nevada
7 case law in reaching this decision. See, Pls.’ Evidentiary Hr’g Closing Br. at 34:15-38:22.

8 **II. FINDINGS OF FACT**

9 This is a product liability case arising out of a February 19, 2014, incident which resulted
10 in the death of Sherry Cunnison (“**Sherry**”). Plaintiffs have alleged that Sherry purchased a
11 Jacuzzi Walk-In Tub to assist her in her bathing. The Walk-in Tub is a tub with a step-through
12 door in the sidewall and an integrated seat inside. Plaintiffs allege that on February 19, 2014,
13 Sherry was in her Jacuzzi Walk-in Tub. Plaintiffs allege that due to the defective design of the
14 tub, Sherry slipped off the seat while reaching for the tub controls and drain and became wedged
15 in such a way that she was unable to stand back up. Plaintiffs allege that Sherry was trapped in
16 the tub for over 3 days. Sherry was discovered trapped in the Jacuzzi walk-in tub. Plaintiffs
17 allege that Sherry was rushed to the hospital where she died a few days later of dehydration and
18 rhabdomyolysis. Plaintiffs allege that Sherry’s death was caused by the Walk-In Tub. Plaintiffs
19 allege that Jacuzzi knew that the Walk-In Tub presented a hazard to users like Sherry.

20 Plaintiffs filed their initial Complaint against Jacuzzi on February 3, 2016. The controlling
21 complaint is Plaintiffs’ Fourth Amended Complaint (“**Complaint**”) which was filed on June 21,
22 2017. Among other causes of action, Plaintiffs assert negligence and strict products liability
23 claims against Jacuzzi. As a product defect case, evidence of both prior or subsequent similar
24 incidents are relevant to whether the Walk-In Tub at issue was defective and whether Jacuzzi had
25 notice of any such defect. Additionally, customer complaints related to the alleged defects are
26 relevant.

27 This Order is the culmination of a long history of discovery disputes in this case involving
28 Plaintiffs’ legitimate efforts to discover evidence regarding other incidents involving Jacuzzi

1 walk-in tubs and other evidence relevant to Jacuzzi's knowledge of the dangerousness of its tubs.²
2 From the beginning of discovery, Jacuzzi failed to disclose such evidence in violation of the
3 mandatory disclosure requirements of NRCP 16.1, in numerous responses to Plaintiffs' written
4 discovery requests, and in deposition testimony. In fact, Jacuzzi ardently and zealously denied
5 that such evidence exists at all. Not only did Jacuzzi fail to produce the evidence, it consistently
6 misrepresented facts about its efforts to locate evidence in its responses (and amended responses)
7 to written discovery, in multiple briefs submitted to the Court, in oral argument before former
8 Discovery Commissioner Bulla ("**Commissioner Bulla**") and this Court, and in its Petition for
9 Writ filed in the Nevada Supreme Court.³

10 As discovery continued, the Plaintiffs and Jacuzzi became involved in numerous
11 discovery disputes before former Discovery Commissioner Bulla ("**Commissioner Bulla**") and
12 this Court. Ultimately, Jacuzzi was ordered to (1) produce information and documents pertaining
13 to incidents involving injury or death and (2) specifically search for such documents wherever
14 documents created in the ordinary course of business were stored, including but not limited to,
15 emails.

16 Jacuzzi violated these orders by failing to produce – and reasonably search for – relevant
17 documents that were in Jacuzzi's possession while, at the same time, explicitly representing to
18 Plaintiffs, the Discovery Commissioner, this Court, and the Nevada Supreme Court that all
19 relevant databases had been thoroughly and diligently searched and that all relevant documents
20 had been disclosed.⁴ On March 7, 2019, after over a year of discovery disputes and court
21 involvement, Jacuzzi revealed that it withheld evidence regarding a matter involving a person
22 dying after becoming stuck in a Jacuzzi tub. Based on this late disclosure, Plaintiffs requested an
23 evidentiary hearing which this Court granted. After this Court granted the evidentiary hearing,
24 Jacuzzi finally began producing hundreds of pages of evidence of other incidents involving
25

26 ² The Court adopts the stipulated Timeline of Events submitted to the Court as **Evidentiary Hr'g Ex. 198**.

27 ³ The specific misrepresentations found by the Court that have been made throughout this litigation are more fully
28 set forth and discussed in this Order in sections A through L below.

⁴ Again, the specific misrepresentations found by the Court are more fully set forth and discussed in sections A
through L below.

Jacuzzi walk-in tubs.⁵ The Court expanded the scope of the evidentiary hearing to determine whether sanctions against Jacuzzi are appropriate and necessary. Based on the following factual findings, the Court finds that striking Jacuzzi's Answer as to liability only is necessary and appropriate.

A. JACUZZI WILLFULLY & KNOWINGLY MISREPRESENTED FACTS IN RESPONSES TO PLAINTIFFS' WRITTEN DISCOVERY REQUESTS

From the beginning of discovery, Jacuzzi definitively and conclusively claimed there are no prior incidents. On May 1, 2017, Plaintiffs served their first set of Interrogatories⁶ and Requests for Production of Documents⁷ on Jacuzzi. Plaintiffs requested information on whether Jacuzzi had ever received notice of any bodily injury claims arising out of the use of a Jacuzzi walk-in tub. In its Answers to Interrogatories⁸ and Responses to RFPDs,⁹ Jacuzzi claimed to only be aware of two incidents nationwide. Coincidentally, the two incidents that Jacuzzi claimed to know about were the instant litigation and another case involving the Smith family (whom Plaintiffs' Counsel represents in an unrelated lawsuit against Jacuzzi). Jacuzzi did not disclose any other prior or subsequent incidents. Jacuzzi misrepresented the facts in its written discovery responses as was on full display at the evidentiary hearing when hundreds of pages of evidence was presented pertaining to a significant number of prior and subsequent incidents.¹⁰

B. JACUZZI WILLFULLY & KNOWINGLY MISREPRESENTED FACTS IN AMENDED RESPONSES TO PLAINTIFFS' MAY 1, 2017, INTERROGATORIES

Plaintiffs' Counsel, believing it odd that the only other incident that Jacuzzi knew about was the other incident where he was also plaintiff's counsel, met and conferred with Jacuzzi and challenged Jacuzzi's written discovery responses as not being full and complete. Jacuzzi

⁵ **Evidentiary Hr'g Ex. 199** is a "Master OSI (Other Similar Incidents) Summary" Excel sheet created by Plaintiffs which summarizes the contents of the relevant Jacuzzi disclosures. The Court has reviewed the Aff. of Catherine Barnhill (**Ex. 200**) and accepts that **Ex. 199** is an accurate summary of the documents it describes.

⁶ See, Pl. Tamantini's 1st Set of Interrog. to Def. Jacuzzi, served May 1, 2017, previously admitted as **Evidentiary Hr'g Ex. 207**.

⁷ See, Pl. Tamantini's 1st Set of Req. for Produc. of Doc. to Def. Jacuzzi, dated May 1, 2017, previously admitted as **Evidentiary Hr'g Ex. 208**.

⁸ See, Jacuzzi's First Resp. to Pl. Tamantini's 1st Set of Interrog., served June 19, 2017, previously admitted as **Evidentiary Hr'g Ex. 173**.

⁹ See, Jacuzzi's First Resp. to Pl. Tamantini's 1st Set of Req. for Produc. of Doc., served June 19, 2017, previously admitted as **Evidentiary Hr'g Ex. 172**.

¹⁰ See, fn 5, *supra*.

1 represented to Plaintiffs that it conducted another search of its databases to identify relevant
2 similar incidents. Then, Jacuzzi served Amended Responses to Interrogatories on December 8,
3 2017. The Amended Responses again stated that there were no prior incidents.¹¹ As was revealed
4 at the evidentiary hearing and proceedings leading up to that, Jacuzzi had misrepresented the facts
5 in its Amended Responses to Interrogatories.¹²

6 **C. JACUZZI WILLFULLY & KNOWINGLY MISREPRESENTED FACTS IN AN APRIL 23,**
7 **2018, LETTER TO PLAINTIFFS**

8 In February of 2018, still in disbelief that the only two families nationwide that had a
9 problem with Jacuzzi Walk-In tubs were coincidentally being represented by the same lawyers,
10 Plaintiffs again met and conferred with Jacuzzi and asked Jacuzzi to look again for all incidents.
11 Plaintiffs and Jacuzzi agreed upon twenty (20) search terms for Jacuzzi to utilize in its search.¹³
12 On April 23, 2018, Jacuzzi sent a letter to Plaintiffs claiming to have performed another search
13 utilizing the agreed-upon search terms. The letter stated: “[a]s agreed, Jacuzzi has performed a
14 search for prior incidents, using the search terms you proposed . . . [t]he search is now complete
15 and no responsive documents were discovered.”¹⁴ As was revealed at the evidentiary hearing and
16 proceedings leading up to that, Jacuzzi had misrepresented the facts in its April 23, 2018, letter
17 to Plaintiffs.¹⁵

18 **D. JACUZZI WILLFULLY & KNOWINGLY MISREPRESENTED FACTS IN SEVERAL**
19 **RULE 30(B)(6) DEPOSITIONS**

20 In addition to the written discovery, Jacuzzi’s NRCP 30(b)(6) witness, William Demeritt
21 (Director of Risk Management), steadfastly testified that there were no prior **or** subsequent
22 incidents.

23 **E. PLAINTIFFS FIRST MOTION TO STRIKE**

24 While Jacuzzi continued to deny the existence of other incidents, Plaintiffs independently

25 ¹¹ See, Jacuzzi’s Am. Resp. to Pl. Tamantini’s 1st Set of Interrog., served Dec. 8, 2017, previously admitted as **Evidentiary Hr’g Ex. 174**

26 ¹² See, fn 5, *supra*.

27 ¹³ See, Email correspondence between Joshua Cools, Esq. and Benjamin Cloward, Esq., Feb. 12, 14 & 15, 2018, previously admitted as **Evidentiary Hr’g Ex. 209**.

28 ¹⁴ See, Letter from Jacuzzi to Pls., Apr. 23, 2018, previously admitted as **Evidentiary Hr’g Ex. 210**. (emphasis added).

¹⁵ See, fn 5, *supra*.

1 discovered two subsequent incidents involving persons complaining of injuries from the use of a
2 Jacuzzi walk-in tub. Because Jacuzzi failed to disclose the two subsequent incidents via NRC
3 16.1 disclosures, responses to discovery requests, or deposition testimony, Plaintiffs filed a
4 Motion to Strike Defendant Jacuzzi's Answer on June 22, 2018.¹⁶

5 **F. JACUZZI MISREPRESENTED FACTS TO THE COURT IN FILED BRIEFS**

6 Even in the face of a motion to strike, Jacuzzi continued misrepresenting the facts to
7 Plaintiffs and began misrepresenting facts to the Court as well. In Plaintiffs' Motion to Strike
8 Jacuzzi's Answer, Plaintiffs argued that the undisclosed subsequent incidents were evidence of
9 Jacuzzi's bad faith discovery conduct and requested that the Court strike Jacuzzi's Answer.

10 On July 12, 2018, Jacuzzi filed an Opposition to Plaintiffs' (first) Motion to Strike
11 Jacuzzi's Answer. See, Pls.' Evidentiary Hr'g Closing Br. at 6:1-8:18. Jacuzzi affirmatively
12 stated, multiple times, that it had produced all relevant evidence related to prior incidents, that
13 there are no prior incidents, and that it had not withheld any evidence. Jacuzzi made the following
14 false statements to the Court:

- 15 • "In sum, **Jacuzzi has produced all relevant evidence related to other prior incidents.**"¹⁷
- 16 • "Furthermore, Plaintiffs state: 'At this point, it has become clear that Jacuzzi is
17 aware of prior similar incidents but has willingly withheld such evidence.' This
18 too is false. **There are no other prior incidents;** Jacuzzi has withheld
19 nothing."¹⁸
- 20 • "Jacuzzi's attorneys, in-house and outside counsel, oversaw the search and
21 analysis of documents as described in counsel's correspondence to Plaintiffs.
22 *See* April 23, 2018 letter from J. Cools to B. Cloward, attached as Exhibit F,
23 and Cools Decl. at ¶ 10, attached as Exhibit E. **Fundamentally, there were no**
24 **prior similar incidents to Jacuzzi's knowledge.** Neither Jacuzzi nor its
25 attorneys withheld any evidence."¹⁹
- 26 • "**Jacuzzi has consistently produced all prior incidents,** which are the only
27 documents relevant to Jacuzzi's notice—Plaintiffs' own articulated basis for
28 production."²⁰

16 See, Pls.' Mot. to Strike Def. Jacuzzi, Inc. d/b/a Jacuzzi Bath's Answer, **Evidentiary Hr'g Ex. 175.**

17 Id. at 7:21 (emphasis added).

18 Id. at 11:15-17 (emphasis added).

19 Id. at 12:9-13 (emphasis added).

20 Id. at 13:3-4 (emphasis added).

1 At the evidentiary hearing, and events preceding it, evidence of many, many prior
2 incidents in addition to many, many subsequent incidents was produced showing that in addition
3 to the Plaintiffs, now Jacuzzi was misrepresenting the facts to the Court.²¹

4 **G. THE JULY 20, 2018, HEARING AND ORDER**

5 The hearing on Plaintiffs' Motion to Strike Jacuzzi's Answer came on for hearing on July
6 20, 2018. At the hearing, Commissioner Bulla made her first ruling in this case regarding
7 Jacuzzi's production obligations. Up until that time, Jacuzzi took the position that only prior
8 incidents needed to be produced.²² At the hearing, Commissioner Bulla granted Plaintiffs
9 alternative relief and affirmatively, clearly, and unequivocally ordered Jacuzzi to produce
10 information for all accidents or incidents involving injury or death from 2008 to present.²³ There
11 was no limitation to "serious" or "significant" injuries. Instead, Jacuzzi was ordered to produce
12 information related to any type of injury – even a "pinched finger."²⁴ The Order required Jacuzzi
13 to produce such documents by August 17, 2018.²⁵ Additionally, there was no limitation to
14 "claims" or incidents where a customer was demanding remuneration or demanding that
15 something be done like a refund or removal of the tub as Jacuzzi's prior counsel Vaughn Crawford
16 later tried to claim. Commissioner Bulla continued the hearing to August 29, 2018.

17 Just five days after the hearing on Plaintiffs' Motion to Strike Jacuzzi's Answer, on July
18 25, 2018, Mr. Templer, Jacuzzi's in-house counsel, sent an email to the Director of Customer
19 Service, Kurt Bachmeyer, Regina Reyes, a customer service manager, William Demeritt, the
20 Vice-President and Risk Manager, and Jess Castillo, an individual in Information Technology
21 (with Anthony Lovallo, General Counsel copied).²⁶

22 In that email, Mr. Templer, in-house counsel for Jacuzzi, instructed all recipients to search

23 ²¹ See, fn 5, *supra*.

24 ²² The Court finds that Jacuzzi's argument that it was only required to produce prior incidents was a pre-textual
25 argument which Jacuzzi made to defend against Pls.' Mot. to Strike (which was based on subsequent incidents Pls.'
Counsel found).

26 ²³ See, Rep.'s Tr. of Hr'g, July 20, 2018, **Evidentiary Hr'g Ex. 177** at 9:21-24.

27 ²⁴ See, Rep.'s Tr. of Hr'g, July 20, 2018, **Evidentiary Hr'g Ex. 177** at 17:9-20.

28 ²⁵ Id.

²⁶ Email from Ron Templer, Esq. to Various Jacuzzi Employees, July 25, 2018, (produced to Pls. on Oct. 10, 2019)
attached as **Ex. 217 to Pls.' Evidentiary Hr'g Closing Br.**

1 for “[a]ll letters, emails, customer service/warranty entries and all other communications and
2 documents (written or electronic) that mention or refer to a personal injury sustained in a walk-in
3 tub from 1/1/2008 to the present.”²⁷ Additionally, in-house counsel, Mr. Templer, informed the
4 recipients that a proper search “require[d] a search of **all** databases (both current and old), **email**
5 and other potential locations where the information may be stored.”²⁸ Finally, the email revealed
6 that Jacuzzi knew full well the importance of the search and the consequences of not obeying the
7 Court order. In fact, Mr. Templer’s email ends with a bold, ALL CAPS warning stating the
8 importance of the search: **“THIS SEARCH AND PRODUCTION WAS ORDERED BY A
9 COURT, AND AS SUCH, NEEDS TO BE TIMELY AND COMPLETE, FAILURE TO
10 PROPERLY AND THOROUGHLY CONDUCT THE SEARCH AND PRODUCE ALL
11 REQUESTED INFORMATION WILL RESULT IN MAJOR ADVERSE
12 CONSEQUENCES TO THE COMPANY.”**²⁹

13 This search was never performed as Jacuzzi admitted for the first time at the evidentiary
14 hearing when Mr. Templer, in-house counsel, testified that *some* emails were searched, but not
15 all.³⁰

16 **H. JACUZZI MISREPRESENTED FACTS TO COMMISSIONER BULLA ON AUGUST 29,
2018**

17 At the continued hearing on Plaintiffs’ Motion to Strike, Jacuzzi made numerous
18 misrepresentations regarding its search efforts and the results of its search. Jacuzzi made the
19 following representations to the Court:

- 20 • “there were no prior incidents;”³¹
- 21 • “we ran a search based off of the parameters you had provided...and we identified
22 nothing...;”³²

23 ²⁷ Id.

24 ²⁸ Id.

25 ²⁹ Id.

26 ³⁰ See, Rep.’s Tr. of Evidentiary Hr’g, Day 2, **Ex. 202 to Pls.’ Evidentiary Hr’g Closing Br.** at 149:19-24.

27 Q: Remember I asked did Jacuzzi ever search these terms through email. Do you remember that? A: Yes.
28 Q: And you said no. A: I said some email searches were done. **It has not been run against the entire email
database.**

27 ³¹ See, Rep.’s Tr. of Hr’g, Aug. 29, 2018, previously admitted as **Evidentiary Hr’g Ex. 179** at 7:3-6 (emphasis
added).

28 ³² Id. at 2:18-3:3 (emphasis added).

- “...there’s nothing related...;”³³
- “We have searched and it’s Jacuzzi’s position that there are none.”³⁴

As was revealed at the evidentiary hearing and proceedings leading up to that, Jacuzzi’s representations to then-Commissioner Bulla were all false.³⁵ Jacuzzi had not in fact performed the search that Commissioner Bulla requested.³⁶

I. JACUZZI MISREPRESENTED FACTS IN THE MOTION FOR PROTECTIVE ORDER

After the July 20, 2018, hearing, Plaintiffs served additional written discovery requests. On September 13, 2018, Jacuzzi filed a Motion for Protective Order regarding Plaintiffs’ RFPDs in which Jacuzzi made similar misrepresentations that no other incidents existed and that Jacuzzi had complied with Commissioner Bulla’s order to conduct searches for relevant documents (i.e., “Jacuzzi has complied with this Court’s order and produced records **showing all incidents from 2008 to present;**” “- they did not contain any prior incidents of personal injury even remotely related to the claims.”).³⁷ The representations set forth in Jacuzzi’s Motion regarding other incidents were false.³⁸

J. THE SEPTEMBER 19, 2018, HEARING: JACUZZI MISREPRESENTED FACTS AND THE COURT’S ORDER

Jacuzzi’s Motion for Protective Order came on for hearing before Commissioner Bulla on September 19, 2018. At the hearing, Jacuzzi represented, in violation of Commissioner Bulla’s July 20, 2018, Order, that it performed a search and that there were no other incidents.³⁹

Nonetheless, Commissioner Bulla ordered Jacuzzi to conduct another search.⁴⁰ Commissioner Bulla ordered Jacuzzi to “double check” its databases and to “take a look again with fresh eyes.”⁴¹ Commissioner Bulla also ordered Jacuzzi to search for all documents prepared

³³ Id. at 7:7-10 (emphasis added).

³⁴ Id. at 10:8-10; See also, Joshua Cools, Esq. Mem. to Disc. Commissioner Bulla, Oct. 12, 2018, previously admitted as **Evidentiary Hr’g Ex. 212** (“**there were no pre-incident relevant claims.**”) (emphasis added).

³⁵ See, fn 5, *supra*.

³⁶ See, fn 30, *supra*.

³⁷ See, Jacuzzi’s Mot. for Protective Order, filed Sept. 11, 2018, Pls. previously admitted as **Evidentiary Hr’g Ex. 211** (emphasis added).

³⁸ See, fn 5, *supra*.

³⁹ See, Rep.’s Tr. of Hr’g, Sept. 19, 2018, **Evidentiary Hr’g Ex. 180** at 7:7-10:15 (emphasis added).

⁴⁰ See, Rep.’s Tr. of Hr’g, Sept. 19, 2018, **Evidentiary Hr’g Ex. 180** at 6:6-18 (emphasis added).

⁴¹ Id. at 23:2-6.

1 in the ordinary course of business. Commissioner Bulla made it absolutely clear that the Court
2 was requiring Jacuzzi to search all potential sources of information, including Jacuzzi's email
3 systems.⁴² Notably, it was upon Jacuzzi's request for clarification wherein Jacuzzi raised
4 concerns about the potential burden for conducting a detailed search of emails when
5 Commissioner Bulla made it abundantly clear that emails were to be included and that Jacuzzi
6 was required to search all sources containing documents created in the ordinary course of
7 business.⁴³ In particular, the following exchange took place:

8 MR. COOLS: Can I just clarify something in regards to something like 43? All
9 documents relating to complaints made to you about your walk-in tubs from
January 1, 2012 to the present. . . .

10 MR. COOLS: **My question is obviously, you know, that could also pertain to**
11 **internal communications via email about that. Are you requiring us to also do**
12 **an ESI search and privilege log for all privileged communications about those**
claims as well?

13 DISCOVERY COMMISSIONER: **Ordinary course of business is what I'm**
14 **talking about. . . .**

15 DISCOVERY COMMISSIONER: Okay? **To the extent that the complaint gets**
16 **passed on to the lawyer and the lawyer is making opinions about it, I would**
say you need to do a privilege log.

17 MR. COOLS: That's just extremely costly and burdensome to have to go through
18 and do –

19 DISCOVERY COMMISSIONER: Okay, but we're limiting it to the time frame,
20 and this one is January 1st of 2012 and it deals with wrongful death or bodily injury.
21 So it wouldn't involve any of the warranties, it wouldn't involve anything where
there's no injury. How many claims could you possibly have?

22 MR. COOLS: **I'm just saying even doing the search based off of the ten or**
23 **eleven claims, subsequent claims that have been produced,** having to go through
24 and find all the custodians that may have touched that claim do a search, have
25 counsel review for privilege, those are just very burdensome and costly endeavors.
If that's part of your ruling, I understand.

26 DISCOVERY COMMISSIONER: Well, I don't want this to be overly burdensome
27 and costly for the defendant, but you cannot hide behind a privilege not to produce

28 ⁴² See, Rep.'s Tr. of Hr'g, Sept. 19, 2018, **Evidentiary Hr'g Ex. 180** at 25:2-26:24 (emphasis added).

⁴³ See, *Id.*



documents that were in the ordinary course of business. **And when you say something like that, it worries me.**

MR. COOLS: I don't know that -- frankly, Your Honor, I don't know that any exist. **I'm just saying I'm sure there's emails about it.** So, you know, if a claim came in and it's escalated or whatever -- . . .

MR. COOLS: I mean, these aren't about our claim, so we're getting into a granular level on these other claims that --

DISCOVERY COMMISSIONER: **All documents related to complaints made to you about your walk-in tubs from January 1st, 2012 to the present.** The complaints have to be about wrongful death or bodily injury. So any warranty claims, any non-injury claims are not part of this production. **Documents that are produced or prepared in the ordinary course of business have to be produced. If some point the claim goes to the legal department, you just need to identify the fact that any other documents are part of the legal -- it went to legal and are covered by work product privilege or whatever it is.** I mean, I don't know how many we're talking about. I don't expect you to do this for every warranty claim.⁴⁴

Jacuzzi was required to search all locations where documents made in the ordinary course of business were stored including emails. This search was never performed as Jacuzzi admitted for the first time at the evidentiary hearing when Mr. Templer testified that *some* emails were searched, but not all.⁴⁵

K. JACUZZI FULLY UNDERSTOOD THE SCOPE OF COMMISSIONER BULLA'S ORDERS

The Court finds that Commissioner Bulla's orders were clear and unambiguous. Additionally, the Court finds that Jacuzzi fully understood the Orders. The fact that Jacuzzi fully understood the Orders is illustrated in Jacuzzi's own statements to the Nevada Supreme Court and the internal email sent by Mr. Templer, in-house counsel.

Jacuzzi sought relief from the orders by filing a Petition for Writ of Prohibition with the Nevada Supreme Court. Jacuzzi's own description of the orders in its Petition shows that Jacuzzi fully understood the orders. Jacuzzi's Petition accurately describes the orders as follows:

[T]he district court ordered Jacuzzi to disclose *all* incidents of *any* bodily injury,

⁴⁴ See, *Id.*

⁴⁵ See, fn 30, *supra*, (A: I said some email searches were done. **It has not been run against the entire email database.**)



1 however slight, or however dissimilar, involving *any* model of Jacuzzi® walk-
2 in tub, regardless of how the injury occurred (i.e., if a consumer pinched a finger
3 closing the door of a walk-in-tub, it would be subject to the Court's order),
4 including the private identifying information of Jacuzzi's customers.⁴⁶

5 [T]he district court's order ... requires Jacuzzi to find and disclose *any* incident
6 involving *any* bodily injury at all, however slight, and involving any of Jacuzzi's
7 walk-in tubs, whether containing the same alleged defect or not, and regardless
8 of any similarity to plaintiffs' claims of defect.⁴⁷

9 Additionally, the email sent by Mr. Templer documents that Jacuzzi fully understood the
10 importance of complying with Commissioner Bulla's order.⁴⁸

11 **L. JACUZZI MISREPRESENTED THE FACTS TO THE NEVADA SUPREME COURT**

12 Jacuzzi's Petition falsely stated: "[t]o date, Jacuzzi has identified and produced to
13 Plaintiffs all of the evidence in Jacuzzi's possession of other prior and subsequent incidents of
14 alleged bodily injury or death related to the Jacuzzi tub in question."⁴⁹ Jacuzzi's Petition also
15 falsely stated that Jacuzzi had "already produced the universe of possibly relevant other incidents
16 involving the tub in question."⁵⁰ Evidence produced prior to and at the evidentiary hearing
17 revealed that the statements to the Nevada Supreme Court were false.⁵¹ Further, in-house counsel
18 Mr. Templer's testimony at the evidentiary hearing reveals that Jacuzzi had not performed the
19 requisite searches to make such statements which were also false.⁵²

20 **M. PLAINTIFFS' RENEWED MOTION TO STRIKE**

21 In November of 2018, Jacuzzi and Defendant *firstSTREET* produced thousands of email
22 correspondence. Buried in the emails, Plaintiffs discovered a woman named Jerre Chopper who
23 made numerous complaints to Jacuzzi about the dangerousness of her walk-in tub. Plaintiffs filed
24 a Renewed Motion to Strike arguing that Jacuzzi withheld evidence regarding Ms. Chopper as
25 well as other evidence regarding customer complaints about the slipperiness of the tubs.

26 ⁴⁶ See, Jacuzzi's Writ of Prohibition, filed Dec. 7, 2018, **Evidentiary Hr'g Ex. 185** at 3-4.

27 ⁴⁷ *Id.* at 16.

28 ⁴⁸ See, fn 26, *supra* ("FAILURE TO PROPERLY AND THOROUGHLY CONDUCT THE SEARCH AND
PRODUCE ALL REQUESTED INFORMATION WILL RESULT IN MAJOR ADVERSE
CONSEQUENCES TO THE COMPANY.")

⁴⁹ See, Jacuzzi's Writ of Prohibition, filed Dec. 7, 2018, **Evidentiary Hr'g Ex. 185** at 16 (emphasis added).

⁵⁰ See, Jacuzzi's Writ of Prohibition, filed Dec. 10, 2018, **Evidentiary Hr'g Ex. 185** at 8, 13, 15, (emphasis added).

⁵¹ See, fn 5, *supra*.

⁵² See, fn 30, *supra*.



On March 4, 2019, the Court entered a *first* Minute Order setting an Evidentiary Hearing on the matter. The March 4, 2019, Minute Order also ordered the parties to identify, by Thursday, March 7, 2019, “[t]he names of any relevant customers of Jacuzzi/First Street that have died...”⁵³

On March 12, 2019, this Court issued a *second* Minute Order stating that the Court concluded that “neither Jacuzzi nor First Street engaged in any egregious bad faith conduct, or intentional violation of any discovery Order, or conduct intended to harm Plaintiff.”⁵⁴ Therefore, the Court vacated the previously scheduled Evidentiary Hearing. The *second* Minute Order was made before the Court appreciated that Jacuzzi had withheld the “Pullen Death” discussed below. Additionally, the *second* Minute Order was made before the Court held the evidentiary hearing where Jacuzzi’s misconduct was thoroughly documented over approximately four days.

N. JACUZZI VIOLATED THE JULY 20, 2018, ORDER

The Court finds that Jacuzzi violated the July 20, 2018, order as follows:

1. Plaintiffs’ Motion for Reconsideration: the Pullen Death

On March 7, 2019, in response to the Court’s March 4, 2019, Minute Order, Jacuzzi filed its “Brief Pursuant to the March 4, 2019, Minute Order” which revealed that Jacuzzi had been aware *since October 2018* of a death involving a person, Susan Pullen, “getting stuck” in a Jacuzzi walk-in tub (“Pullen Death”). Plaintiffs filed a Motion for Reconsideration arguing that Jacuzzi’s failure to disclose the Pullen Death until March 7, 2019, was a violation of Commissioner Bulla’s clear orders to produce all evidence of injury or death involving a Jacuzzi walk-in tub.⁵⁵ The hearing on Plaintiffs’ Motion for Reconsideration came on for hearing on July 1, 2019, and the Court ordered an evidentiary hearing to determine whether Jacuzzi wrongfully withheld the Pullen Death.

a. Jacuzzi Did in Fact Violate the July 20, 2018, Order by Withholding the Pullen Death

The Court expressly now finds that Jacuzzi willfully and wrongfully withheld the Pullen Death in violation of Commissioner Bulla and this Court’s Orders. On October 1, 2018, Robert

⁵³ See, Ex. 1 to Pls. Mot. for Reconsideration.

⁵⁴ See, Ex. 2 to Pls. Mot. for Reconsideration.

⁵⁵ See, Ex. 2 to Pls. Mot. for Reconsideration.

1 Pullen called Jacuzzi and informed Jacuzzi of his mother's death. Robert Pullen called Jacuzzi
2 again on October 30, 2018. The relevant Salesforce (Jacuzzi's Customer Relations Management
3 software) document states: "Customer wants to take legal action because he thinks the tub killed
4 his mom." At the evidentiary hearing, it was revealed that Jacuzzi's Corporate Counsel, Ron
5 Templer, was immediately made aware of the Pullen Death that same day.⁵⁶ Jacuzzi, in
6 consultation with its outside counsel, made the decision not to produce information pertaining to
7 the Pullen Death. The Court finds that Jacuzzi's failure to timely produce information pertaining
8 to the Pullen Death was a violation of Commissioner Bulla's July 20, 2018, and September 19,
9 2018, Orders.

10 Additionally, the Court rejects Jacuzzi's argument that it was not required to disclose the
11 Pullen Death because it was not a "claim." The Salesforce documents specifically state that
12 Robert Pullen "want[ed] to take legal action because he thinks the tub killed his mom." The Court
13 finds that Jacuzzi's narrow interpretation of the term "claim" was grossly unreasonable and in bad
14 faith. In a previous hearing on July 1, 2019, Jacuzzi's outside counsel, Vaughn Crawford, posited
15 that Jacuzzi's interpretation of the word "claim" was "a demand for remediation of some sort,
16 whether it's money, whether it's reimbursement..."⁵⁷ The fact that Robert Pullen advised Jacuzzi

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18 ⁵⁶ See, Rep.'s Tr. of Evidentiary Hr'g, Day 2, **Ex. 202 to Pls.' Evidentiary Hr'g Closing Br.** at 32:1-7.

19 Q: So when did you receive notice? Because no emails have been produced with the salesforce documents,
20 no emails from anybody internally have been produced in this case. So when did you receive notice that
21 this individual thinks the tub killed his mom?

22 A: The Pullen incident specific?

23 Q: Yeah.

24 A: October 30, 2018.

25 ⁵⁷ See, Hr'g Tr., July 1, 2019 at 51:12-52:11; see also generally, Id. at 54:13-22, 65:18-67:8.

26 THE COURT: Wait, hold on, hold on. How do you interpret the word claim? Does the individual calling
27 have to actually use the word claim or do they have to say I want money? What is it that the Pullen family
28 would have had to say for Jacuzzi or Jacuzzi's insured to believe that was a claim?

MR. CRAWFORD: Your Honor, I think a claim is a demand for remediation of some sort, whether it's
money, whether it's reimbursement, whether it's take my product back.

THE COURT: What was the substance of the communication here?

MR. CRAWFORD: With -- on the blood clot incident?

THE COURT: I mean, I'm sure the person wasn't calling up just to say, hey, my dad died, just wanted you
to know. Not a big deal, but just thought you might need to know that. Have a nice day. That wasn't what
was going on here, right?

1 that he wanted to take legal action undermines Jacuzzi's argument. Therefore, the Court rejects
2 Jacuzzi's argument that the Pullen Death was not a "claim."

3 **2. Jacuzzi Willfully Violated the July 20, 2018, Order to Produce**
4 **Documents Involving Personal Injury or Death**

5 After this Court ordered an evidentiary hearing, Jacuzzi finally began producing hundreds
6 of pages of documents containing evidence of both prior and subsequent incidents. On July 26,
7 2019, over a year after Commissioner Bulla's July 20, 2018, Order and the business day before
8 the deposition of Jacuzzi's Director of Customer Service, Kurt Bachmeyer; two Customer Service
9 Employees, Eda Rojas and Deborah Nuanes; and the assistant to Jacuzzi's Director of Customer
10 Service (Mr. Bachmeyer), Mayra Lopez; and three business days before the court-ordered
11 forensic computer search of Jacuzzi's Salesforce system, Jacuzzi served its Eighteenth
12 Supplemental NRCP 16.1 Disclosure. Jacuzzi's Eighteenth Supplement contained evidence of up
13 to forty-seven (47) prior and subsequent incidents⁵⁸ with forty-three (43) of those being prior to
14 the Cunnison incident.⁵⁹ On August 12, 2019, Jacuzzi served its Nineteenth Supplemental NRCP
15 16.1 Disclosure which contained three prior incidents and 31 subsequent incidents. Jacuzzi also
16 produced additional incidents on August 23, 2019, and August 27, 2019.⁶⁰

17 Jacuzzi's July 26, 2019; August 12, 2019; August 23, 2019; and August 27, 2019;
18 disclosures (collectively, "Jacuzzi's Late Disclosures") were a "document dump" of emails,
19 communications and previously undisclosed Salesforce entries which reference not only prior
20 customer complaints, but also reference prior incidents involving bodily injury.

21 The Court adopts Plaintiffs' Exhibit 205, which is a table summarizing the 15th, 18th,
22 19th, 22nd, and 23rd NRCP 16.1 Supplements.⁶¹ A sampling of the documents shows that Jacuzzi

23 MR. CRAWFORD: The substance of the claim, and again, I think 15 or 18 or 20 pages of those
24 communications have been turned over the Plaintiffs. The substance of the claim was that --

25 THE COURT: See, you just used the word claim. I'm sure that was a slip, but --

26 MR. CRAWFORD: You got me going. You got me going, Your Honor.

27 ⁵⁸ The Court adopts Pls.' use of the term "incident" to be synonymous with claims, occurrences, notices, episodes,
28 warnings, notifications, occasions, events, complaints or any other word that would cause Jacuzzi to know about a
defect in the walk-in tub.

⁵⁹ Notably, at this time, the case had a firm trial setting for Oct. 28, 2019.

⁶⁰ In Jacuzzi's 22nd and 23rd NRCP 16.1 Suppl.; see also, Pls.' Ex. 205 to Evidentiary Hr'g Closing Br.

⁶¹ See, Tables Summarizing Pertinent Doc. of Jacuzzi's 15th, 18th, 19th, 22nd, 23rd NRCP 16.1 Suppl., Pls.' Ex. 205 to

1 knew of customers who complained of the same risks that Plaintiffs allege caused Sherry's death.
2 For example, a December 27, 2013, email (prior to the Cunnison DOL), from one of Jacuzzi's
3 dealers/installers to Jacuzzi informed Jacuzzi about *frequent* customer complaints and referenced
4 injured customers. The email specifically referenced four customers who had slipped and two
5 who had seriously injured themselves:

6 Also he says the bottom of the tub is extremely slippery, he has slipped, and
7 also a friend has slipped in using it. We get this complaint a lot, we have two
8 customers right now that have injured themselves seriously and are
9 threatening law suits. We have sent out bath mats to put in the tub to three
other customers because they slipped and were afraid to use the tub.⁶²

10 A July 9, 2012, email chain (also prior to the Cunnison DOL), with the Subject "All
11 FirstStreet unresolved incidents" contained a reference to a customer with broken hips
12 complaining about the slipperiness and lack of adequate grab bars.⁶³ An April 9, 2013, email
13 chain (also prior to the Cunnison DOL) contained information about a customer named Donald
14 Raidt who called to complain that he slipped and fell and hurt his back. He informed Jacuzzi that
15 he is willing to get a lawyer if the tub is not taken out.⁶⁴ A December 2013 email (also prior to
16 the Cunnison DOL) stated "we have a big issue and . . . Due to the circumstances involved with
17 time line and slip injuries this needs to be settled..."⁶⁵ A June 2013, email chain (prior to
18 Cunnison DOL) with the Subject, "Service issues on 5230/5229" from Regina Reyes to Kurt
19 Bachmeyer referred to a customer I. Stoldt, who became "stuck in tub." ⁶⁶ The same email
20 mentioned David Greenwell, who slipped and became stuck in the footwell for two hours.⁶⁷ A
21 second email chain showed that Mr. Greenwell actually had to call the fire department to get
22 out.⁶⁸ Similarly, that same email references a customer "C. Lashinsky" whose partner slipped in
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24 **Evidentiary Hr'g Closing Br.**

25 ⁶² See, Evidentiary Hr'g Ex. 11 at JACUZZI005320 (emphasis added).

26 ⁶³ See, Evidentiary Hr'g Ex. 2 at JACUZZI005287.

27 ⁶⁴ See, Evidentiary Hr'g Ex. 8 at JACUZZI005367.

28 ⁶⁵ See, Evidentiary Hr'g Ex. 41 at JACUZZI005327 (emphasis added).

⁶⁶ See, Evidentiary Hr'g Ex. 10 at JACUZZI005374.

⁶⁷ Id.

⁶⁸ See, Id. at Jacuzzi005623.



1 the tub such that the customer “had to remove the door to get her out.”⁶⁹

2 The Court finds that these documents were relevant and discoverable documents which
3 should have been voluntarily disclosed pursuant to NRCP 16.1 and in response to Plaintiffs’
4 discovery requests. The Court finds that Jacuzzi did not timely disclose these documents.
5 Additionally, the Court finds that Jacuzzi repeatedly misrepresented to Plaintiffs, the Discovery
6 Commissioner, this Court, and the Nevada Supreme Court that these documents did not exist. By
7 not disclosing these documents by August 17, 2018, Jacuzzi violated Commissioner Bulla’s July
8 20, 2018, Order. Jacuzzi was in continuous violation of Court Orders with each misrepresentation
9 described herein.

10 **J. JACUZZI VIOLATED THE SEPTEMBER 19, 2018, ORDER TO SEARCH ALL**
11 **DOCUMENTS MADE IN THE ORDINARY COURSE OF BUSINESS**

12 In violation of Court orders, the Court finds that Jacuzzi did not search relevant emails.
13 Jacuzzi did not look with “fresh eyes.” Jacuzzi did not produce documents made in the ordinary
14 course of business. The Court finds that Jacuzzi knowingly and willingly failed to conduct an
15 adequate, reasonable search of its email systems.

16 At the Evidentiary Hearing Jacuzzi admitted for the first time that it had not, in fact,
17 obeyed Commissioner Bulla’s order when Mr. Templer, Jacuzzi’s in-house counsel, testified that
18 *some* emails were searched, but not all.⁷⁰ The Court rejects Mr. Templer’s testimony that Jacuzzi
19 thought that all relevant emails would be found in Jacuzzi’s KBM and Salesforce databases. See,
20 Pls.’ Evidentiary Hr’g Closing Br. at 23:13-29:17; see also, Pls.’ Reply Br. at 16:14-23:13; 32:3-
21 33:17. In direct violation of Commissioner Bulla’s order, the Court finds that Jacuzzi did not
22 search for all documents made in the ordinary course of business.

23 **1. Jacuzzi Violated Commissioner Bulla’s Order When It Lied in its**
24 **Responses to Plaintiffs’ Recent Written Discovery Requests**

25 At the September 19, 2018, hearing, Commissioner Bulla found that Plaintiffs’ RFPD 43
26 sought relevant information but was overbroad. Plaintiffs served an amended RFPD 43 on
27 November 29, 2018. Plaintiffs’ amended RFPD 43 was specifically limited to the scope ordered

28 ⁶⁹ Id.

⁷⁰ See, fn 30, *infra*.



1 by Commissioner Bulla:

2 **REQUEST NO. 43.**

3 ~~All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.~~

4 **All documents relating to complaints involving bodily injury or death made to You (directly or indirectly) about Your Walk-In Tubs. The scope of this Request is limited to incidents which occurred (or were alleged to have occurred) from 2008 to present.**

5 **Pursuant to the Discovery Commissioner's Report and Recommendations (as approved by the trial court), other than social security numbers, Your response to this request shall not redact the names, addresses, telephone numbers, or other contact information of customers who have made complaints or claims to Jacuzzi.**⁷¹

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10 By this point, Mr. Templer, in-house counsel, had already sent his July 25, 2019, email to Mr. Bachmeyer, Ms. Reyes, Mr. Demeritt, and Mr. Castillo instructing them to search all databases, including email. By this point, Mr. Templer, in-house counsel, had already attended a November 2, 2018, hearing when Commissioner Bulla noted that complaints could come directly from dealers to Jacuzzi and that those types of complaints must be found and disclosed. By this point, Jacuzzi had already filed its Petition for Writ acknowledging the scope of the court orders. Nonetheless, on January 9, 2019, Jacuzzi served its Response to Plaintiff Ansara's Amended RFPD 43. Jacuzzi's Response simply referred to the previously disclosed ten subsequent incident documents which Jacuzzi had already produced (in redacted form):

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19 **AMENDED REQUEST FOR PRODUCTION NO. 43:**

20 ~~All documents relating to complaints made to you about your Walk-In Tubs from January 1, 2012 to the present.~~

21 **All documents relating to complaints involving bodily injury or death made to You (directly or indirectly) about Your Walk-In Tubs. The scope of this Request is limited to incidents which occurred (or were alleged to have occurred) from 2008 to present.**

22 **Pursuant to the Discovery Commissioner's Report and Recommendations (as approved by the trial court), other than social security numbers, Your response to this request shall not redact the names, addresses, telephone numbers, or other contact information of customers who have made complaints or claims to Jacuzzi.**

23 **RESPONSE:**

24 Jacuzzi objects to this production request because it is overbroad

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28 ⁷¹ See, Pl. Ansara's Am. 2nd Set of Req. for Prod. of Doc. to Jacuzzi (strikethrough in original), served Nov. 29, 2018, Evidentiary Hr'g Ex. 184 at 13.

1 and unduly burdensome, because it requires production not limited in scope
2 to the subject Walk-In Bathtub or Plaintiffs' allegations. Jacuzzi objects to
3 this request as vague, ambiguous and seeking information that is irrelevant
4 to the subject matter of this action and not likely to lead to the discovery of
5 relevant or admissible evidence. Jacuzzi further objects because the
6 production seeks information protected from disclosure by the right of
7 privacy of third parties.

8 Jacuzzi refers Plaintiffs to the documents regarding other incidents
9 of personal injury or death in walk-in tubs from 2008 to present produced
10 in compliance with Discovery-Commissioner's direction at July 20, 2018
11 hearing produced to Plaintiffs on August 17, 2018, bates nos.
12 JACUZZI002912-002991. The production should not be regarded as a
13 waiver to the documents and information's relevance or admissibility.

14 Jacuzzi has provided redacted copies of the requested records, and
15 has a writ pending regarding the personal information of third parties.⁷²

16 Even though Commissioner Bulla had already ordered Jacuzzi to do more research, to
17 look at its systems with "fresh eyes,"⁷³ and to supplement its responses to RFPD 43,⁷⁴ Jacuzzi
18 still failed to identify and produce any of the documents produced nearly nine months later.
19 Instead, Jacuzzi affirmatively represented that the only documents regarding other incidents of
20 personal injury or death in walk-in tubs from 2008 to present were already produced. Jacuzzi did
21 not search relevant emails. The Court finds that Jacuzzi did not look with "fresh eyes." Jacuzzi
22 did not produce documents made in the ordinary course of business. Most troublesome, Jacuzzi
23 did not even produce the Pullen matter.⁷⁵

24 Rather than produce relevant evidence, Jacuzzi objected that the Request was overbroad
25 and unduly burdensome. Commissioner Bulla had already considered these objections and
26 ordered Plaintiffs to amend their Requests. Plaintiffs' Amended RFPD 43 is exactly within the
27 scope allowed by Commissioner Bulla. Jacuzzi also objected that the Request required the
28 production of private information of third parties. Again, Commissioner Bulla ruled that the

⁷² See, Jacuzzi's Resp. to Pl. Ansara's Am. 2nd Set of Req. for Prod. of Doc., served Jan. 9, 2019, **Evidentiary Hr'g Ex. 186** at 6-7, Resp. 43.

⁷³ See, Rep.'s Tr. of Hr'g, Sept. 19, 2018, **Evidentiary Hr'g Ex. 180** at 23:2-6.

⁷⁴ See, Rep.'s Tr. of Hr'g, Sept. 19, 2018, **Evidentiary Hr'g Ex. 180** at 13:24-14:1.

⁷⁵ Similarly, on Dec. 28, 2018, Jacuzzi served Suppl. Resp. to Pl. Tamantini's Interrog. No. 11, affirmatively representing that it was unaware of any prior incidents and that all subsequent incidents had already been produced. Again, Jacuzzi did not reveal the Pullen matter in this Response. Jacuzzi's Am. Resp. to Interrog. 11 was verified by William Demeritt. See, Jacuzzi's Suppl. Resp. to Pl. Tamantini's 1st Set of Interrog., at Resp. to Interrog. 11 at **Ex. 219 to Pls.' Evidentiary Hr'g Closing Br.**

1 productions would be subject to protective order and ruled that Jacuzzi could only redact social
2 security numbers. Not only were Commissioner Bulla's orders effective at the time they were
3 made, but this Court affirmed Commissioner Bulla's Report and Recommendations on November
4 5, 2018. Still, Jacuzzi refused to produce additional documents.⁷⁶

5 After over a year of EDCR 2.34 conferences, written discovery requests, five amended
6 deposition notices, six discovery motions, four discovery hearings, one conference call with
7 Commissioner Bulla, amended discovery requests, and a Petition to the Nevada Supreme Court,
8 Jacuzzi was fully aware of its disclosure obligations. Yet, on January 9, 2019, Jacuzzi violated
9 court orders in its Response to RFP 43 by untruthfully representing that all evidence within the
10 scope set by Commissioner Bulla and this Court had already been produced.

11 In sum, Jacuzzi willfully and repeatedly violated clear and unambiguous court orders even
12 though Jacuzzi fully understood the scope of the orders and its obligations under those orders.

13 **K. THE COURT BIFURCATED THE EVIDENTIARY HEARING TO GIVE JACUZZI AN**
14 **OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF AN "ADVICE OF**
15 **COUNSEL" DEFENSE**

16 The Court, recognizing the sanctity of the attorney-client privilege, decided to bifurcate
17 the evidentiary hearing into two phases. In the first phase, the Court would hear evidence and
18 determine whether sanctions were appropriate. If the Court did find that sanctions were
19 appropriate, the Court would give Jacuzzi the opportunity to waive the attorney client privilege
20 in order to present evidence in support of the "advice of counsel" defense in a second phase.

21 On March 5, 2020, the Court entered a Minute Order finding that "Jacuzzi willfully and
22 repeatedly violated the orders by failing to produce all discoverable documents and by failing to
23 conduct a reasonable search despite knowing how to do so. Jacuzzi's failure to act has irreparably
24 harmed Plaintiffs and extraordinary relief is necessary."⁷⁷

25 **L. JACUZZI DID NOT PRESENT ANY EVIDENCE TO SHOW THAT IT'S MISCONDUCT**
26 **WAS DUE TO ITS RELIANCE ON THE ADVICE OF ITS OUTSIDE COUNSEL**

27 On May 22, 2020, Jacuzzi filed a Motion to Clarify the Parameters of the Waiver of

28 ⁷⁶ See, Notice of Entry of Order Aff'g Disc. Commissioner's R. and R., Sept. 19, 2018, Hr'g, **Evidentiary Hr'g Ex. 183** at 14.

⁷⁷ See, Ct.'s Min. Order, Mar. 5, 2020.



1 Attorney-Client Privilege that Would be Required in Order to Present Evidence that it was Acting
2 on the Advice of Counsel. The Court heard Jacuzzi's Motion on June 29, 2020, and ruled that the
3 Court could not and would not determine the scope of the waiver of attorney-client privilege
4 without first hearing the evidence Jacuzzi elected to present.

5 On September 19, 2020, Jacuzzi filed a Notice of Waiver of Phase 2 Hearing and Request
6 to Have Phase 2 of Evidentiary Hearing Vacated.⁷⁸ Thus, Jacuzzi did not present any evidence to
7 support an "advice of counsel" defense and the Court hereby finds that Jacuzzi did not
8 demonstrate or establish that its misconduct was due to any reliance on advice of its outside
9 counsel.

10 **III. ANALYSIS OF THE YOUNG FACTORS**

11 **A. Degree of Willfulness of the Offending Party**

12 The Court finds that there is substantial evidence showing that Jacuzzi's violations were
13 knowing and willful and meant to harm Plaintiffs. The Discovery Commissioner's and this
14 Court's Orders were clear on the scope of productions required by Jacuzzi.

15 Jacuzzi has been in violation of a Court order requiring production of the documents at
16 issue since August 17, 2018, when Jacuzzi failed to produce the documents that are at issue now.
17 Jacuzzi continuously violated this order when it made disclosures without the documents at issue.
18 Jacuzzi also violated the order every occasion it misrepresented written discovery responses and
19 supplements thereto, filed briefs, made false statements in open court, made false statements in
20 written and oral communications to Plaintiffs' counsel, and made false statements in its Petition
21 to the Nevada Supreme Court that all relevant and discoverable documents had been found and
22 produced. See, Pls.' Evidentiary Hr'g Closing Br. at 39-48; Pls.' Reply at 38-39.

23 Jacuzzi willfully and wrongfully withheld evidence of the Pullen Death in violation of
24 multiple court orders (as discussed above). The Court rejects Jacuzzi's argument that it was not
25 required to disclose the Pullen Death because it was not a "claim." The Salesforce documents
26 specifically state that Robert Pullen "want[ed] to take legal action because he thinks the tub killed
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28 ⁷⁸ Jacuzzi's Notice of Waiver of Phase 2 Hr'g and Request to Have Phase 2 of Evidentiary Hr'g Vacated, filed Sept. 19, 2020.

1 his mom." The Court finds that Jacuzzi's narrow interpretation of the term "claim" was
2 unreasonable. The fact that Robert Pullen advised Jacuzzi that he wanted to take legal action
3 undermines Jacuzzi's argument. Therefore, the Court rejects Jacuzzi's pretextual argument that
4 the Pullen Death was not a "claim." See, Pls.' Evidentiary Hr'g Closing Br. at 14-17; Pls.' Reply
5 at 15:13-16:7.

6 Based on the Court's consideration of the testimony and inferences therefrom, the Court
7 concludes that Jacuzzi willfully and wrongfully violated court orders by failing to conduct a good
8 faith search of all its databases to locate and produce all documents relating to any bodily injury
9 involving Jacuzzi's walk-in tubs. Mr. Templer, Jacuzzi's in-house counsel, testified that some
10 emails were searched, but not all. ("I said some email searches were done. It has not been run
11 against the entire email database.")⁷⁹ The Court finds that Jacuzzi knew and understood how to
12 conduct a complete search of its databases but did not do so. See, Pls.' Evidentiary Hr'g Closing
13 Br. at 24:12-29:17; Pls.' Reply at 16:14-23:13.

14 The Court rejects Jacuzzi's assertion that Jacuzzi reasonably believed that all relevant
15 emails would be found in Jacuzzi's KBM and Salesforce databases. See, Pls.' Evidentiary Hr'g
16 Closing Br. at 23:13-29:17; see also, Pls.' Reply at 16:14-23:13; 32:3-33:17. Substantial evidence
17 supports the conclusion that Jacuzzi's argument here is pre-textual. At the Evidentiary Hearing,
18 Mr. Templer, in-house counsel. testified that in attempting to comply with Commissioner Bulla's
19 order, "the company did a search in a place that it's reasonably expected that type of information
20 to be maintained."⁸⁰ He testified that at the time that Jacuzzi performed its searches, it only
21 expected to find relevant documents in the KBM and Salesforce databases:

22 Q Well, let me ask you. Do you think it would be reasonably expected
23 to find issues with regard to this tub, and that the customer service director
24 would have information that's reasonably expected?

25 A Mr. Bachmeyer wasn't the customer service director at that time, he
26 was warranty, and at the time, again, in speaking with people, the
27 understanding was that the information that was requested, incidents
28 involving serious personal injury or death, should be within the KBM sales

⁷⁹ See, Rep.'s Tr. of Evidentiary Hr'g, Day 2, Ex. 202 to Pls.' Evidentiary Hr'g Closing Br. at 149:19-24.

⁸⁰ See, Id. at 136:22-24.



1 force customer service databases.⁸¹

2 Mr. Templer, in-house counsel, then justified Jacuzzi's failure to search Director of
3 Customer Service, Kurt Bachmeyer's, emails because he did not expect relevant information to
4 be found in employee emails:

5 Q And my question, Mr. Templer, is this very specific question. You
6 gave a limitation, you said, we did what we reasonably expected. We looked
7 into places that we reasonably expected. And my question was simply, do
8 you think, is it reasonably expected that the director of customer service
9 would have information responsive to what the Commissioner was
10 ordering?

11 A At the time I expected it to be in the customer service databases, not
12 in emails outside of those databases.⁸²

13 Jacuzzi argued that the recent disclosures containing Kurt Bachmeyer's and Audrey
14 Martinez's employee emails were innocently missed. The Court rejects this argument. First,
15 Commissioner Bulla specifically ordered Jacuzzi to search its emails when she ordered Jacuzzi
16 to review all documents made in the ordinary course of business. Second, a simple review of
17 "Email Recipients" column of Plaintiffs' demonstrative Exhibit 199 shows that Kurt Bachmeyer
18 (the Director of Customer Service), Audrey Martinez (Marketing Manager), Regina Reyes (a
19 Customer Service Manager), and other customer service department employees are consistently
20 listed as email recipients. Yet those are the emails that inexplicably were not searched.

21 Additionally, in-house counsel Mr. Templer's testimony is significantly undermined by
22 his very own email sent on July 25, 2018, where he specifically directed the email to the Director
23 of Customer Service, Kurt Bachmeyer; the Customer Service Manager, Regina Reyes; and
24 Director of Risk Management, William Demeritt – yet testified that their emails were not
25 searched.⁸³ His own email also instructed the recipients to search for "[a]ll letters, emails,
26 customer service/warranty entries and all other communications and documents (written or
27 electronic) that mention or refer to a personal injury sustained in a walk-in tub from 1/1/2008 to

28 ⁸¹ See, *Id.* at 137:7-14.

⁸² See, *Id.* at 137:15-22.

⁸³ Email from Ron Templer, Esq. to Various Jacuzzi Employees, July 25, 2018 (produced to Pls. on Oct. 10, 2019).
Ex. 217 to Pls.' Evidentiary Hr'g Closing Br.

1 the present.”⁸⁴ Yet no search of these very employees’ emails was conducted. Additionally, Mr.
2 Templer, in-house counsel, informed the recipients that a proper search “require[d] a search of
3 **all** databases (both current and old), email and other potential locations where the information
4 may be stored.”⁸⁵

5 Based on all evidence presented, the Court finds that Jacuzzi wrongfully and knowingly
6 withheld numerous documents relating to the “slipperiness” of the tubs even though it was clear
7 to this Court from the pleadings that slipperiness of the tubs has always been an issue in this case.
8 The Court finds that the "slipperiness" of the tubs has always been an issue in this case and rejects
9 Jacuzzi's argument to the contrary. To the extent that Jacuzzi’s Late Disclosures contained
10 information pertaining to the slipperiness of the tubs, such disclosures were untimely and were
11 wrongfully withheld in violation of the Court’s Orders. See, Pls.’ Reply at 21:3-22:17; 26:16-
12 29:2.

13 At the Evidentiary Hearing, he is the one person at Jacuzzi that worked with outside
14 counsel in responding to discovery.⁸⁶ Mr. Templer also testified that all productions were done
15 in conjunction with outside counsel and that all discovery decisions were jointly made, including
16 the decision to withhold the Pullen matter.⁸⁷ Therefore, Jacuzzi was directly involved in the

17 ⁸⁴ Id.

18 ⁸⁵ Id.

19 ⁸⁶ See, Id.

20 Q Well, I'm trying to get answers to questions about what Jacuzzi knew or didn't know. So
21 the particular question is if you, Mr. Templer, don't know, then who at Jacuzzi would
22 know?

23 A In regard to responding to a discovery request?

24 Q Yes.

25 A Nobody, it should be me.

26 Q So you're the only guy?

27 A I was the one that dealt with outside counsel in responding to discovery, if that's
28 what you're asking.

⁸⁷ See, Rep.’s Tr. of Evidentiary Hr’g Day 2, Ex. 203 to Pls.’ Evidentiary Hr’g Closing Br. at 45:2-46:9.

Q Ultimately, without getting into the -- I guess the substance of any communication, who
had the decision as to what documents to turnover or not to turnover? Was that Jacuzzi's
decision or was that Snell Wilmer and outside counsel's decision?



1 discovery abuses in this case. Based on the evidence presented, the Court finds that Jacuzzi's
2 conduct in willfully and wrongfully withholding documents that it had been repeatedly required
3 to produce was supervised and/or orchestrated by Jacuzzi's corporate counsel, Mr. Templer.

4 **B. Factor Two: Extent to which Non-Offending Party Would be Prejudiced by
a Lesser Sanction**

5 The prejudice to the Plaintiffs has been massive and irreversible. Should the Court enter
6 any less sanction, Plaintiffs would have to conduct follow up discovery to request additional
7 information pertaining to the newly disclosed incidents and then conduct new depositions of
8 persons found in Jacuzzi's Late Disclosures. Then, Plaintiffs would have to re-depose both
9 Jacuzzi and firstSTREET/AITHR's Rule 30(b)(6) witnesses regarding their knowledge of each
10 prior and subsequent incident. Plaintiffs were not given an opportunity to question Jacuzzi's
11 witnesses on perhaps the most critical issue in the case: Jacuzzi's prior knowledge. Jacuzzi's
12 piecemeal, "drip-drip-drip" style of production makes this Court extremely concerned that
13 Jacuzzi has still failed to produce all relevant documents. Plaintiffs have lost their fundamental
14 right to have their case heard expeditiously. See, Pls.' Evidentiary Hr'g Closing Br. at 48:22-
15 50:15. It is worth noting that given the target demographic of the Jacuzzi Walk-in Bathtub, some
16 of the people involved in other incidents have since passed away, thereby forever depriving
17 Plaintiffs of the testimony and evidence related to those incidents.

18
19
20 A All productions and discovery in the case has been in conjunction with outside counsel,
both Snell Wilmer and Weinberg Wheeler, depending on the timing.

21 Q Okay. So as I understand your response, the decision regarding the production of
22 documents was a jointly made decision between Jacuzzi and its retained counsel, true? . . .

23 THE WITNESS: I can't answer any more than I said it a minute ago, is that all discovery
24 responses were done in conjunction with outside counsel.

25 Q Okay. Was there ever, to your knowledge, a discovery response or -- and that could be
26 interrogatories, that could be -- that could be requests for production, that could be requests
27 for admissions, so any of the discovery responses, **was there ever a time that you recall
28 where it was not a collective decision?**

A **No.** I mean, I didn't -- or, I mean, the company, exclusively, did not serve any discovery
responses. All of them were served through counsel. . . . And to my knowledge and
recollection, **all discovery responses were discussed with the company before being
served.**



1 **C. Factor Three: Severity of the Sanction Relative to the Severity of the Discovery Abuse**

2 Jacuzzi's abuse of its discovery obligations was extensive, repetitive, and prolonged.
3 Jacuzzi explicitly misrepresented the quality and comprehensiveness of its discovery efforts in an
4 attempt to simply survive through each discovery dispute. Jacuzzi mislead Plaintiffs, the
5 Discovery Commissioner, the Court and the Nevada Supreme Court each time it claimed that all
6 relevant documents had been produced. Moreover, contrary to Jacuzzi's arguments, Jacuzzi's
7 misconduct was recalcitrant. Jacuzzi knowingly conducted invalid searches by failing to search
8 emails even though Jacuzzi understood the importance of searching them. Yet Jacuzzi
9 continuously lied about having disclosed all relevant documents knowing that it had not even
10 conducted a complete search of its own systems. Jacuzzi's misconduct is severe because it
11 prevented Plaintiffs from discovering evidence relevant to the crucial issues of this case:
12 defectiveness and notice. The sanction of striking Jacuzzi's Answer as to liability is
13 commensurate with the extent of Jacuzzi's severe abuse and is limited to that which is necessary
14 to remedy such abuse. See Pls.' Evidentiary Hr'g Closing Br. at 50:15-51:2.

15 **D. Factor Four: Whether any Evidence has Been Irreparably Lost**

16 Crucial evidence has been lost. Jacuzzi walk-in tubs are sold and marketed to the elderly.
17 In a case where similar incident witnesses are likely elderly persons, each day that passes results
18 in witness memories fading. Jacuzzi's Late Disclosures contained evidence of other customers
19 who slipped and fell in a Jacuzzi tub. Plaintiffs were deprived of the ability to discover if any of
20 those slip and falls did in fact result in injury. Due to Jacuzzi's discovery tactics, these elderly
21 witnesses' memories have been allowed to fade for years. Witnesses have disappeared and
22 memories have faded over the three years that Plaintiffs have been trying to obtain the information
23 at issue. Relevant companies, like other dealers who likely have knowledge about other similar
24 incidents – have gone out of business. See, Pls.' Evidentiary Hr'g Closing Br. at 51:3-52:3.

25 **E. Factor Five: Feasibility and Fairness of Alternative, Less Severe Sanctions**

26 This Court carefully considered the possible need to strike Jacuzzi's entire Answer and
27 enter default judgment. However, after careful consideration, this Court determined that the less
28 severe sanction of striking Jacuzzi's Answer as to liability only is the proper sanction. This



1 sanction is narrowly tailored to address the exact harm caused by Jacuzzi, i.e., Plaintiffs' inability
2 to conduct proper discovery. A less severe sanction – such as evidentiary presumptions – would
3 not eliminate or sufficiently mitigate the prejudice suffered by Plaintiffs. It would not be fair to
4 require Plaintiffs to expend additional time and resources to sift through Jacuzzi's disjointed,
5 misleading, and incomplete discovery to prepare for trial.

6 **6. Factor Six: Whether Sanctions Unfairly Operate to Penalize a Party for**
7 **Misconduct of His Attorney**

8 Based on the evidence presented, the Court finds that Jacuzzi was directly involved in its
9 discovery misconduct. Based on the evidence presented, the Court finds that Jacuzzi knew what
10 it was required to produce, knew how its document retention system worked, knew how to locate
11 the relevant documents, and knew that it was not too time-consuming or difficult to take steps to
12 obtain relevant documents. In addition, it was Jacuzzi's own witnesses in depositions, letters,
13 Affidavits, and interrogatory response verifications, by which Jacuzzi, not its outside counsel,
14 withheld relevant documents. The fact that Jacuzzi disclosed the documents at issue now shows
15 that Jacuzzi did have the ability to locate relevant documents. The evidence presented shows that
16 Jacuzzi did not undertake adequate efforts to locate and obtain the relevant documents.

17 Based on the evidence presented, the Court finds that Jacuzzi's in-house corporate
18 counsel, Mr. Templer, and other Jacuzzi managers were directly involved and knowledgeable
19 about the steps Jacuzzi took regarding its supposed efforts to locate and produce relevant
20 documents. Mr. Templer coordinated Jacuzzi's "efforts" to obtain relevant documents. Mr.
21 Templer involved Kurt Bachmeyer (Director of Customer Service), Regina Reyes (Customer
22 Service Manager), William Demeritt (Director of Risk Management), and Nicole Simmons (legal
23 department) in Jacuzzi's efforts. Mr. Templer also copied Jacuzzi's General Counsel, Anthony
24 Lovallo, in emails to Jacuzzi managers regarding Jacuzzi's search for documents. These people
25 were involved in Jacuzzi's searches and were aware of Jacuzzi's obligation to find all relevant
26 documents. See, Pls.' Evidentiary Hr'g Closing Br. at 27:1-29:7.

27 Because the evidence presented does show that Jacuzzi understood its discovery
28 obligations yet failed to disclose the evidence at issue, the Court finds that Jacuzzi waived the
"advice of counsel" defense by not presenting any evidence to support an "advice of counsel."

1 The Court notes that Jacuzzi's counsel objected to the conditions under which the Court was
2 permitting it to present an 'advice of counsel' defense.

3 **7. Factor Seven: The Need to Deter Both Parties and Future Litigants from**
4 **Similar Abuse**

5 The judicial system in America depends on honesty, good faith, and transparency, which
6 Jacuzzi lacked here. The extent of Jacuzzi's discovery abuse in this case is so massive that a
7 message has to be sent not only to Jacuzzi, but to the community as a whole, that concealing
8 evidence is abhorrent. The community must be assured that the rules of discovery and orders must
9 be followed. The community must be assured that the judicial system in America is not broken.
10 No party should be able to frustrate legitimate discovery by misrepresenting that good faith,
11 thorough discovery efforts were being undertaken when they were not. Jacuzzi has impaired the
12 adversarial system and must suffer the consequences – not Plaintiffs.

13 In sum, the Court finds that Commissioner Bulla's and this Court's orders were clear and
14 Jacuzzi fully understood them. Jacuzzi willfully and repeatedly violated the orders by failing to
15 produce all discoverable documents and by failing to conduct a reasonable search despite
16 knowing how to do so. Jacuzzi's failure to act has irreparably harmed Plaintiffs and extraordinary
17 relief is necessary.

18 **IV. CONCLUSIONS OF LAW**

19 The Court concludes that Jacuzzi intentionally, willfully, and wrongfully withheld
20 evidence that is relevant to crucial issues of Plaintiffs' case, i.e., whether the tub at issue is
21 defective and whether Jacuzzi was on notice of such defect. Jacuzzi's willful conduct unfairly,
22 significantly, and irreparably prejudiced Plaintiffs.

23 The Court concludes that following narrowly-tailored remedy ordered immediately below
24 is the least stringent remedy available to reverse the harm Jacuzzi caused to Plaintiffs:

25 **ORDER**

26 **IT IS HEREBY ORDERED** that Plaintiffs' Motion for Reconsideration re: Plaintiffs'
27 Renewed Motion to Strike Defendant Jacuzzi Inc.'s Answer is GRANTED. Defendant Jacuzzi,
28 Inc. d/b/a Jacuzzi Luxury Bath's Answer is stricken as to liability only. Liability is hereby
established as to Plaintiffs' claims against Jacuzzi for (1) negligence, (2) strict product liability,

1 (3) breach of express warranties, (4) breach of implied warranty of fitness for a particular purpose,
2 and (5) breach of implied warranty of merchantability. The only remaining issue to be tried as to
3 Jacuzzi is the nature and quantum of damages for which Jacuzzi is liable. Jacuzzi is precluded
4 from presenting any evidence to show that it is not liable for Plaintiffs' harms as to any of
5 Plaintiffs' causes of action against Jacuzzi.

6 **IT IS HEREBY ORDERED** that Plaintiffs are entitled to reasonable attorney's fees
7 incurred in all briefing and hearings conducted related to Plaintiffs' efforts to obtain the relevant
8 and Court-Ordered document productions. The matter of such fees shall be resolved at a hearing
9 on _____, 202__.

10 **IT IS HEREBY ORDERED** that the Court is deferring its decision regarding Plaintiffs'
11 additional requests for sanctions regarding various fees, motions in limine, and jury instructions
12 until after additional briefing and the oral argument on December 7, 2020.
Dated this 18th day of November, 2020



DISTRICT COURT JUDGE

BBB 1E4 CE68 4406
Richard F. Scotti
District Court Judge

15 Prepared and Submitted by:
16 **RICHARD HARRIS LAW FIRM**
17 /s/ Benjamin P. Cloward
18 BENJAMIN P. CLOWARD, ESQ.
19 Nevada Bar No. 11087
20 801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs



1 **CSERV**

2
3 **DISTRICT COURT**
4 **CLARK COUNTY, NEVADA**

5
6 Robert Ansara, Plaintiff(s)

CASE NO: A-16-731244-C

7 vs.

DEPT. NO. Department 2

8 First Street for Boomers &
9 Beyond Inc, Defendant(s)

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

12 This automated certificate of service was generated by the Eighth Judicial District
13 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 11/18/2020

15 "Meghan Goodwin, Esq." .

mgoodwin@thorndal.com

16 "Sarai L. Brown, Esq. " .

sbrown@skanewilcox.com

17 Ashley Scott-Johnson .

ascott-johnson@lipsonneilson.com

18 Benjamin Cloward .

Benjamin@richardharrislaw.com

19 Calendar .

calendar@thorndal.com

20 DOCKET .

docket_las@swlaw.com

21 Eric Tran .

etran@lipsonneilson.com

22 Jorge Moreno - Paralegal .

jmoreno@swlaw.com

23 Karen M. Berk .

kmb@thorndal.com

24 Kimberly Glad .

kglad@lipsonneilson.com

25 Lilia Ingleberger .

lingleberger@skanewilcox.com

1	Lorrie Johnson .	LDJ@thorndal.com
2	Stefanie Mitchell .	sdm@thorndal.com
3	Susana Nutt .	snutt@lipsonneilson.com
4	Vaughn A. Crawford .	vcrawford@swlaw.com
5	zdocteam .	zdocteam@richardharrislaw.com
6	Audra Bonney	abonney@wwhgd.com
7	D. Lee Roberts	lroberts@wwhgd.com
8	Kelly Pierce	kpierce@wwhgd.com
9	Raiza Anne Torrenueva	rtorrenueva@wwhgd.com
10	Philip Goodhart	png@thorndal.com
11	Michael Hetey	mch@thorndal.com
12	Daniel McCain	djm@thorndal.com
13	Morgan Petrelli	mpetrelli@swlaw.com
14	Abraham Smith	asmith@lrrc.com
15	Docket Docket	docket_las@swlaw.com
16	Jessie Helm	jhelm@lrrc.com
17	Charles Allen	callen@charlesallenlawfirm.com
18	Patti Pinotti	plp@thorndal.com
19	Lyndsey Luxford	lluxford@swlaw.com
20	Nicole Griffin	ngriffin@richardharrislaw.com
21	Brittany Llewellyn	bllewellyn@wwhgd.com
22	Vaughn Crawford	vcrawford@swlaw.com
23	Karen Haratani	kharatani@swlaw.com
24		
25		
26		
27		
28		

1	Ian Estrada	ian@richardharrislaw.com
2	Cat Barnhill	catherine@richardharrislaw.com
3	Barbara McCartney	bmccartney@swlaw.com
4	Jorge Moreno	jmoreno@swlaw.com
5	Hale Benton	halebenton@gmail.com
6	Daniel Polsenberg	dpolsenberg@lrrc.com
7	Joel Henriod	jhenriod@lrrc.com
8	Taylor Higgins	thiggins@swlaw.com
9	Flor Gonzalez-Pacheco	FGonzalez-Pacheco@wwhgd.com
10	Kelly Gaez	kgaez@wwhgd.com
11	Cynthia Kelley	ckelley@lrrc.com
12		
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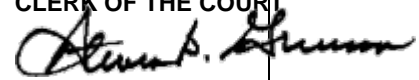
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ATTORNEYS

www.thorndal.com

PETITIONERS' APPENDIX TAB 4



1 **MSTR**

2 BENJAMIN P. CLOWARD, ESQ.

3 Nevada Bar No. 11087

4 **RICHARD HARRIS LAW FIRM**

5 801 South Fourth Street

6 Las Vegas, Nevada 89101

7 Phone: (702) 444-4444

8 Fax: (702) 444-4455

9 E-Mail: Benjamin@RichardHarrisLaw.com

10 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 ROBERT ANSARA, as Special Administrator of the
14 Estate of SHERRY LYNN CUNNISON, Deceased;
15 ROBERT ANSARA, as Special Administrator of the
16 Estate of MICHAEL SMITH, Deceased heir to the
17 Estate of SHERRY LYNN CUNNISON, Deceased; and
18 DEBORAH TAMANTINI individually, and heir to the
19 Estate of SHERRY LYNN CUNNISON, Deceased,

20 Plaintiffs,

21 vs.

22 FIRST STREET FOR BOOMERS & BEYOND, INC.;
23 AITHR DEALER, INC.; HALE BENTON, Individually,
24 HOMECCLICK, LLC; JACUZZI INC., doing business as
25 JACUZZI LUXURY BATH; BESTWAY BUILDING &
26 REMODELING, INC.; WILLIAM BUDD, Individually
27 and as BUDDS PLUMBING; DOES 1 through 20; ROE
28 CORPORATIONS 1 through 20; DOE EMPLOYEES 1
through 20; DOE MANUFACTURERS 1 through 20;
DOE 20 INSTALLERS I through 20; DOE
CONTRACTORS 1 through 20; and DOE 21
SUBCONTRACTORS 1 through 20, inclusive,

Defendants.

AND ALL RELATED MATTERS

CASE NO.: A-16-731244-C
DEPT NO.: II

Hearing Requested

PLAINTIFFS' RENEWED
MOTION TO STRIKE
DEFENDANT FIRST STREET
FOR BOOMERS & BEYOND,
INC.'S & AITHR DEALER,
INC.'S ANSWER TO
PLAINTIFFS' FOURTH
AMENDED COMPLAINT

1 Plaintiffs, by and through their attorney of record, BENJAMIN P. CLOWARD, ESQ. of
2 the RICHARD HARRIS LAW FIRM, hereby submits Plaintiffs' Renewed Motion to Strike
3 Defendant First Street For Boomers & Beyond, Inc.'s and AITHR Dealer, Inc.'s Answer to
4 Plaintiffs' Fourth Amended Complaint. This Motion is made and based on the papers and
5 pleadings on file herein, the following Memorandum of Points and Authorities, and the oral
6 argument of counsel at the hearing on this Motion.

7 DATED THIS 9th day of October, 2020.

8 **RICHARD HARRIS LAW FIRM**

9 /s/ Benjamin P. Cloward

10 BENJAMIN P. CLOWARD, ESQ.

11 Nevada Bar No. 11087

12 801 South Fourth Street

13 Las Vegas, Nevada 89101

14 *Attorney for Plaintiffs*

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MEMORANDUM OF POINTS AND AUTHORITIES

I. BRIEF INTRODUCTION

This Motion is brought for the following two reasons:

First: Plaintiffs have recently learned of additional¹ significant nondisclosures on the part of Defendants *firstSTREET* and AITHR (collectively “*firstSTREET*”).

Second: Plaintiffs want to provide the Court with an understanding as to why sanctions against both parties (the *firstSTREET* Defendants and Jacuzzi) are necessary to cure the prejudice caused by Defendants’ choices.

II. FIRSTSTREET AND AITHR HAVE WITHHELD CRITICAL INFORMATION

Just recently (within the last 3-4 months), Plaintiffs learned that *firstSTREET* has failed to turn over recordings of phone calls that Sherry Cunnison actually made herself to these Defendants prior to her death and that she informed them she was stuck once before she ultimately became stuck as a result of the incident in question.² Plaintiffs have obtained a copy of at least one of these phone call recordings and have reason to believe that other recordings do exist or at one point did exist. Based on the information detailed below, Sherry was actually stuck twice! Yet, Defendants withheld that information. Defendants also withheld recordings of hundreds of other customer complaints and hundreds of computer records documenting calls and complaints made by customers. This is not the first time *firstSTREET* has violated the Rules of Civil Procedure.

III. BRIEF HISTORY OF OTHER DISCOVERY ABUSES LEADING UP TO THIS

“Birds of the feather flock together”

--William Turner, 1545

¹ This recent discovery is in addition to years of nondisclosure and hiding the ball.

² These recordings are in addition to the thousands of documents that *firstSTREET* failed to turn over pursuant to written discovery requests and the *affirmative* obligations pursuant to NRCP 16.1 which is also documented below.

1 *firstSTREET* has protested loudly³ that it should not be prejudiced by any sanctions entered
2 against co-Defendant Jacuzzi arguing that it is innocent from discovery abuses and therefore any
3 juror inference of wrongdoing against it would be improper. *firstSTREET* **has** however engaged
4 in discovery abuses from the beginning and is as culpable – **if not more so** – than Jacuzzi as will
5 be shown below from very recent discoveries as well as reviewing in closer detail abuses which
6 came to light (but have yet to have been briefed) around the time of the evidentiary hearing and
7 are now being highlighted for the Court’s benefit.

8 Almost in a cryptic projection of its’ misdeeds *firstSTREET* has declared multiple times
9 that it cannot be the subject of sanctions because it has not violated any “Order of the Court.”⁴
10 These statements are peculiar – one would anticipate that a party would say instead – “we’ve
11 turned everything over,” and “we’ve played by the rules,” – rather, *firstSTREET* says *instead*, “we
12 are not in violation of any Order,” as if to tacitly acknowledge that it admits to withholding
13 evidence but it is justified because no Court has specifically ordered the production of the evidence
14 being withheld. While it is true that violating a Court order provides **one** avenue for sanctions and
15 was a focus with Jacuzzi – violation of an order is not the **only** avenue for sanctions. This argument
16 ignores the express obligations imposed by NRCP 16.1(e)(3),⁵ which plainly sets forth a separate
17 avenue of sanctions for violating the mandatory obligations imposed upon each party. NRCP
18 16.1(a)(1)(A) requires a party to disclose evidence, “without awaiting a discovery request . . .”

19 **A. Guild Survey Non-Disclosure**

20 *firstSTREET*/AITHR has received many of the identical discovery requests that have been
21 sent to Jacuzzi. It has been present at all hearings, including the multi-day evidentiary hearing and

22 ³ A line from the play Hamlet, “The lady doth protest too much, methinks,” comes to mind when *firstSTREET*’s
23 counsel repeatedly and forcefully argues that no Order has been violated.

24 ⁴ See, **Ex. 1**, Hr’g Tr., Sept. 22, 2020, at 33:25-34:7, “Those sanctions should not apply to my client, First Street. First
25 Street has never, ever had an order by the discovery commissioner, ordering First Street to produce certain documents
26 that we have not done. There is no order in place. And I think that was one of the big things that the Court looked at
in issuing its, I guess what we’ll call now, a preliminary order striking Jacuzzi’s answer, was that there was an order
from the discovery commissioner that the Court found Jacuzzi violated.” As the Court may recall, First Street’s counsel
made nearly the identical statements at the October 5, 2020 hearing.

27 ⁵ NRCP 16.1(e)(3) (**Failure or Refusal to Participate in Pretrial Discovery; Sanctions** . . . “[i]f an attorney fails to
28 reasonably comply with any provision of this rule **or** if an attorney or a party fails to comply with an order entered
under 16.3, the court, on motion or on its own, **should** impose upon a party or party’s attorney or both, appropriate
sanctions . . . including . . . **any of the sanctions available under Rules 37(b) and 37(f)**”).

is on notice of the Court's expectations of what **should** be turned over. Despite this, on several occasions it has been caught withholding evidence. As the Court may recall, thousands⁶ of pages were disclosed just days/weeks before the first evidentiary hearing via *firstSTREET*'s "Guild Survey" Production, wherein it produced for the first time complaints such as the following⁷:

NAME	COMPLAINT
Mr. Daniel & Donna Addario	<u>I am talking to a lawyer</u> about the tub itself, it doesn't have any traction on the bottom, because <u>both my husband and I have fallen down in the tub</u> . This whole thing with the company has been an ongoing struggle, from the day we called them to now. his has been the worst part, we are going to do a legal procedure against them but absolutely no communication. The entire marketing aspect was absolutely ridiculous. The tub is not safe for anyone over the age of 50.
Mr. Bill & Nancy Greenwood	They have slipped and fell in the tub. They can't open the door to the tub. They are afraid to go back in there now
Mr. William Schanel	We paid high for the thing for my stroke, and I only used once, the 1st time I tried to use by myself, I fell. I slipped and I fell. I couldn't even walk for 1 1/2 months. it was so slippery.
Mr. Luas & Effie Cantu	My wife fell twice in the tub because it is too slippery. She is afraid to get in there. They need to address this problem.
Ms. Pam Gordon	They need to put something on the bottom of the tub so that it will not be so slippery. The shower has one but the tub definitely needs one because if you are in there taking a shower or something there is a danger of slipping. There need to be a slip protectors.
Ms. Elizabeth Dismukes	The floor is dangerously slippery. That is a little scary.
Ms. Carol Amerine	They claimed that the flooring was slip-proof and it wasn't.
Mr. James & Donna Kennedy	Put something on the seat and the floor because we slip when we step in.
Mrs. Marianne Sandor	I slipped the first time and they sent a slip to prevent that from happening.

Further, *firstSTREET* has only turned over ONE year of Guild Surveys – just from 2015. This is troubling because in an email chain around June of **2013**, a *firstSTREET* employee, Norm Murdock, forwarded a complaint from one of the installers, wherein he unambiguously referenced

⁶ Depending on the formatting of the Excel spreadsheet the document production could be anywhere from between 550 pages to over 5,500 pages.

⁷ These are just a few select complaints to give the Court an idea of the type of information that *firstSTREET* withheld. There are hundreds of entries.

1 “things on a **guild survey**.”⁸ For the Court’s edification, a Guild Survey is a survey provided by a
2 company called GuildQuality. This company holds itself out as a company that has “[o]ver 15,000
3 construction and home improvement professionals [that] have trusted GuildQuality to gather
4 authentic customer feedback, helping them pinpoint opportunities to improve while building their
5 online reputation to attract new business.”⁹ This is a very specialized company that provides unique
6 and specific customer service follow up. The email from June of 2013 creates a strong inference
7 that Guild Surveys were being conducted as early as 2013; yet, only one year—2015—has been
8 produced – and nothing post-2015 has been produced either.

9 **B. Alert 911 Non-Disclosure**

10 *firstSTREET* was untruthful about the Alert 911 system associated with the tub. One of
11 the very first other similar incidents (OSIs) that Plaintiffs discovered¹⁰ was that of Ruth Curnutte,
12 who had independently contacted the Consumer Product Safety Commission about her tub, calling
13 it a deathtrap. She stated the following to the Consumer Product Safety Commission:

14 After 30 minutes the tub filled with 50 gal. of water. I opened the air jets at
15 my back. At that moment, I was thrushed forward, landed on my knees and
16 my head was underwater. I was in panic and tried frantically to get a hold of
the bar to pull myself up. I could have drowned. **The Alert 911 would have
been totally useless out of reach.** The Walk-In Tub is a death trap.¹¹

17 Based on the comment about the Alert 911, Plaintiffs sought to identify what Ms. Curnutte was
18 talking about. This was discussed with both lawyers for Jacuzzi and *firstSTREET* before the
19 Discovery Commissioner and in written discovery.¹² Plaintiffs diligently worked to ascertain what
20 the product was and who had provided it to Ms. Curnutte. Logically one would wonder why a
21 customer was provided or instructed to use an Alert 911 product in conjunction with using the tub
22 in the first place since the Defendants have claimed that the tub had no safety complaints and a
23 perfect track record. Neither Jacuzzi nor *firstSTREET* ever disclosed anything about the Alert 911

24 ⁸ See, **Ex. 2**, JACUZZI005311 (emphasis added).

25 ⁹ www.guildquality.com/product (last accessed Sept. 25, 2020).

26 ¹⁰ Notably the Curnutte incident was not disclosed by any Defendant – rather Plaintiffs found it through their own efforts.

27 ¹¹ See, **Ex. 3**, at JACUZZI002965.

28 ¹² See, **Ex. 4**, Jacuzzi’s Resp. to Pl. Ansara’s Fourth Req. for Produc. of Doc.; see, also, **Ex. 5**, Sept. 19, 2018, Hr’g Tr.

1 despite numerous requests by Plaintiffs, instead choosing to sit back and pretend as if they had
2 nothing to do with the product.

3 The day before Ms. Curnutte's deposition, the undersigned texted Mr. Goodhart asking the
4 following:

5 **Mr. Cloward --** "Hey I'm prepping for this drop [sic] tomorrow. Did you ever find
6 out from firstSTREET who was proving [sic] the 911 Alert that
7 Curnutte mentioned? Was that a Jacuzzi product? FS product? Or
8 something that was independent of both?"

9 **Mr. Goodhart --** "No on [sic] at FirstSTREET promoted that with WIT customers. It
10 might have been the installer? Or she could have just thought of
11 that."¹³

12 **Mr. Cloward --** "Are you sure?"¹⁴

13 **Mr. Goodhart --** "Yes. That is what Dave told me. But he can only speak about
14 AITHR. The independent dealers may have done some other things
15 that was not a part of the FirstSTREET program."¹⁵

16 *firstSTREET*, through its counsel, was provided with an opportunity to simply be truthful
17 about the origins of the Alert 911 product but clearly and unambiguously stated that it had nothing
18 to do with it and didn't know anything about it! Fortunately for Plaintiffs, when Ms. Curnutte was
19 deposed (in person), she had testified that she retained *all* packaging materials that came with the
20 Alert 911 product, and wouldn't you know --*firstSTREET* was all over the documentation, proving
21 *firstSTREET* flatly lied! Here is the paperwork that was included with the product¹⁶:

firstSTREET
for Boomers and Beyond

1998 Ruffin Mill Road
Colonial Heights, VA 23834

ACCOUNT #: 0018274019 ORD.#: P088560200015

BILL TO: RUTH CURNUTTE
17498 SE 110TH CT
SUMMERFIELD, FL 34491-8022

SHIP TO: RUTH CURNUTTE
17498 SE 110TH CT
SUMMERFIELD, FL 34491-8022

QTY	ITEM NO.	DESCRIPTION	UNIT PRICE	EXT. PRICE	WHSE. LOC.
1	16194	Guardian Alert 911 with Jacuzzi WIT	0.00	0.00	
1	16195	Literature Bundle for Guardian Alert 911			
1	16119	Guardian Alert 911			STAGING E1010224
The following items have been cancelled per your request					
1	16141	Chatterbug			
1	16197	Cordless Amplified Phone Extra Handset			

05/25/16 2DEFAULT00000000 05/26/16 0000441502 11 01

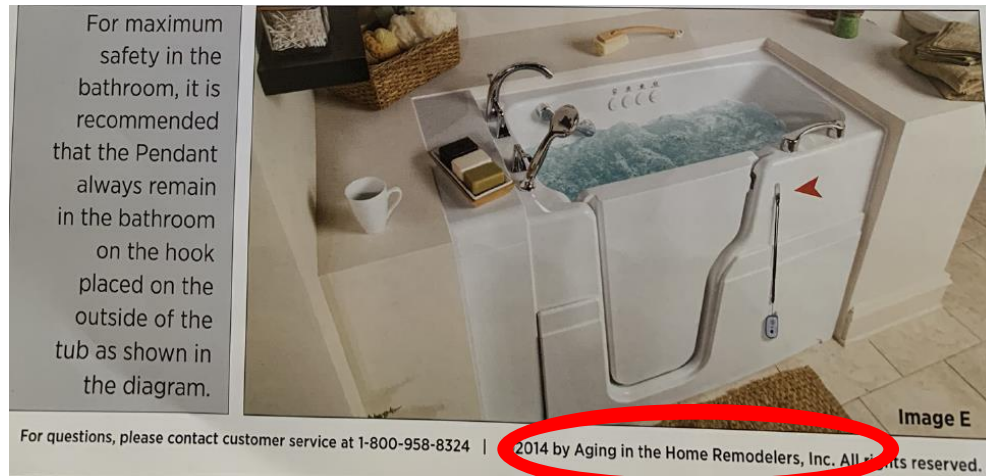
26 ¹³ See, Ex. 6, Text Messages Between Philip Goodhart, Esq. and Benjamin P. Cloward, Esq., Aug. 6, 2019.

27 ¹⁴ Id.

28 ¹⁵ Id.

¹⁶ See, Ex. 7, Ruth Curnutte Dep., at 14:6-13; see also, Ex. 4 to Curnutte Dep.

Further, the advertising materials that were provided with the Alert 911 product were prepared by *firstSTREET*/AITHR and would have had to have been approved by Jacuzzi, pursuant to the manufacturing agreement.¹⁷



As has been discussed in multiple prior motions,¹⁸ *firstSTREET* was not at liberty to simply send out advertising on its own – everything had to have been approved by Jacuzzi. This advertisement would have had to have been approved by Jacuzzi, pursuant to sworn testimony of Michael Dominguez, Jacuzzi’s Rule 30(b)(6) designees.¹⁹

Only after getting caught red-handed did *firstSTREET* now pivot and claim that this was simply a marketing tactic to increase sales. Regardless of when/why the advertisement was used, it is clearly relevant information and, for a time, customers were being instructed to use this safety device in conjunction with their use of the tub. Certainly, this information would be important for consideration by the experts – yet both parties sat silently until Plaintiffs were lucky enough to have flown to Florida to meet in person with Ms. Curnutte and that she had luckily retained all of the paperwork incriminating these parties! What if Plaintiffs had not elected to do the deposition in person and sit with her and see what documents she had retained? What if she would have

¹⁷ See, Id.

¹⁸ The Court may recall one of the things that led to early discoveries of untruth was when Rule 30(b)(6) deponent Mike Dominguez of Jacuzzi claimed that Jacuzzi had nothing to do with the advertising. After the deposition, *firstSTREET* outside counsel, Megan Goodwin contacted the undersigned and indicated that his testimony was not truthful and that *firstSTREET* had many, many emails documenting the back and forth between the two defendants. See, Pls.’ First Motion to Strike firstSTREET’s Answer, filed Jan. 16, 2019, for a full detailed outline of the history.

¹⁹ See, Ex. 8, Michael Dominguez Dep., Vol. II at 152:21-153:11.

1 thrown the paperwork away? What if she had passed away before being deposed? This is not how
2 discovery should work! The parties should not have to hope that if they depose every person that
3 comes up, they will be fortunate enough to “luck into” obtaining information. A party should be
4 able to send discovery and obtain truthful responses. Also, the attorneys should be able to trust
5 one another—and not view every statement with skepticism and doubt.

6 **C. Bathmat Non-Disclosure**

7 Another example of *firstSTREET*’s misrepresentations took place when similar incident
8 witness, Noreen Rouillard, was deposed. In response to then-Commissioner Bulla’s order asking
9 Jacuzzi to take another look at other incidents, Jacuzzi produced a Salesforce.com entry where
10 Donald Rouillard complained that his wife, “felt stuck and tried to crawl out of the tub but fell and
11 hurt herself.”²⁰ As a result of this other incident, Plaintiffs flew to Utah to depose Mrs. Rouillard.
12 At her deposition, she was asked if she ever had any problems slipping or losing her grip and she
13 testified no because she has “a pad with little bubbles.”²¹ Upon questioning by *firstSTREET*’s
14 lawyer she was asked if that was “something you bought for yourself or was that something that
15 was delivered with the tub?”²² She responded that “[i]t came with the tub.”²³

16 Upon further questioning by the undersigned, she could not remember whether the tub
17 came installed with the slip mat/pad or whether her husband had to install it nor could she
18 remember whether it was purchased directly from *firstSTREET* or whether it was purchased
19 somewhere else.²⁴ Based on Mrs. Rouillard’s initial testimony that the bathmat actually came with
20 the tub, Plaintiffs sought to learn whether the parties had, in fact, been sending bathmats to
21 customers as this would be an important fact, especially given the allegation that Sherry slipped,
22 which was what caused her to become stuck. Prior to the deposition of Mrs. Rouillard, neither
23 *firstSTREET* nor Jacuzzi had ever produced anything about a bathmat that was provided to
24 customers of the walk-in tubs. After the deposition, Plaintiffs sent written discovery to both

25 ²⁰ See, Ex. 9, Jacuzzi Case #00398408 (redacted) at JACUZZI002945.

26 ²¹ See, Ex. 10, Rouillard Dep. at 26:19-22.

27 ²² Id.

28 ²³ Id. (emphasis added).

²⁴ See, Ex. 10, Rouillard Dep. at 30:7-12, 30:18-22, 31:5-8.

1 AITHR and *firstSTREET*, specifically asking whether bathmats were ever provided to customers
2 and both parties provided boilerplate responses and referred Plaintiffs to their NRCP 16.1 Early
3 Case Conference Production and supplements thereto, which contained no references to any such
4 bathmats and were completely useless.²⁵

5 *firstSTREET*'s responses were on August 23, 2019, and never provided any meaningful
6 information but instead attempted to suggest that no bathmats were actually provided by the
7 Defendants to customers. Plaintiffs even sent RFAs asking the *firstSTREET* Defendants to admit
8 that they had in fact provided Mrs. Rouillard with her bathmat – both denied this.²⁶

9 But wouldn't you know that when the exact same discovery requests were sent to Jacuzzi
10 (just weeks before the evidentiary hearing and after Mr. Roberts became involved), Jacuzzi
11 admitted to sending bathmats as an available option since as early as 2016.²⁷

12 **RESPONSES TO REQUESTS FOR PRODUCTION OF DOCUMENTS**

13 **REQUEST NO. 129:**

14 Please produce all documents reflecting that you provided, offered, or sold, bathmats to
15 customers of any and all Jacuzzi walk-in tub produced from January 1, 2008 to present.

16 **RESPONSE:**

17 Jacuzzi objects to this request because it is vague, ambiguous, overbroad and unduly
18 burdensome, because it requires production not limited in scope to the subject Walk-In Bathtub
19 or Plaintiffs' allegations of defect, and imposes an undue burden on defendant that is not
20 commensurate with the information sought. The request seeks information that is not relevant to
21 the issues in this action and is not likely to lead to the discovery of relevant or admissible
22 evidence. Lastly, Jacuzzi objects to this request because it imposes an undue burden on
23 defendant that is not commensurate with the information sought: a search of Jacuzzi's electronic
24 mail accounts for the term "Kahuna" returned 33,998 potential results. Subject to and without
25 waiving said objections, and subject to the General Objections above, Jacuzzi responds as
26 follows: The model 5229 walk-in tub has been shipped with a bathmat for optional use since
27 approximately March of 2016. Responding further, please see: JACUZZI004727-005033,
28

25 ²⁵ See, Ex. 11, Pl. Ansara's 6th Set of Req. for Produc. of Doc. to *firstSTREET*, July 28, 2019; see also, Ex. 12, Pl. Ansara's 4th Set of Req. for Produc. of Doc. to AITHR, July 28, 2019.

26 ²⁶ See, Ex. 13, Pl. Cunnison's 3rd set of Req. to Admit to *firstSTREET*, July 28, 2019; see, also, Ex. 14, Pl. Ansara's 2nd set of Req. to Admit to AITHR, July 28, 2019.

27 ²⁷ See, Ex. 15, Jacuzzi's Resp. to Pl. Ansara's 8th Set of Req. for Produc. of Doc., Aug. 27, 2019

1 It is important to understand – *firstSTREET* is the marketing partner who makes the sale
2 to the customer. Any upgrades or options that are sold are done so **by *firstSTREET* Salespeople**.
3 Once the sale is made, AITHR or another dealer installs the tub. Jacuzzi is the manufacturer of
4 the tub and does no direct advertising or sales of the tub. Therefore, *firstSTREET*'s Response
5 regarding this product is false and misleading. *firstSTREET* would have known about this product
6 and should have provided information about it in response to the discovery requests.

7 Furthermore, despite having fought both Defendants for years regarding the slipperiness
8 issue, it was not until stumbling upon the bathmat at the Rouillard deposition that documents
9 regarding this matter were actually produced. In response to Plaintiffs' very specific discovery
10 requests, the following document was produced by Jacuzzi – not *firstSTREET* – which reveals
11 multiple anti-slip options that were available for use.²⁸

Jacuzzi **5229 Non Skid Options**

All Jacuzzi® Walk in Bathtubs and Showers exceed the voluntary American Society for Testing and Materials Standard Consumer Safety Specification for Slip-Resistant Bathing Facilities (ASTM F462 – 79)



#1 Recommended Option	#2 Recommended Option	#3 Recommended Option
What: LiquiGuard SolidStepCote Water-based coating that dries clear and creates non-slip texture	What: NuTeak Mat NuTeak synthetic mat, custom cut to fit tub floor	What: Vitrak Mat Suction cup backed traditional mat, custom cut to fit tub floor
Cost: +/- \$40 per application	Cost: +/- \$95	Cost: +/- \$25
Available: At once	Available: 4 weeks	Available: 6 months
Note: Field application only. Cannot be applied at the plant. Subjective application, unable to replicate in factory.	Note: Tested to exceed voluntary standard. Material appropriate for use in this application.	Challenge: If mat isn't removed often to dry, blisters in acrylic may occur. Requires testing and tooling development.

JACUZZI LUXURY BATH

24 This should have been produced not only by Jacuzzi but also by *firstSTREET* early on in
25 the litigation—not in the **fourth year**!

28 ²⁸ See, *Id.*; see also, Ex. 16, Email from Audrey Martinez re: Non Skid Options at REV JACUZZI006766 – 6767.

1 **IV. RECENT DISCOVERY OF SIGNIFICANT MISCONDUCT**

2 **A. Document Dump by Jacuzzi Highlights *firstSTREET*'s Misconduct**

3 The foregoing examples²⁹ are emblematic of every issue of significance that Plaintiffs have
4 attempted to uncover and of how the *firstSTREET* Defendants have conducted discovery in this
5 case. As the Court recalls, Plaintiffs also filed a motion to strike Defendants' answer back in
6 January of 2019. Naturally, the Court would hesitate to grant motions to strike against two separate
7 Defendants and would have reservations and doubts that two separate Defendants would be
8 engaged in such deviant misconduct. It is because of this that Plaintiffs have been hesitant to renew
9 the motion to strike against *firstSTREET*/AITHR, but when all of the recently produced
10 information is reviewed and with the newly discovered recordings of Sherry Cunnison, it is clear
11 that Defendants have worked (together) to minimize the safety issues with this product. There can
12 be no doubt that "birds of the feather flock together," and because the product defect defenses
13 applicable to both Jacuzzi and *firstSTREET* are identical, they both needed to
14 hide/minimize/confuse the issues with respect to prior and subsequent incidents so that it did not
15 appear as though the product was dangerous and so that there was no evidence either party had
16 notice of that dangerousness. This is why the discovery responses by the parties mirrored one
17 another all along. In 2017, Jacuzzi responded to Plaintiffs' request for any "notice, either verbal
18 or written, from or on behalf of any person claiming injury or damage from his use of a Jacuzzi
19 Walk-In-Tub" that it was "only aware of the claims of injury brought by Plaintiffs' attorney."³⁰

20 In 2018, after having the benefit of Jacuzzi NRCP 30(b)(6) William Demeritt's deposition
21 (May 24, 2018), wherein he was cross-examined on the other incident issue, *firstSTREET* had its
22 own opportunity to respond to the **identical** discovery request sent to Jacuzzi in 2017 and, wouldn't
23 you know, the response was nearly identical!³¹ *firstSTREET*'s discovery response should be
24

25 ²⁹ The foregoing three examples are just a few examples; Plaintiffs do not recount the other issues previously briefed,
26 i.e., Jerre Chopper, the advertising issues, the dealer nondisclosures and others. This type of gamesmanship has been
pervasive throughout the entire length of discovery.

27 ³⁰ See, Ex. 17, Def. Jacuzzi's Resp. to Pl. Tamantini's 1st Set of Interrog., June 19, 2017, at 10:2, 15:7-8; see also, Ex. 18,
Def. Jacuzzi's Am. Resp. to Pl. Tamantini's 1st Set of Interrog., Dec. 8, 2017, at 10:2, 15:14-15.

28 ³¹ See, Ex. 19, *firstSTREET*'s Resp. to Pl. Ansara's 1st Set of Interrog., Oct. 10, 2018:

viewed in light of the document dump just days before Director of Jacuzzi Customer Service, Kurt Bachmeyer's, deposition where thousands of documents set forth nearly **two hundred** other incidents. Most interesting is that a significant number of the damning documents were documents **that originated from within firstSTREET/AITHR** yet have never been produced by these Defendants! Further, the documentation itself, that was produced by Jacuzzi, shows that firstSTREET was on notice of at least **63 of them**! The following are just a few complaints:

Document	Complaint	Name	Date	Bates
Email from firstSTREET Vice-President Norm Murdock to multiple people at Jacuzzi	"I think the other <u>major issue</u> that <u>we see frequently</u> in the surveys are complaints that the seat & floor are too slippery..."		May 2014	Jacuzzi005652
Email from Melanie & Steve Borgia (Installers/Dealers) to Jacuzzi and firstSTREET Representative Simona Reid-Robertson	"She is a 84 year old lady. She went to take a bath and when she was done she could not drain her tub. She was stuck, she had to climb out. "	Irene Stoldt	June 2013	Jacuzzi005621; Jacuzzi005623; Jacuzzi005719; Jacuzzi005720; Jacuzzi006856; Jacuzzi006857
Email from Monique Trujillo of AITHR to several firstSTREET and Jacuzzi employees	"The customer called and is very upset because . . . he has almost fallen 3 times since having his new tub installed . . . This is a very serious safety concern and I really need someone to contact him ASAP . . . before he falls. "	Fred Fuchs	March 2013	Jacuzzi005465; Jacuzzi005466
Email from Jacuzzi	"he slipped and fell causing	Donald	April	Jacuzzi005367;

"11. Please state whether the Defendant FIRST STREET has ever received notice, either verbal or written, from or on behalf of any person claiming injury or damage from his use of a Jacuzzi Walk-in-Tub which is the subject of the litigation . . .

ANSWER: Objection. This Interrogatory is overbroad with respect to timeframe, subject matter, and the term "damage." This Answering Defendant has received notice of the following incidents:

1. Leonard Baize . . .
2. Mack Smith"

No other incidents were disclosed by firstSTREET. It is worth noting that of the two incidents that **were** disclosed, the Smith family was being represented by Sherry's lawyers, and her lawyers had discovered Leonard Baize through their own efforts. What this means is that firstSTREET provided Plaintiffs with nothing that Plaintiffs did not already know.

to Norm Murdock and Monique Trujillo of AITHR/firstSTREET	him to hurt his back . . . Is willing to get a lawyer if the tub is not taken out and he is refunded..."	Raidt	2013	Jacuzzi005715; Jacuzzi005716
Email from AITHR employee Ashley Davidson to Norm Murdock the Vice President of <i>firstSTREET</i>	"she slipped in her tub and hit her arm on the grab bar . . . "	Mrs. Borroz	Sept. 2013	Jacuzzi005315; Jacuzzi005438
"referred to AIHR , we do not support product."	"she slipped when trying to get out and almost drowned. " "She called in previously with the same problem."	Alice Roehl	Nov. 2017	Jacuzzi005838; Rev. Jacuzzi005938
Email copying <i>firstSTREET</i> employee, Simona Robertson	"he says the bottom of the tub is extremely slippery, he has slipped, and also a friend has slipped . . . [w]e get this complaint a lot, we have two customers right now that have injured themselves seriously and are threatening law suits. "	Mr. Flashberger	Dec. 2013	Jacuzzi005327; Jacuzzi005328

The foregoing table shows *firstSTREET* was on notice through its email and other systems of many of the other incidents – yet these Defendants have also failed to turn over this information despite having a front row seat to the multiple hearings and have also claimed in written discovery and oral deposition testimony that only a few incidents total existed!

B. Recent Discovery of Five9 and Ring Central Recordings and Lead Perfection Notes being Withheld

It should come as no surprise that within the last 3-4 months, Plaintiffs discovered that *firstSTREET* and AITHR have withheld even more evidence than Jacuzzi has withheld, including recordings of Sherry Cunnison herself!! Yes, the Court read that correctly—*firstSTREET* and AITHR have withheld recordings of phone calls (at least one which Plaintiffs provide here – but Plaintiffs believe there are more) that Sherry Cunnison made prior to getting stuck and dying.

In the summer and end of 2019, in preparation for and in response to the evidentiary hearing, a flurry of documents was disclosed. One of the documents that was produced by Jacuzzi

1 was an email from an individual named Nick Fawkes, **who was employed by**
2 *firstSTREET/AITHR*. In December of 2012, Mr. Fawkes sent an email to Regina Reyes at Jacuzzi
3 about the slipperiness issues stating, “Regina this is Xbox (sic) wanted to let you know that we
4 actually hear this complaint more and more often and the numbers are increasing installations. I
5 would highly recommend that we consider putting something a little bit more abrasive Not only
6 on the floor but also on the seats **as we have had customers call concerned that they slip off the**
7 **seat so wouldn’t be a bad thing to consider adding to the new job just my thoughts.”**³²

8 Plaintiffs have spent the past several months digesting the thousands of pages of additional
9 documents that have finally been produced in this case. Plaintiffs recently reached out to and spoke
10 with Mr. Fawkes and, shortly thereafter, flew to Denver in July to meet with him and were shocked
11 to learn just how much *firstSTREET/AITHR* has withheld. Mr. Fawkes was a manager who dealt
12 with installing the walk-in tubs after a sale was made. Specifically, he worked with
13 *firstSTREET/AITHR* Project Managers who were responsible to work with new customers
14 regarding their newly purchased tubs.³³ Mr. Fawkes also coordinated with construction crews who
15 would perform the actual installations.³⁴ Mr. Fawkes had direct communications with customers
16 and was routinely contacted by the construction crews as well.³⁵

17 Mr. Fawkes was personally aware of Sherry Cunnison’s incident and informed Plaintiffs
18 that Sherry was actually stuck *twice*!³⁶ Prior to becoming stuck as a result of the incident in
19 question, Ms. Cunnison called to report that she became stuck when her tub failed to drain and she
20 had to “dive underneath,” the water to get the drain to work.³⁷ This was corroborated by Annie
21 Doubek, who was a Project Manager.³⁸ Mr. Fawkes shared that *firstSTREET* has a Customer
22 Relationship Management (CRM) software program called Lead Perfection, which is used to
23

24 ³² See, **Ex. 20**, Email from Nick Fawkes to Regina Reyes re: Arnouville, Manuel – Serial #BDFDK9, Dec. 21, 2012,
at REV JACUZZI005959 (emphasis added).

25 ³³ See, **Ex. 21**, Aff. of Nick Fawkes, Sept. 22, 2020.

26 ³⁴ Id.

27 ³⁵ Id.

28 ³⁶ Id.

³⁷ Id.

³⁸ See, **Ex. 22**, Aff. of Annie Doubek, Sept. 10, 2020.

1 document calls between customers and *firstSTREET*.³⁹ Mr. Fawkes recalls reading the Lead
2 Perfection note that Annie Doubek created at the time Sherry was first stuck and that Ms. Doubek
3 noted that Sherry was overweight.⁴⁰ As a result, Nick coached Ms. Doubek about not putting so
4 much personal detail in the notes.⁴¹ Mr. Fawkes was provided a copy of the Lead Perfection notes
5 that *firstSTREET* produced in the instant litigation and did not see the additional detail that he
6 coached Annie about.⁴²

7 Mr. Fawkes also shared that customers routinely complained about safety aspects
8 associated with the tub, like the door being too narrow, the tub being too slippery, and the water
9 being too forceful among other things.⁴³ He told how he routinely conveyed these concerns to both
10 Jacuzzi and *firstSTREET*/AITHR.⁴⁴ One of the concerns that was seen often was the slipperiness
11 of the tub seat and floor.⁴⁵ He personally relayed that concern to *firstSTREET*/AITHR Vice-
12 President, Dave Modena.⁴⁶ In addition to relaying that concern to Mr. Modena, Mr. Fawkes also
13 recalls discussing that with Mark Gordon, the President and CEO of *firstSTREET*, via a conference
14 call around the same time he sent the email to Regina Reyes.⁴⁷ All of the customer complaints
15 regarding the various issues were entered into Lead Perfection.⁴⁸

16 Importantly, *firstSTREET*/AITHR actually recorded conversations between the customers
17 using two different programs—Ring Central and Five9.⁴⁹ Prior to ending his working relationship
18 with *firstSTREET*/AITHR, Mr. Fawkes obtained a copy of some of the calls made regarding the
19
20

21 ³⁹ See, Ex. 21, Aff. of Nick Fawkes, Sept. 22, 2020.

22 ⁴⁰ Id.

23 ⁴¹ Id.

24 ⁴² Id.; Below, Dave Modena’s testimony reveals that it might be a business practice to “scrub” information from the
25 computer system.

26 ⁴³ Id.

27 ⁴⁴ Id.

28 ⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

1 Cunnison matter.⁵⁰ Those calls were provided to Plaintiffs' counsel on July 8, 2020.⁵¹ The calls
2 are attached here as an exhibit.⁵² None of these calls were ever produced by *firstSTREET*, AITHR
3 or Jacuzzi in this litigation. Mr. Fawkes indicated that during the time he worked there, call
4 recordings were kept indefinitely.⁵³ He also explained that safety concerns were discussed on
5 nearly a weekly basis with Vice-President Dave Modena.⁵⁴ Project Manager, Annie Doubek
6 confirmed that the safety concerns were discussed during weekly meetings where the Supervisors
7 provided guidance to the Project Managers on how to respond to customers about the most
8 common types of complaints received.⁵⁵ None of these details have been provided by the
9 *firstSTREET* Defendants in the instant litigation.

10 From the very beginning *firstSTREET* has worked in a coordinated effort with Jacuzzi to
11 minimize the dangerousness of the product at issue. As has been detailed in prior motions, the
12 parties have only turned over evidence when forced to or when something "slipped through the
13 cracks," and was inadvertently disclosed. When Vice-President and NRCP 30(b)(6) designee,
14 Dave Modena, testified on behalf of *firstSTREET*, he indicated that there were only maybe "one
15 or two" injury-type claims. From the documents that were produced by Jacuzzi as summarized
16 above, we now know his testimony was completely false. As a refresher, Mr. Modena evasively
17 testified he was only aware of **one** significant incident involving a safety aspect of the Tub—the
18 instant case. A review of Mr. Modena's testimony reveals he downplayed safety-related issues:

19 Q How about we focus now on kind of the safety aspect of the tub. How often
20 and what types of claims are called in on that?

21 A **Very, very few** that I can -- **I just don't remember many at all**, honestly. I
22 don't -- I just -- the issues were normally the warranty or the installation. I just didn't
23 hear about those. There may -- **there may have been a couple** of -- I mean, there's
24 just -- that wasn't an occurrence that happened very often at all.

Q So if it -- I mean, if it didn't happen often at all, you would probably remember
the ones that did happen, right? They would kind of --

⁵⁰ Id.

⁵¹ Id.

⁵² See, Ex. 24, Recording of Sherry Cunnison's call.

⁵³ Id.

⁵⁴ Id.

⁵⁵ See, Ex. 22, Aff. of Annie Doubek, Sept. 10, 2020.

1 A You would think so.

2 Q So they didn't stand out when you --

3 A Well, I just -- I honestly just can't think of particular ones in general because it
4 just did not happen that -- I mean, you would have people raising concerns about
5 certain things, but an actual injury? I just don't -- I'm just not -- I can't recall. **I**
6 **don't remember incidents**, anything like this that come up to that point.

7 Q So is it fair to say that -- that the Cunnison case is the only incident you recall?

8 A To this level, for sure. But I -- I feel like there must have been a couple, but, as
9 honest I can be, I just don't recall incidents like this. I -- concerns -- you know,
10 people addressing maybe other concerns about their tub or something like that,
11 you'd get into those, but an actual injury? I don't -- I -- **I feel like there must have**
12 **been one or two**. I just -- I couldn't tell you who they were and when they were, if
13 it was before that point in time.⁵⁶

14 Mr. Modena testified that significant incidents did not occur often; yet, at the same time, he
15 testified that he could not recall the rare times that they did occur, which is counter-intuitive. Mr.
16 Modena went on to testify that he did not have information regarding any other lawsuits involving
17 *firstSTREET*:

18 Q Were you informed of, say, for instance, when a lawsuit is filed?

19 A Normally. Normally, I would have -- I would have known. I would -- normally
20 it would have come in. It would always go into our in-house legal counsel. That's
21 where it went first. And then typically our in-house counsel would approach me
22 with making sure we had all the information in our files and turned over to the right
23 people, so, normally, yes.

24 Q Okay. And is this the only -- the only case that First Street is aware of?

25 A I can't answer that, because, again, legal -- our in-house counsel would
26 probably be -- probably could answer that better than myself. I'm just not able
27 to tell you that there were two or three more that I can think of like this.⁵⁷

28 Mr. Modena could not answer the simple question of whether *firstSTREET* was aware of
any other lawsuits. He testified that *firstSTREET*'s General Counsel, Stacey Hackney, would have
more knowledge than he had. Thus, the undersigned requested to depose Ms. Hackney on this
topic. Instead, a recess was taken so that Counsel for *firstSTREET* and Ms. Hackney could re-
educate Mr. Modena on the topic of similar incidents:

Q Okay. Well, I'm entitled to have the most -- I guess, the information.

A Sure.

MR. CLOWARD: If you're relying on your memory, maybe what we could do is

⁵⁶ See, Ex. 23, David Modena Dep., Vol. I at 26:4-27:8.

⁵⁷ See, Id., Modena Dep. at 27:9-23.

1 take a break and have Ms. Hackney testify. Is that -- is that okay?

2 MR. GOODHART: Or I can -- we can take a break and I can re-educate my witness
on certain things.

3 MR. CLOWARD: I mean, that's -- if that's what's -- what's necessary.

4 MR. GOODHART: Yeah. That's fine with me.

5 MR. CLOWARD: It's a topic in the --

6 MR. GOODHART: I understand. I just have not been objecting and have not been
trying to coach the witness in any way, shape, or form. But you know as well as I
do, you know, sometimes memories fade and things like that, but I can certainly
have a discussion with Mr. Modena and

7 Ms. Hackney, and we can clear this up for you.

8 MR. CLOWARD: Yeah.

9 MR. GOODHART: **And just so I'm clear on your question, you're asking him
even up through to today --**

10 MR. CLOWARD: Yeah.

11 MR. GOODHART: -- **about any type of claims of any injuries that have taken
place --**

12 MR. CLOWARD: Yeah.

13 MR. GOODHART: -- in a Jacuzzi product?

14 MR. CLOWARD: Correct.

15 MR. GOODHART: Okay. All right. Why don't we take two minutes and we'll clear
it up for you.

16 MR. CLOWARD: Okay. Do you want me to leave or --

17 MR. GOODHART: No. We can just go out there.

18 MR. CLOWARD: Okay.

19 MR. GOODHART: That's fine. Thank you.

20 THE VIDEOGRAPHER: We are going off the record at 11:01 a.m.

21 (Recess from 11:01 a.m. to 11:07 a.m.)⁵⁸

22 After the recess, Mr. Modena testified that *firstSTREET* was aware of two other incidents:
23 conveniently, only the Smith and Baize cases (which Plaintiffs found independently of Jacuzzi or
24 *firstSTREET* and which had been disclosed by Plaintiffs months prior). However, in discussing
25 *firstSTREET*'s knowledge of the Smith and Baize cases, Mr. Modena revealed that he had, in fact,
26 reviewed notes regarding both the Smith and Baize cases recently **while preparing for his**
27 deposition:

28 Q So what other reasonably significant events are -- is First Street aware of?

A After the Cunnison is -- because I think I was working a little bit prior -- prior
to the Cunnison -- up to that point, I think I was more concerned about that, but --
in answering that, but there -- there had been two, one in Texas, Baez or something,
and I was -- I wasn't directly notified on that one, but eventually so -- and that went

⁵⁸ See, *Id.*, Modena Dep. at 27:24-29:10 (emphasis added).

1 to legal counsel, and -- not even sure that was an injury -- we're not sure that's even
2 an injury case.

3 The -- probably the more significant one is Max Smith, I believe, which is
4 in Georgia, and that was well after the fact, as well, so that was something that
5 would have gone to our legal counsel. First Street was notified and then, thus, I
6 would have been notified at that time.

7 Q Okay. So --

8 A Those are the two situations, which, one, we're not even sure was an injury
9 incident.

10 Q Okay. So it's fair to say you now recall, I guess, those -- those incidents. You
11 recall being told about those incidents at some point?

12 A Well, the one -- certainly the one in Georgia. That's probably the one that would
13 -- the more significant issue that was obviously an injury-related type issue. The
14 one in Texas, we weren't sure about, so to say I absolutely a hundred percent
15 remember that one, it sounds familiar. You know, it -- the -- I was -- **and I've**
16 **looked at it since then, too, since -- in prepping for this,** too, as well, and the
17 notes were even unclear on it, as well, so it was -- it's one that I could see if I was
18 notified of -- it was relatively unclear what had even happened so it --

19 **Q So you reviewed some notes about that prior to the deposition?**

20 **A We looked at it just recently.** I was -- this was just going through probably
21 those two situations and -- and, actually, our notes were relatively -- they were not
22 that forthcoming on what had actually happened.

23 Q Is there a reason you weren't able to recall reviewing those notes five minutes
24 ago?

25 A Well, I thought we were -- actually, I was going to bring that up, because that's
26 the Baez thing, the one -- that's -- because that is the one that I remember that,
27 **because I looked at it recently, but when I looked at the notes,** and -- it wasn't
28 in our -- in our LP system that I talked about earlier. There really wasn't much in
there, so that's why I was having a hard time. We didn't -- it didn't show up as a --
as a -- you know, an injury report, **so I was like -- I knew that that was potentially**
an issue that we could discuss, but I couldn't find anything in the note that even
shows it as an injury, so I didn't -- didn't designate it as an injury type of an incident
--

Q Okay. And did you --

A -- in my mind.

Q Did you review notes in the system, as well, regarding the Smith case?

A Yes. But there, again, in our system, because most of this, once it gets
turned over -- once Denver sort of turns it over, there's not much in there, as
well.⁵⁹

Q Okay. You knew there was a death, though, right?

A Yes.

Q You were informed --

A Yes.

⁵⁹ This testimony is concerning and lends credibility to Nick Fawkes' affidavit implying that important information had been "scrubbed" from the computer system Lead Perfection.

Q -- of that?

A Yes. Yes.

Q Is there a reason why you didn't remember that five minutes ago?

A Well, again, I was thinking about up to that point. I thought that's how I'd answered it. I thought we were just trying to -- up to that point, what we were aware of.

Q **Okay. So why don't you tell me all of the incidents that you're aware of at any point, safety incidents.**

A **Those would be it.**

Q Just those three?

A That I would be aware of.⁶⁰

Thus, even though Mr. Modena had reviewed documents about the Smith and Baize cases before his deposition, until he was cross-examined on that point, he testified evasively about any other incident other than the Cunnison incident. Even after taking a break and speaking to defense counsel and General Counsel, he was conveniently only able to recall the two other incidents which Plaintiffs had independently found and disclosed. Mr. Modena's deposition was back in 2018, and when compared with all of the evidence that has developed since then, it is obvious this was a well-coordinated attempt by in-house counsel, Stacey Hackney, and *firstSTREET* Vice-President, Dave Modena, to minimize the production of documents related to injuries, claims, and complaints with respect to these walk-in tubs.

V. LEGAL ARGUMENT

The Court should strike *firstSTREET* & AITHR's Answers because their actions violate the rules of discovery. Discovery is to remove surprise from trial preparation. The discovery rules accomplish this objective by advancing the time at which disclosure can be compelled from the trial to the period preceding it, thereby reducing the possibility of surprise and obviating the need to conduct a trial blindly.⁶¹ Discovery is designed to aid a party in preparing and presenting his case or defense and to enable the parties to narrow and clarify the basic issues between them. Discovery should expedite the disposition of the litigation, by educating the parties in advance of trial of the real value of their claims and defenses, which may encourage settlements. Id. Here, Plaintiffs are being forced to prepare for trial blindly because Defendants have withheld relevant

⁶⁰ See, **Ex. 23**, Modena Dep. at 29:24-32:25.

⁶¹ 23 Am. Jur. 2d, Depositions and Discovery § 1.

1 evidence. NRCP 16.1 and NRCP 26 are intended to accomplish the full-disclosure purpose of the
2 discovery rules. They do so by requiring parties to make initial disclosures **voluntarily** without
3 awaiting request. Thus, NRCP 16.1 creates an obligation on parties to **fully disclose** discoverable
4 evidence at the outset of litigation:

5 NRCP 16.1 is intended to promote and facilitate prompt investigation,
6 preparation, prosecution, **and full disclosure**, so that cases can be resolved
7 quickly – by settlement or otherwise – thereby minimizing litigation delay
and needless expenses to all parties and the judicial system as a whole.⁶²

8 Additionally, not only must the parties make initial disclosures under NRCP 16.1, they
9 must also supplement their disclosures under NRCP 26(e). The purpose of voluntary disclosure
10 and supplementation rules is to promote the timely prosecution of litigation.⁶³ Further, the rules
11 are intended to provide the parties an informed basis upon which to meaningfully approach the
12 litigation rather than only providing such a basis after a substantial expenditure of time and
13 resources in discovery and pretrial preparation.⁶⁴ They are also intended to compel cooperation
14 among the parties to accomplish the full disclosure objectives of the discovery rules with a
15 minimum of time and expense consumed in procedural requirements, thereby resulting in the most
16 efficient use of professional and judicial time. *Id.* Accomplishing these goals requires the
17 cooperation of the parties along with firm and consistent judicial action to encourage those refusing
18 to cooperate or honor their NRCP 16.1 obligations to do so by the imposition of meaningful
19 sanctions. *Id.*

20 Here, *firstSTREET* has failed to promote the timely prosecution of this litigation by
21 knowingly failing to provide Plaintiffs with an informed basis upon which to approach this
22 litigation. The NRCP 16.1 disclosures and supplements of the *firstSTREET* Defendants are
23 woefully insufficient and have not been in good faith. The Defendants are in violation of NRCP
24 16.1 and NRCP 26 because they have not produced significant portions of the above-mentioned
25 evidence. Accordingly, sanctions under NRCP 16.1(e)(3) and NRCP 37 are appropriate.

26
27 ⁶² Craig R. Delk, *Nevada Civil Practice Manual*, §16.02[1] (Jeffrey W. Stempel et al. eds., 5th ed. 2012).

⁶³ *Arnold v. Kip*, 123 Nev. 410, 418, 168 P.3d 1050, 1055 (2007).

28 ⁶⁴ Craig R. Delk, *Nevada Civil Practice Manual*, §16.02[1] (Jeffrey W. Stempel et al. eds., 5th ed. 2012).

1 **A. NEVADA LAW GRANTS THIS COURT BROAD AUTHORITY AND**
2 **DISCRETION TO STRIKE DEFENDANTS' ANSWERS.**

3 This Court is invested with authority to issue sanctions for discovery violations.⁶⁵ Under
4 16.1(e)(3), sanctions can be imposed upon motion or the court's own initiative for failure to
5 reasonably comply with any provision of NRCP 16.1 **without prior entry of a court order**⁶⁶
6 compelling the discovery in question. NRCP 16.1(e)(3) provides:

7 **(e) Failure or Refusal to Participate in Pretrial Discovery; Sanctions.**

8 **(3) If an attorney fails to reasonably comply with any provision of this**
9 **rule,** or if an attorney or a party fails to comply with an order entered
10 pursuant to subsection (d) of this rule, the court, upon motion or upon its
11 own initiative, shall impose upon a party or a party's attorney, or both,
12 appropriate sanctions in regard to the failure(s) as are just, including the
13 following:

14 (A) Any of the sanctions available pursuant to Rule 37(b)(2) and
15 Rule 37(f);

16 (B) An order prohibiting the use of any witness, document or
17 tangible thing which should have been disclosed, produced,
18 exhibited, or exchanged pursuant to Rule 16.1(a).⁶⁷

19 As a result, under NRCP 16.1(e)(3), any sanctions available under NRCP 37 are
20 immediately available. A noncompliant attorney or party is not afforded an opportunity to cure a
21 violation of the discovery disclosure rules because NRCP 16.1(e)(3) **does not require the entry**
22 **and violation of a court order before sanctions can be imposed.**⁶⁸

23 Sanctions under NRCP 37(b)(2) are as follows:

24 ...
25 **(B) An order refusing to allow the disobedient party to support**
26 **or oppose designated claims or defenses, or prohibiting that**
27 **party from introducing designated matters in evidence;**

28 **(C) An order striking out pleadings or parts thereof, or staying**

⁶⁵ Nevada Power v. Fluor Illinois, 108 Nev. 638, 644, 837 P.2d 1354, 1358-59 (1992); Young v. Johnny Ribiero Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

⁶⁶ Counsel for *firstSTREET* has exclaimed numerous times that sanctions against it are not appropriate because there is no order that has been violated. All sanctions do **not** require an Order to be violated, but rather NRCP 16.1 provides that in addition to an Order being violated, a violation of the rule itself is sufficient for the Court to issue sanctions.

⁶⁷ NRCP 16.1(e)(3).

⁶⁸ Craig R. Delk, Nevada Civil Practice Manual, §16.02[3] (Jeffrey W. Stempel et al. eds., 5th ed. 2012).

1 further proceedings until the order is obeyed, or dismissing the
2 action or proceeding or any part thereof, or rendering a
3 judgment by default against the disobedient party;

4 . . .

5 In lieu of any of the foregoing orders or in addition thereto, the court shall
6 require the party failing to obey the order or the attorney advising that party
7 or both to pay the reasonable expenses, including attorney's fees, caused by
8 the failure, unless the court finds that the failure was substantially justified
9 or that other circumstances make an award of expenses unjust.⁶⁹

10 This Court is also granted authority under other Nevada statutes to ensure compliance with
11 its orders and to impose sanctions upon those who fail to do so.⁷⁰ The Nevada Supreme Court has
12 stated that EDCR 7.60 permits a court to impose all of the sanctions provided under NRCP
13 37(b).⁷¹ Thus, a district court may impose sanctions, including striking pleadings, when there has
14 been willful noncompliance with a discovery order or willful failure to produce documents as
15 required under NRCP 16.1. In this case, *firstSTREET* has repeatedly, willfully withheld crucial,
16 discoverable evidence in noncompliance of both NRCP 16.1 and NRCP 26.

17 **B. *firstSTREET* and AITHR's Answers Should Be Stricken as to Liability Due to
18 its Abusive Discovery Tactics**

19 In Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 787 P.2d 777 (1990), the Supreme
20 Court of Nevada held that courts have "inherent equitable powers to dismiss actions or enter
21 default judgments for ... abusive litigation practices. Litigants and attorneys alike should be aware
22 that these powers may permit sanctions for discovery and other litigation abuses not specifically
23 proscribed by statute."⁷² The Supreme Court further stated, "while dismissal need not be preceded
24 by other less severe sanctions, it should be imposed only after thoughtful consideration of all the
25 factors involved in a particular case." Id. at 92, 787 P.2d at 780. In discussing the legal basis for
26 dismissal, the Supreme Court held:

27 ⁶⁹ NRCP 37(b)(2).

28 ⁷⁰ See, NRS 22.010 (defining contempt as, "disobedience or resistance to any lawful writ, order, rule or process issued
by the court or judge at chambers."); see also, EDCR 7.60 (if, without excuse, a party fails to comply with the rules,
the Court may dismiss the answer or impose fines or other sanctions.)

⁷¹ See, Nevada Power Co. v. Fluor Illinois, 108 Nev. 638, 837 P.2d 1354 (1992); see also, Temora Trading Co. Ltd v. Perry, 98 Nev. 229, 645 P.2d 436 (1982) (affirming the district court's order striking the defendant's **answer** and entering judgment in favor of the plaintiff for violating court orders); Skeen v. Valley Bank of Nevada, 89 Nev. 301, 511 P.2d 1053 (1973) (striking the defendant's **answer** and awarding attorney's fees pursuant to NRCP 37).

⁷² Id., 106 Nev. at 92, 787 P.2d at 779. (Internal quotation and citation omitted).

1 that every order of dismissal with prejudice as a discovery sanction be supported
2 by an express, careful and preferably written explanation of the court's analysis of
3 the pertinent factors. The factors a court may properly consider include, but are not
4 limited to, the degree of willfulness of the offending party, the extent to which the
5 non-offending party would be prejudiced by a lesser sanction, the severity of the
6 sanction of dismissal relative to the severity of the discovery abuse, whether any
7 evidence has been irreparably lost, the feasibility and fairness of alternative, less
8 severe sanctions, such as an order deeming facts relating to improperly withheld or
9 destroyed evidence to be admitted by the offending party, the policy favoring the
10 adjudication on the merits, whether sanctions unfairly operate to penalize a party
11 for the misconduct of his or her attorney, and the need to deter both the parties and
12 future litigants from similar abuses.⁷³

13 An analysis of the aforementioned Young factors reveals that striking
14 *firstSTREET*/AITHR's Answer is appropriate given the lengthy history of nondisclosure.

15 **1. Degree of Willfulness of the Offending Party**

16 *firstSTREET*'s violations have been willful. *firstSTREET* sat silent while Plaintiffs
17 pursued Jacuzzi for other similar incidents. *firstSTREET* could have put an end to the entire matter
18 by simply disclosing the documents itself which would have saved everyone hundreds of hours.
19 Yet it chose to sit silently regarding the other incident issue. Further, it also sat silently regarding
20 the marketing issues, the Alert 911 issue, the bathmats, and other matters. *firstSTREET* has
21 minimized every important issue that has arisen from the beginning instead of simply being truthful
22 and presenting the evidence that existed. *firstSTREET* chose to withhold the phone call(s) of not
23 only Sherry Cunnison but hundreds of other customers and also has withheld the computer records
24 (Lead Perfection) for those customer complaints as well.

25 Further, as previously briefed, both Mr. Modena and Ms. Hackney received Mrs.
26 Chopper's letters, yet *firstSTREET* never disclosed Mrs. Chopper. Notably, Plaintiffs learned
27 about Mrs. Chopper from Jacuzzi's document dump; *firstSTREET* disclosed nothing from Mrs.
28 Chopper, despite receiving correspondence directly from her and from Jacuzzi regarding the safety
concerns associated with the tub. This is the same pattern of withholding with regard to the other
incidents.

And while the majority of discovery disputes before this Court have been disputes between

⁷³ *Id.* at 93, 787 P.2d at 780.

1 Plaintiffs and Jacuzzi, *firstSTREET* cannot claim to have clean hands in this matter. *firstSTREET*
2 has been involved in this case from the beginning, have attended every hearing and every
3 deposition, have been served with all discovery from all parties, and have seen each discovery
4 dispute before this Court. They are intimately familiar with the fact that Plaintiffs have been
5 consistently seeking similar incidents information for years and is aware that Plaintiffs have been
6 seeking the identities of other dealers, customers who have lodged complaints (about design
7 defects—not just complaints about injuries), and of evidence regarding Jacuzzi’s involvement in
8 marketing. Yet, *firstSTREET* has sat silent, only providing information when its hand is forced
9 and only producing information that Plaintiffs discovered on their own. Again, *firstSTREET* did
10 not disclose marketing emails between *firstSTREET* and Jacuzzi until Jacuzzi began taking the
11 position that *firstSTREET* was solely in control of marketing. Similarly, *firstSTREET* did not
12 disclose the other dealers until its corporate witness was forced to answer questions under oath (as
13 opposed to written discovery requests which were prepared by in-house counsel, Stacey Hackney).
14 Clearly, *firstSTREET*’s discovery abuses have been willful.

15 **2. Extent to which Non-Offending Party Would be Prejudiced by a Lesser**
16 **Sanction**

17 Plaintiffs would be severely prejudiced if they are forced to litigate liability at trial or
18 continue this “cat and mouse” type of discovery.

19 **a. Plaintiffs Have Been Prejudiced by Being Forced to Litigate the**
20 **“Discovery Abuses” Rather than Case’s Underlying Merits**

21 Nearly every issue of importance from the identity of the dealers to the marketing practices,
22 from the Alert 911 to the names of other incidents to the custom-made bathmat inserts has been
23 minimized or flatly lied about by *firstSTREET*. Instead of being able to flesh out these important
24 other issues, Plaintiffs have wasted countless hours following up on details that should have been
25 provided by Defendants via NRCP 16.1 or pursuant to written discovery requests that were directly
26 on point. Instead, *firstSTREET* chose time and time again to misrepresent things to Plaintiffs.

27 **b. Plaintiffs, and this Court, Can Never Know How Many Other**
28 **Witnesses or Documents Have Been Withheld**

Discovery on issues pertaining to customer complaints and prior and subsequent similar

1 incidents has been dependent on *firstSTREET*'s good faith. How can the Court or anyone for that
2 matter trust *firstSTREET* to have produced documents in good faith when recordings of Sherry
3 Cunnison herself have not even been turned over?! Plaintiffs do not have the ability or time to
4 search through *firstSTREET*'s internal systems. Nor do they have the ability to search through
5 every single court in every single jurisdiction. Therefore, Plaintiffs have been at the mercy of
6 *firstSTREET*'s willingness to produce documents and witnesses on these issues and has been
7 shown time and time and time again – unless it is caught – it is not going to produce information.
8 Period. There has been **zero** good faith participation by any defendant in this case.

9 *firstSTREET* has demonstrated such an unwillingness to participate in good faith discovery
10 that it is impossible to know the true “universe” of relevant evidence. It is unknown how many
11 other dealers received letters from customers. It is unknown what else Sherry may have told the
12 parties. It is unknown what other steps were taken to improve the safety of the product – and, more
13 importantly, **why** the parties felt compelled to make those decisions. Clearly, the parties are not
14 making changes if there were not problems leading up to those changes. Yet it wasn't until the
15 **fourth year** of litigation that we finally find out about the bathmats! By now it should be known
16 how many other incident reports or other investigation materials exist and which might be held by
17 any of the other dealers – yet that is still unknown. It is also unknown what other Customer
18 Relations Management companies may have had contracts with the other dealers and, therefore,
19 might have had evidence of similar incidents. Simply put, it is almost a complete mystery regarding
20 what other evidence exists.

21 **c. Plaintiffs right to present their case at trial expeditiously has**
22 **been destroyed**

23 Sherry's family has a fundamental right to a litigate this case in an expeditious manner.
24 Plaintiffs have been engaged in a “cat and mouse” game with the Defendants in this case for years.
25 Plaintiffs have spent significant time, resources and money in this case. Extending discovery would
26 increase the cost to Plaintiffs exponentially, but if the Court is not inclined to strike *firstSTREET*'s
27 Answer, continued discovery must be allowed liberally (multiple second and third depositions
28 must be allowed and at the Defendants' cost). Plaintiffs litigation strategy – and budget – has been

1 based on the information provided. Plaintiffs should not be forced to expend significantly more
2 money in discovery re-deposing witnesses about information just received when those witnesses
3 should have been able to have been deposed about the relevant documents the first time around.
4 Because Plaintiffs are prejudiced by the continuation of discovery, and, without it, the Plaintiffs'
5 ability to present their case at trial will have been so significantly prejudiced, the only true and fair
6 remedy is to simply strike *firstSTREET*'s/AITHR's Answer.

7 **d. Plaintiffs Cannot Fairly Present their Case at Trial**

8 Taken as a whole, Plaintiffs still remain "in the dark" on the crucial issues of notice and
9 dangerousness. Even more worrisome, witnesses (i.e., customers who have complained and
10 dealers who those customers would have complained to) have still not been disclosed. These
11 witnesses' memories continue to fade, and this crucial evidence continues to disappear. Plaintiffs
12 continue to expend valuable resources during this never-ending "cat and mouse" game with
13 Defendants. It would be extremely prejudicial to force Plaintiffs to go to trial without evidence of
14 all similar incidents—without deposing the unidentified witnesses in the many other incident
15 documents—because such evidence is germane to the issue of whether the tub was defective or
16 whether Jacuzzi and *firstSTREET* had notice of such defects. Additionally, prior similar incidents
17 evidence goes directly to the core of Plaintiffs' claim for punitive damages. Plaintiffs are now
18 unable to go to trial with all relevant evidence and cannot present a complete case to the jury – that
19 alone is so prejudicial that striking *firstSTREET*'s Answer is the only appropriate sanction.

20 **3. Severity of the Sanction Relative to the Severity of the Discovery Abuse**

21 While striking an answer is a severe sanction, doing so is proper in this case. *firstSTREET*
22 has withheld fundamental evidence in this case and has flatly lied about numerous important issues
23 in an attempt to create the illusion that this tub was safe and problem-free. Despite hearing after
24 hearing with Jacuzzi wherein the Discovery Commissioner and this Honorable Court set forth the
25 expectations of discoverable information, *firstSTREET* sat by quietly and chose to only produce
26 information when caught red-handed or when Plaintiffs stumbled upon the evidence (i.e. 911 Alert,
27 custom anti-slip tub mats, etc.) These are important issues that go directly to whether the tub was
28 defective (too slippery and therefore causing injuries). They go to the issue of prior notice and

1 design defect. *firstSTREET* also failed to disclose documents—i.e., communications from
2 complaining customers, communications with Jacuzzi, and any other documents related to
3 customer complaints.

4 After Mr. Lee Roberts got involved and took over as lead counsel for Jacuzzi and
5 documents responsive to Plaintiffs’ requests were finally produced, it was discovered that many
6 of those documents **originated from within** the *firstSTREET* Defendants’ systems and had been
7 requested by Plaintiffs via written and other formal discovery mechanisms. Despite having had
8 requested the information by Plaintiffs, *firstSTREET* chose to misrepresent what evidence existed.
9 Given the allegations in Plaintiffs’ Fourth Amended Complaint, *firstSTREET* knew that this
10 evidence was relevant and chose not to disclose it. As discussed below, the severity of
11 *firstSTREET*’s abuse is compounded by the fact that *firstSTREET*’s own General Counsel is the
12 party representative who signed the verification for both *firstSTREET* and AITHR’s interrogatory
13 responses.

14 **4. Whether any Evidence has Been Irreparably Lost**

15 At the time of the writing of this motion, it is unknown whether *firstSTREET* has destroyed
16 similar incidents evidence housed within its Lead Perfection or email systems. It is unknown
17 whether *firstSTREET* has destroyed the recordings of other customers who called and complained
18 about the tub. Mr. Fawkes explained that at the time he was working for these Defendants, those
19 customer calls were kept indefinitely.⁷⁴ Yet nothing has been produced – not even Sherry
20 Cunnison’s calls to the companies! Further, Mr. Fawkes establishes that the Lead Perfection notes
21 may have been manipulated. The extent of that manipulation is unknown, but Mr. Fawkes makes
22 clear, the notes have been altered because he did not see the overweight comment that he
23 specifically remembered coaching Annie Doubek about.⁷⁵ There is also nothing in the Lead
24 Perfection notes about Sherry getting stuck once before. It appears as this has been “scrubbed”
25 from the note system. What else has been deleted is unknown.

26
27 ⁷⁴ See, **Ex. 21**, Aff. of Nick Fawkes at ¶34.

28 ⁷⁵ See, **Id.** at ¶¶16-19.

1 **5. Feasibility and Fairness of Alternative, Less Severe Sanctions**

2 Less severe sanctions are not feasible because *firstSTREET* has already displayed its
3 willingness to withhold critical evidence. An order to compel production is dependent on
4 *firstSTREET*'s willingness to participate in good faith. *firstSTREET* has already demonstrated
5 that an order compelling the production of documents or witnesses would be futile (completely
6 disregards any potential co-Defendant sanction), and this is why the Court should simply strike the
7 *firstSTREET* Defendants' Answer.

8 **6. Whether Sanctions Unfairly Operate to Penalize a Party for**
9 **Misconduct of His Attorney**

10 *firstSTREET* has in-house General Counsel, Stacey Hackney, Esq, who has been
11 intimately involved in this case. Ms. Hackney was identified as the "person or persons responding
12 to [Plaintiffs'] interrogatories" to both *firstSTREET* and AITHR. Additionally, Ms. Hackney is
13 the corporate representative who signed the verifications for *firstSTREET* and AITHR's responses
14 to Interrogatories. Additionally, Ms. Hackney was present at Mr. Modena's deposition and was
15 even part of the off-record discussions with Mr. Modena that were supposed to re-educate Mr.
16 Modena on similar incidents evidence. As a licensed attorney, she had an ethical obligation to
17 step in and correct Mr. Modena's testimony. Moreover, as an attorney, she was aware of the
18 obligation to educate Mr. Modena about all prior complaints about design defects. Just last year,
19 when the parties received the Jacuzzi document dump, the email from *firstSTREET* employee,
20 Nick Fawkes, indicated that early on (2012) the parties were seeing problems with the slipperiness
21 of the tub. Other emails indicate that people were consulting with lawyers because of being
22 injured. Certainly, Ms. Hackney was aware of all of this, yet she sat silently saying nothing during
23 Mr. Modena's deposition.

24 Clearly, she has been a knowing participant in *firstSTREET*'s obstructionist discovery
25 tactics. This is not a case where an attorney has undertaken abusive discovery tactics on behalf of
26 his client. This is not a case where the party was unaware of his attorney's discovery abuse. Rather,
27 this case involves the actual party defendant – through its own General Counsel who affirmatively
28 signed interrogatory response verifications – taking part in withholding evidence. Striking

1 *firstSTREET*'s Answer would not unfairly operate to punish *firstSTREET* for the actions of its
2 defense counsel.

3 **7. The Need to Deter Both Parties and Future Litigants from Similar**
4 **Abuses**

5 The Supreme Court of Nevada has held that entering default is proper when "litigants are
6 unresponsive and engaged in abusive litigation practices **that cause interminable delays.**"⁷⁶
7 Further, such sanctions are "necessary to demonstrate to future litigants that they are not free to
8 act with wayward disregard of a court's orders," and that the conduct of the appellants evidenced
9 "their willful and recalcitrant disregard of the judicial process."⁷⁷ Here, it is absolutely necessary
10 to deter not only *firstSTREET* but also future litigants from withholding evidence. Shockingly,
11 **the threat of having a co-Defendants' Answer struck** has not been enough of a deterrent to
12 prevent *firstSTREET* from acting with such blatant disregard of the discovery rules. Litigants
13 cannot be permitted to abuse discovery to the detriment of the opposing party. The purpose of
14 discovery is to enable parties to access **all** relevant evidence so that they can evaluate and resolve
15 their dispute. Striking *firstSTREET*'s/AITHR's Answer is necessary to prevent similar
16 misconduct.

17 **V. CONCLUSION**

18 Plaintiffs can only have a fair trial if the defendants litigate in good faith. In a product
19 liability case, a plaintiff must be able to fairly discover whether other similar incidents have
20 occurred because such incidents go to the heart of the issue of the dangerousness of a product.
21 Similar incidents also go directly to the issue of notice (if they are prior incidents). For the same
22 reason, a product liability plaintiff must be able to discover both prior and subsequent customer
23 complaints.

24 In this case, *firstSTREET* sat idly by while Plaintiffs have been trying to discover similar
25 incident and customer complaints. *firstSTREET*'s corporate witness, Mr. Modena, evaded similar
26 incidents questions and even claimed that *firstSTREET* was not aware of any other incidents until
27 he was coached during a recess. Even then, he failed to mention countless other incidents that

28 ⁷⁶ Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592, 599 (Nev. 2010).

⁷⁷ Id. (internal citations omitted).



1 have recently come to light and long after his deposition. The discovery abuses are intentional,
2 their Answer should be stricken, and the same evidentiary rulings requested of Jacuzzi should be
3 entered against *first*STREET and AITHR.

4 DATED THIS 9th day of October, 2020.

5 **RICHARD HARRIS LAW FIRM**

6 /s/ Benjamin P. Cloward

7 BENJAMIN P. CLOWARD, ESQ.

8 Nevada Bar No. 11087

9 801 South Fourth Street

10 Las Vegas, Nevada 89101

11 *Attorney for Plaintiffs*



12 RICHARD HARRIS
13 LAW FIRM
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the amendment to EDCR 7.26, and Administrative Order 14-2, I hereby certify that on this 9th day of October, 2020, I caused to be served a true copy of the foregoing **PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT FIRST STREET FOR BOOMERS & BEYOND, INC.'S & AITHR DEALER, INC.'S ANSWER TO PLAINTIFFS' FOURTH AMENDED COMPLAINT** as follows:

- ☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or
- ☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below; and/or
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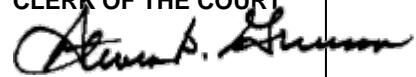
Meghan M. Goodwin, Esq.
Philip Goodhart, Esq.
Thorndal Armstrong Delk
Balkenbush & Eisinger
1100 East Bridger Ave.
Las Vegas, Nevada 89101-5315
Telephone: 702-366-0622
Fax: 702-366-0327
E-mail: MMG@thorndal.com
E-mail: png@thorndal.com
Mail to:
P.O. Box 2070
Las Vegas, Nevada 89125-2070
Attorneys for Defendants/Cross-Defendants first STREET for Boomers and Beyond, Inc. and AITHR Dealer, Inc. and Defendant, Hale Benton

Vaughn A. Crawford, Esq.
Morgan Petrelli, Esq.
Snell & Wilmer, LLP
3883 Howard Hughes Pkwy., Suite 1100
Las Vegas, Nevada 89159
Telephone: 702-784-5200 / Fax: 702-784-5252
E-mail: vcrawford@swlaw.com
E-mail: mpetrelli@swlaw.com

D. Lee Roberts, Esq.
Brittany M. Llewellyn, Esq.
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Phone: 702.938.3838 / Fax: 702.938.3864
E-mail: lroberts@wwhgd.com
E-mail: bllewellyn@wwhgd.com

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
Lewis Roca Rothgerber Christie, LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169-5996
E-mail: DPolsenberg@LRRC.com
E-mail: JHenriod@LRRC.com
E-mail: ASmith@LRRC.com
Attorneys for Defendant/Cross-Defendant, Jacuzzi, Inc. dba Jacuzzi Luxury Bath

/s/ Catherine Barnhill
An employee of RICHARD HARRIS LAW FIRM



1 **APEN**
2 BENJAMIN P. CLOWARD, ESQ.
3 Nevada Bar No. 11087
4 **RICHARD HARRIS LAW FIRM**
5 801 South Fourth Street
6 Las Vegas, Nevada 89101
7 Phone: (702) 444-4444
8 Fax: (702) 444-4455
9 E-Mail: Benjamin@RichardHarrisLaw.com
10 *Attorneys for Plaintiffs*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 ROBERT ANSARA, as Special Administrator
14 of the Estate of SHERRY LYNN CUNNISON,
15 Deceased; MICHAEL SMITH, individually,
16 and heir to the Estate of SHERRY LYNN
17 CUNNISON, Deceased; and DEBORAH
18 TAMANTINI, Individually; and heir to the
19 Estate of SHERRY LYNN CUNNISON,
20 Deceased,

21 Plaintiff,

22 vs.

23 FIRST STREET FOR BOOMERS &
24 BEYOND, INC.; AITHR DEALER, INC.;
25 HALE BENTON, Individually;
26 HOMECLICK, LLC; JACUZZI INC., doing
27 business as JACUZZI LUXURY BATH;
28 BESTWAY BUILDING & REMODELING,
INC.; WILLIAM BUDD, Individually and as
BUDDS PLUMBING; DOES 1 through 20;
ROE CORPORATIONS 1 through 20; DOE
EMPLOYEES 1 through 20; DOE
MANUFACTURERS 1 through 20; DOE 20
INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE 21
SUBCONTRACTORS 1 through 20,
inclusive,

Defendants.

AND ALL RELATED MATTERS

CASE NO.: A-16-731244-C

DEPT NO.: II

APPENDIX TO PLAINTIFFS'
RENEWED MOTION TO STRIKE
DEFENDANT FIRST STREET FOR
BOOMERS & BEYOND, INC.'S &
AITHR DEALER, INC.'S ANSWER
TO PLAINTIFFS' FOURTH
AMENDED COMPLAINT



COME NOW, the Plaintiffs, by and through their attorney, BENJAMIN P. CLOWARD, ESQ., of RICHARD HARRIS LAW FIRM, pursuant to EDCR 2.27, and hereby submit their **APPENDIX TO PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT FIRST STREET FOR BOOMERS & BEYOND, INC.'S & AITHR DEALER, INC.'S ANSWER TO PLAINTIFFS' FOURTH AMENDED COMPLAINT** filed on October 9, 2020.

Exhibit No.	Brief Description of Exhibit	No. of Pages	Appendix Pg. Range
1	Hr'g Tr., Sept. 22, 2020 at 33:25-34:7	62	001 - 062
2	Email from Norm Murdock to Audrey Martinez & Kurt Bachmeyer, June 18, 2013 [JACUZZI005311]	1	063
3	Report #20160824 [JACUZZI002965-2966]	2	064 - 065
4	Jacuzzi's Resp. to Pl. Ansara's Fourth Req. for Produc. of Doc	11	066 - 076
5	Hr'g Tr., Sept. 19, 2018	29	077 - 105
6	Thread of Text Messages Between Philip Goodhart, Esq. and Benjamin P. Cloward, Esq., Aug. 6, 2019	2	106 - 107
7	Ruth Curnutte Dep. Tr., Aug. 7, 2019	13	108 - 120
8	Michael Dominguez Dep. Tr., Sept. 21, 2018	5	121 - 125
9	Jacuzzi Case #00398408 (redacted) [JACUZZI002945-2947]	3	126 - 128
10	Noreen Rouillard Dep. Tr., July 19, 2019	6	129 - 134
11	Pl. Ansara's 6th Set of Req. for Produc. of Doc. to <i>firstSTREET</i> , July 28, 2019	6	135 - 140
12	Pl. Ansara's 4th Set of Req. for Produc. of Doc. to AITHR, July 28, 2019	7	141 - 147
13	Pl. Cunnison's 3rd set of Req. to Admit to <i>firstSTREET</i> , July 28, 2019	5	148 - 152
14	Pl. Ansara's 2nd set of Req. to Admit to AITHR, July 28, 2019	5	153 - 157
15	Jacuzzi's Resp. to Pl. Ansara's 8th Set of Req. for Produc. of Doc., Aug. 27, 2019	8	158 - 165
16	Email from Audrey Martine re: Non Skid Options [REV JACUZZI006766-6767, 6769-6771]	5	166 - 170
17	Def. Jacuzzi's Resp. to Pl. Tamantini's 1st Set of Interrog., June 19, 2017	22	171 - 192
18	Def. Jacuzzi's Am. Resp. to Pl. Tamantini's 1st Set of Interrog., Dec. 8, 2017	21	193 - 213



Exhibit No.	Brief Description of Exhibit	No. of Pages	Appendix Pg. Range
19	<i>first</i> STREET's Resp. to Pl. Ansara's 1st Set of Interrog., Oct. 10, 2018	25	214 - 238
20	Email from Nick Fawkes to Regina Reyes re: Arnouville, Manuel – Serial #BDFDK9, Dec. 21, 2012 [REV JACUZZI005958-5959]	2	239 - 240
21	Aff. of Nick Fawkes, Sept. 22, 2020	13	241 - 253
22	Aff. of Annie Doubek, Sept. 10, 2020	3	254 – 256
23	David Modena Dep. Tr., Vol. I, Dec. 11, 2018	5	257 - 261
24	Flash Drive re: Recording of Sherry Cunnison's Call and other calls pertaining to Sherry Cunnison	n/a	262

DATED THIS 9th day of October, 2020.

RICHARD HARRIS LAW FIRM

/s/ Benjamin P. Cloward

BENJAMIN P. CLOWARD, ESQ.

Nevada Bar No. 11087

801 South Fourth Street

Las Vegas, Nevada 89101

Attorneys for Plaintiffs



CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), the amendment to EDCR 7.26, and Administrative Order 14-2, I hereby certify that on this 9th day of October, 2020, I served a copy of the foregoing **APPENDIX TO PLAINTIFFS' RENEWED MOTION TO STRIKE DEFENDANT FIRST STREET FOR BOOMERS & BEYOND, INC.'S & AITHR DEALER, INC.'S ANSWER TO PLAINTIFFS' FOURTH AMENDED COMPLAINT** as follows:

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Meghan M. Goodwin, Esq.
Philip Goodhart, Esq.
Thorndal Armstrong Delk
Balkenbush & Eisinger
1100 East Bridger Ave.
Las Vegas, Nevada 89101-5315
Telephone: 702-366-0622
Fax: 702-366-0327
E-mail: MMG@thorndal.com
E-mail: png@thorndal.com
Mail to:
P.O. Box 2070
Las Vegas, Nevada 89125-2070
*Attorneys for Defendants/Cross-
Defendants first STREET for
Boomers and Beyond, Inc. and
AITHR Dealer, Inc. and Defendant,
Hale Benton*

Vaughn A. Crawford, Esq.
Morgan Petrelli, Esq.
Snell & Wilmer, LLP
3883 Howard Hughes Pkwy., Suite 1100
Las Vegas, Nevada 89159
Telephone: 702-784-5200 / Fax: 702-784-5252
E-mail: vcrawford@swlaw.com
E-mail: mpetrelli@swlaw.com

D. Lee Roberts, Esq.
Brittany M. Llewellyn, Esq.
Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC
6385 S. Rainbow Blvd., Suite 400
Las Vegas, Nevada 89118
Phone: 702.938.3838 / Fax: 702.938.3864
E-mail: lroberts@wwhgd.com
E-mail: bllewellyn@wwhgd.com

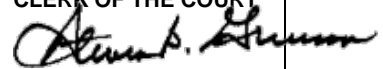
Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
Lewis Roca Rothgerber Christie, LLP
3993 Howard Hughes Pkwy., Suite 600
Las Vegas, Nevada 89169-5996
E-mail: DPolsenberg@LRRC.com
E-mail: JHenriod@LRRC.com
E-mail: ASmith@LRRC.com
*Attorneys for Defendant/Cross-Defendant, Jacuzzi, Inc. dba Jacuzzi
Luxury Bath*

/s/ Catherine Barnhill

An employee of RICHARD HARRIS LAW FIRM

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EXHIBIT “1”



1 RTRAN

2
3
4
5 DISTRICT COURT

6 CLARK COUNTY, NEVADA

7)
8 ROBERT ANSARA, ET AL.,)

CASE#: A-16-731244-C

9 Plaintiffs,)

DEPT. II

10 vs.)

11 FIRST STREET FOR BOOMERS &)
BEYOND, INC., ET AL.,)

12 Defendants.)
13

14 BEFORE THE HONORABLE RICHARD F. SCOTTI
DISTRICT COURT JUDGE
15 TUESDAY, SEPTEMBER 22, 2020

16 **RECORDER'S TRANSCRIPT OF EVIDENTIARY HEARING - DAY 1**

17 APPEARANCES:

18 For Plaintiffs:

BENJAMIN P. CLOWARD, ESQ.
IAN C. ESTRADA, ESQ.

19 For Defendant Jacuzzi, Inc:

20 D. LEE ROBERTS, JR., ESQ.
BRITTANY M. LLEWELLYN, ESQ.
21 JOHNATHAN T. KRAWCHECK, ESQ.
DANIEL F. POLSENBERG, ESQ.
22 JOEL D. HENRIOD, ESQ.

23 For Defendants AITHR
Dealer Inc., Benton Hale,
24 First Street for Boomers &
Beyond, Inc.:

PHILIP GOODHART, ESQ.

25 RECORDED BY: BRITTANY AMOROSO, COURT RECORDER

1 Las Vegas, Nevada, Tuesday, September 22, 2020

2

3 [Case called at 9:05 A.M.]

4 THE COURT: Case number A-731244.

5 Let's have appearances. Let's first hear -- who is from the

6 Plaintiff?

7 MR. CLOWARD: Good morning, Your Honor. Ben Cloward

8 and Ian Estrada.

9 MR. ESTRADA: Good morning.

10 THE COURT: Good morning. All right. Who do we have for

11 Jacuzzi?

12 MR. ROBERTS: Good morning, Your Honor. Lee Roberts in

13 the courtroom. And also on BlueJeans, we've got my partner John

14 Krawcheck, Joel Henrion, and Dan Polsenberg.

15 Did I miss anyone? Is Brittany here?

16 MS. LLEWELLYN: Yes, I'm --

17 MR. ROBERTS: Oh.

18 MS. LLEWELLYN: -- here.

19 MR. ROBERTS: And Brittany Llewellyn, Your Honor.

20 THE COURT: Okay. One second.

21 All right. What about First Street? Do we have anybody for

22 First Street on the line?

23 MR. GOODHART: Yes, Your Honor. This is Philip Goodhart

24 on behalf of First Street and Defendant Hale Benton.

25 THE COURT: All right. Good. Do we have anybody else on

1 the line?

2 All right. Anybody else appearing for any other parties?

3 All right. I think that is it.

4 All right. So counsel, I have some opening remarks, and
5 then we'll see where we are. Okay? All right. Very good.

6 So I'm going to give several points here so that anybody ever
7 looking at this can follow easily.

8 So number one, the Court previously conducted an
9 evidentiary hearing on Plaintiff's request for sanctions.

10 Number two, the Court conducted that hearing.

11 Number three, the Court applied the *Johnny Ribeiro* factors.

12 Number four, the Court issued its sanctions order striking
13 Jacuzzi's answer.

14 Number five, Jacuzzi advised the Court that the sanction
15 order was premature because Jacuzzi had not yet presented its, quote,
16 "advice of counsel," end quote, defense.

17 Jacuzzi had intended to present evidence that Jacuzzi relied
18 upon advice of counsel and should not be punished for relying on such
19 advice.

20 Point six, the Court decided to stay the sanctions order and
21 conduct a phase two evidentiary hearing to allow Jacuzzi to present its
22 advice of counsel defense.

23 Number seven, the Court advised Jacuzzi that if it presented
24 any evidence of advice of counsel, then the attorney/client privilege as to
25 that specific piece of evidence would be waived.

1 Number eight, Jacuzzi then asked whether the privilege
2 would be waived in other respects.

3 Number nine, the Court did order that if Jacuzzi presented
4 evidence of advice it gave to -- I'm sorry, the Court did order that if
5 Jacuzzi's counsel presented evidence of advice that it gave to Jacuzzi,
6 then the Plaintiff could discover who received that advice, when they
7 received it, whether they relied upon the advice, and how they relied
8 upon the advice.

9 To this Court, that all seems to be common sense. It seems
10 common sense that if a Jacuzzi attorney says I directed Jacuzzi not to
11 produce certain evidence, then the Plaintiffs should be allowed to depose
12 Jacuzzi on whether they actually did receive that direction. That seems
13 to be common sense, and that was the gist and overall feeling of the
14 Court at the prior hearing.

15 Number ten, the Court refused at the prior hearing to make
16 any further order regarding the extent of any waiver. The Court did tell
17 the parties that it can't decide whether any evidence would cause a
18 waiver until it actually heard and knew what that evidence would be.

19 The Court -- number eleven, the Court stands by that position
20 and its prior orders in this case, except for the so-called sanctions order
21 for which the Court already indicated what it intends to do with that.

22 All right. Point number twelve. The Court intends to provide
23 Jacuzzi with exactly what it asked for, which is to present whatever
24 evidence it wants on whether Jacuzzi had an opportunity -- I'm sorry.
25 The Court is going to allow Jacuzzi to produce whatever evidence it

1 wants that Jacuzzi's discovery and disclosure actions were based on
2 advice of counsel.

3 That was my intent. To allow Jacuzzi to do what I thought
4 they wanted to do. And then, we came up with this issue of waiver.

5 Point number thirteen. So after that, it's the Court's intent to
6 evaluate all of the prior evidence, including the evidence of advice of
7 counsel. And then at that time, to vacate the prior sanction order and
8 issue a new order which may or may not contend -- contain sanctions
9 and may or may not contain the same sanctions that was in the original
10 order.

11 But anyway, that new order will contain a new analysis of all
12 the evidence, including advice of counsel evidence and new findings and
13 new conclusions.

14 Point number fourteen. Jacuzzi has now issued a memo that
15 says it waives its -- if I understand it correctly -- and the parties will be
16 able to elaborate on all of this. But Jacuzzi has now issued a memo that
17 says it waives its right to present an advice of counsel defense.

18 Jacuzzi states that it doesn't want to take the risk that its
19 evidence might open the door to a waiver of attorney/client privilege to a
20 broader extent than it intended or expected.

21 Point fifteen. For these reasons, Jacuzzi asked this Court to
22 vacate this second phase of the evidentiary hearing and set a briefing
23 schedule to address all remaining issues, whatever those might be.

24 Point sixteen. The Court refused, initially, to continue the
25 second phase of the evidentiary hearing until it better understood

1 Jacuzzi's position or upon stipulation of the parties.

2 Point seventeen. As of this point in time, the Court has not
3 received notice of any stipulation to continue.

4 Point number eighteen. The Court now will hear argument
5 on Jacuzzi's request to continue. And then Plaintiff may respond. And
6 the Jacuzzi may reply. Then the Court may have some questions.

7 Point number nineteen. And this is the last point. As part of
8 Jacuzzi's argument, the Court would like to hear the parameters under
9 which Jacuzzi would prefer to present its advice of counsel defense so
10 that Plaintiff may hear and consider that, and so that the Court can
11 consider whether those parameters would be appropriate.

12 Those are my points in summary of what led us to where we
13 are today. Obviously, that is a simplification. The record will stand for
14 itself, but this is a reiteration for whoever might be looking at this record
15 at some later point in time.

16 So with that framework set up, I guess Mr. Roberts, or Mr.
17 Polsenberg, or whoever else, I would appreciate hearing your argument
18 or thoughts on this.

19 MR. ROBERTS: Thank you, Your Honor. Lee Roberts for
20 Defendant Jacuzzi. And I will address this issue for Jacuzzi.

21 I think as a preliminary matter, Judge, we should clarify that
22 Jacuzzi, to my recollection, has never stated that we are going to waive
23 attorney/client privilege to present advice of counsel. Rather, the prior
24 motion sought to clarify the scope of the waiver of privilege necessary
25 for Jacuzzi to make an informed decision about whether to proceed to a

1 second phase.

2 We believe we had a right to proceed to a second phase, but
3 in order to make that decision, we wanted clarification on the scope of
4 waiver.

5 And the example I think that would make it easy for the
6 Court, and I thought would make it easy for Mr. Cloward just for sake of
7 example, to choose one issue, is let's take the Pullen matter. If we
8 presented evidence through Mr. Templer that he immediately told
9 outside counsel about the complaint received from the Pullen's when it
10 was received and that he received advice that it was not within the scope
11 of any pending discovery request and did not have to be produced, and
12 then we presented one attorney for the Defense at the time, Mr. Cools, to
13 confirm that was the advice he gave and why, and then we rested our
14 case. Just oversimplifying it, but that could be expanded on an issue by
15 issue basis.

16 If that's all we did, I asked Mr. Cloward if he would stipulate
17 that the scope of the waiver would be limited to the Pullen incident, and
18 it would be limited to communications between Mr. Temper and Mr.
19 Cools because that would be what Jacuzzi claimed the advice was that
20 they relied on, and it would be -- from Jacuzzi's side -- the person who
21 says I relied on the advice.

22 And I thought that would be a fair way to clarify whether we
23 could reach agreement on the scope of waiver.

24 Our concern was is that in the briefing, Mr. Cloward had
25 stated that if Jacuzzi put on any evidence in phase two, that Jacuzzi

1 would waive the attorney/client privilege for all discovery-related
2 matters.

3 So that would --

4 THE COURT: That's --

5 MR. ROBERTS: -- be basically --

6 THE COURT: -- not --

7 MR. ROBERTS: -- an open door.

8 THE COURT: Mr. Roberts, just to -- that wasn't the position
9 of the Court. I -- that is not my position.

10 MR. ROBERTS: And I understood that, Your Honor. But here
11 was my concern in -- with doing this and -- and that was that -- there was
12 the *Wynn* decision, which the Court basically said, as a matter of law,
13 you can't use the waiver of privilege as the sword and a shield, and that
14 if you waive the privilege, you waive it for all communications within the
15 subject matter.

16 Now, I actually have no idea what that means. I think our
17 interpretation could be read as consistent with that, but Mr. Cloward's
18 interpretation that the subject matter is discovery abuse -- now we've
19 waived everything for discovery abuse. And I don't know if we could
20 actually rely upon this Court's thoughts expressed in the transcript or
21 even an order of this Court because once we've waived the privilege, as
22 a matter of law, something is waived. And there's a scope of something
23 that's waived.

24 And if Mr. Cloward --

25 THE COURT: Mr. Roberts?

1 MR. ROBERTS: -- took a writ to the Supreme Court, it's the
2 Nevada Supreme Court that would decide what we waived.

3 THE COURT: No, yeah. And I don't want that. So Mr.
4 Roberts? Again, there's a little bit of a delay, so I apologize if I end up
5 talking over you.

6 So, I mean, I guess -- it's actually hard to set specific
7 parameters when we're not dealing with -- you know, we -- unless we
8 take it piece of evidence by evidence, but -- but it was my general view
9 that, you know, you get the right to say, hey, here's the advice I gave
10 them, and this is -- basically, this is what I told this person. And then Mr.
11 Cloward should be allowed to say, well, Jacuzzi, did you actually rely
12 upon that advice? And how? I mean, that -- to me that seems pretty
13 simple. I mean, as a general proposition.

14 So do you say, you know, A -- you know, "A" attorney told
15 "B" official at Jacuzzi X, Y, and Z, then, you know, Mr. Cloward gets to
16 find out, did they really tell you that? And what did you do with that
17 information, right?

18 I mean, that -- to me that seems, as a general proposition, the
19 way this should happen.

20 Anyway, go ahead.

21 MR. ROBERTS: And I would agree with the Court, but I think
22 in absence of either a Nevada Supreme Court ruling that limited the
23 scope of waiver or a stipulation from Mr. Cloward voluntarily agreeing to
24 limit the scope of waiver, I don't think that that law is clear enough that I
25 can say Mr. Cloward's position has no chance of success. And therefore,

1 once we waive the privilege, it's going to be determined not by me or
2 Mr. Cloward, it's going to be determined as a matter of law by
3 someone -- maybe someone higher than you -- that the scope goes
4 further than any of us anticipated or intended.

5 THE COURT: Well, what would --

6 MR. ROBERTS: And because there --

7 THE COURT: -- want --

8 MR. ROBERTS: -- are --

9 THE COURT: -- me to do?

10 MR. ROBERTS: Pardon?

11 THE COURT: Yeah. What would you -- what would you ask
12 this Court to do to be able to resolve this? I -- because I was unclear
13 from your brief, you know, what specific things I could say or order to
14 allow this second phase to go forward, because under *Ribeiro*, you're
15 entitled to present advice of counsel. And obviously, a plaintiff should
16 be allowed, to some extent, to explore the validity of that -- of that
17 defense.

18 And what more could the Court say or what more are you
19 looking for me to say to allow this to proceed in a fair manner to both
20 sides?

21 MR. ROBERTS: Your Honor, the reason --

22 THE COURT: That's a tough one, huh?

23 MR. ROBERTS: No, it's difficult. And the reason that we filed
24 a waiver instead of a further motion is because after consideration of the
25 dilemma that we're in, I was unable to think of any way the Court could

1 help us; could provide a final ruling that we could actually rely upon as
2 to the scope of waiver. And that the only solution --

3 THE COURT: How does this usually happen?

4 MR. ROBERTS: -- was a stipulation --

5 THE COURT: I --

6 MR. ROBERTS: -- which we're unable to reach.

7 THE COURT: Right.

8 MR. ROBERTS: And again, I'm not being critical of Mr.
9 Cloward; that's his position.

10 I think alternatively if the Court were to issue a written order
11 on the scope of waiver, and then Mr. Cloward were to take a writ on that,
12 and the Supreme Court were to accept it and rule on the merits, that
13 would solve my problem. But I don't think --

14 THE COURT: Well --

15 MR. ROBERTS: -- that's a feasible solution, Your Honor.

16 THE COURT: It's not getting too economical, but, you know, I
17 handle several of these motions for sanctions to strike an answer based
18 upon purported discovery abuse, and this is the first time I ever had
19 anyone who wanted to actually present the advice of counsel defense.

20 But I wonder, Mr. Roberts, if you or Mr. Polsenberg, who I
21 see is in the courtroom there; if either of you have had this situation
22 before where advice of counsel defense was presented in this context,
23 and how the other Courts have dealt with that.

24 But anyway, Mr. Roberts, you don't need to answer that
25 question. I just pose that. And why don't I let you proceed without,

1 hopefully, too many more questions. So I'll let you proceed in a logical
2 manner that you have in your notes.

3 MR. ROBERTS: And Your Honor, I have not had that
4 situation before, but I'll ask Mr. Polsenberg to advise the Court if he has.

5 MS. POLSENBERG: No, not actually, no.

6 THE COURT: Okay. Well, I'm not smart enough sitting here
7 to figure out all the details on how that would work, so -- but let's
8 proceed.

9 MR. ROBERTS: So Your Honor --

10 THE COURT: Don't put that in a commercial. Okay? All
11 right.

12 MR. ROBERTS: So --

13 THE COURT: Go ahead.

14 MR. ROBERTS: So under the circumstances, Jacuzzi did not
15 see any way the Court could limit the scope of waiver and have it be
16 something we could rely upon. I'll represent that just between Mr. Cools
17 and Mr. Templer there are about 2,000 emails. And discovery is often
18 meshed in with other subjects and that -- it just appeared to be us -- you
19 know, without knowing the scope of waiver and without knowing
20 whether or not 2,000 emails between attorneys inside and outside
21 counsel would be admissible in a punitive phase and go to the jury, and
22 whether juries, you know, understand the giving and receiving of legal
23 advice on that matter. It might be misconstrued. It just seemed that it
24 was a risk that I could not advise Jacuzzi to take.

25 So I think that puts us back where we were on the competing

1 orders. And to be clear, you know, Jacuzzi reserves all of its objections
2 to the Court's prior order on sanctions. And I'll let Mr. Polsenberg jump
3 in if he wants to, but in fairness to the Court, we should let you know that
4 we are contemplating a writ to the Supreme Court after the Court enters
5 a final written order on the competing orders.

6 THE COURT: Okay. Understood.

7 MR. ROBERTS: And the other thing the Court would need to
8 address is the scope of discovery and some of the issues that were
9 deferred by the Court as moot after the last hearing. You know, Mr.
10 Cloward's request to have Jacuzzi pay for all of the electronic discovery,
11 which might normally be the burden of the party requesting the
12 information. His request to have us pay for the forensic search. And this
13 is hundreds of thousands of dollars. The scope of discovery, which he's
14 still entitled to pursue in support of his punitive damage claim.

15 I think Mr. Cloward's made it clear to us that the fact that our
16 answer is struck, and he gets to go to the compensative -- compensatory
17 phase on damages doesn't mean he's done with discovery on liability,
18 causation, and other facts that may support his punitive claim. So I think
19 we do still have discovery left. But there are issues regarding the scope
20 of that discovery and who pays for it.

21 The final thing that we put in our brief and that I would like
22 the Court to address this morning is we did attempt a private mediation
23 with Judge Glass, which was unsuccessful.

24 THE COURT: Oh.

25 MR. ROBERTS: That was prior to this Court striking our

1 answer and prior to many of the facts regarding alleged similar incidents
2 being produced. And it would be our request that given the change in
3 circumstances, it would be appropriate for the Court to order a
4 mandatory settlement conference to see if there is any chance of
5 resolving this without further litigation costs.

6 THE COURT: Thank you. Was there anything that your co-
7 counsel wanted to add? No? Okay. All right. Very good.

8 MR. HENRIOD: No. Thank you, Your Honor.

9 THE COURT: All right. Very good.

10 Mr. Cloward, I would like to hear from you then.

11 MR. CLOWARD: Thank you, Your Honor. A couple of things.
12 I guess in going back I guess reverse chronological order just because
13 the issues are present, I don't believe the Court ever determined that the
14 additional discovery was moot. I think it's always been contemplated. I
15 mean, we still have an active case against First Street and Aging in the
16 Home where their answer is not struck. So we need to complete the
17 discovery for that case. So while the answer may be struck as to Jacuzzi,
18 we still have to prove our case against Aging in the Home and First
19 Street.

20 And the parties have been working to try and complete the
21 forensic search. But due to the COVID-19 restrictions, particularly with
22 California, and Jacuzzi's own internal companywide rule, that's been
23 delayed. I think the date that we've been given that we're trying to
24 complete the forensic search is something like November. But one of
25 the frustrations is, you know, there are -- we chased around the country

1 doing some depositions that really, looking at all of the other similar
2 incidents, we probably wouldn't have wasted our time, and money, and
3 effort doing those types of depositions. Say for instance somebody that,
4 you know, wasn't as injured as bad as someone that was stuck for three
5 or four hours. And we've been waiting to kind of complete this -- these
6 phases to determine okay, which ones do we really want to take, and do
7 we have everything so that we're not wasting our time again.

8 You know, we spent an inordinate amount of time trying to
9 contact the dealers and get information from the dealers, only to find out
10 at the last deposition that there were not just 14 or 15 dealers, but there
11 were potentially up to 200 dealers. And that was after repeated
12 discovery. So I just wanted to touch on the discovery issue.

13 And then I want to, I guess, shift my focus and argument on
14 the example that Mr. Roberts gave on behalf of Jacuzzi. I think the Court
15 has been overly cautious and with tremendous professionalism and has
16 done an excellent job documenting each phase of this evidentiary
17 hearing. And the opportunity was given to Jacuzzi to present the advice
18 of counsel defense. But they're basically wanting to have the scope so
19 narrowed that -- before the evidence is even presented. And I don't think
20 that's fair to the Court, and I don't think that's fair to the Plaintiff.

21 And the example that I gave -- and I give this again just for
22 appellate review for the record -- you know, given the example, let's just
23 say that Mr. Cools -- they presented Mr. Cools at the evidentiary hearing
24 to say I told them that I thought that the Pullen matter did not need to be
25 turned over, and then they concluded the hearing.

1 Well, suppose for a moment that Vaughn Crawford was on
2 the call and a moment later he said, you know what, I don't think that's
3 right, Josh, I think we've got to turn it over, I think it's within the scope of
4 the rulings. I think we absolutely need to turn it over, so you know, Ron
5 -- Mr. Templer, go ahead and turn it over. You know, under the
6 guidelines that Jacuzzi seeks today, I wouldn't be allowed to go into that
7 subsequent conversation or that subsequent thought, or another
8 hypothetical. I mean, there are a lot of hypotheticals.

9 And the Court, I know, practiced in private practice. And I'm
10 sure at some point was a junior associate, and then a senior associate,
11 and then a partner, as were most of the attorneys in the courtroom. The
12 way that that generally works is sometimes an associate will give advice
13 in an email, and then when the partner comes around and reads it,
14 they'll do a reply all and says, you know what, I've looked at this a little
15 further, and I think we need to turn it over.

16 So same example, if Mr. Cools took the stand, and they
17 provided one email from Mr. Cools to Mr. Templer that said, I don't think
18 that this meets the scope of the prior ruling, don't worry about it, and
19 then a day or two later Mr. Crawford does a reply all as the senior -- you
20 know, as the partner, the trial counsel and says, no, guys, I think this
21 needs to be turned over, please turn it over. Under the guideline that
22 Jacuzzi seeks, I would be prevented from discovering any of that.

23 THE COURT: Well, let me interrupt you for a second then,
24 Mr. Cloward. I would think under that circumstance the Court would end
25 up ruling -- now, again, I'm speculating because we have just a

1 hypothetical here. And I'm speculating that the Court would allow you to
2 depose the relevant people at Jacuzzi to say, you know, did you ever get
3 any further advice that countermanded or that was different than you
4 received from this associate. And if they said, yeah, Mr. Crawford called
5 back and said X, Y, and Z, well, then I think that would be the appropriate
6 way to do it rather than to jump in and taking the deposition of other
7 attorneys.

8 You know, go to Jacuzzi and say, all right, this is what Mr.
9 Roberts' evidence is, that you were instructed as follows by this
10 associate, is that true, right, and did you ever get any countermanding
11 instructions.

12 Wouldn't that be the fairest way to do it that allows you to
13 explore whether that advice really was given, and did they rely upon it,
14 and not extending the waiver of attorney-client privilege too far? I mean,
15 we -- isn't it there a way that we can cut this? But we have to do it on an
16 evidence by evidence basis to make sure that the scope is not waived
17 more than necessary. And I don't know what Mr. Roberts' position on
18 that would be, but I would think he would think that that's fair that you
19 get some latitude to explore whether, you know, that advice really was
20 the advice -- the final advice that was given and wasn't changed and that
21 they relied upon it.

22 Anyway, go ahead.

23 MR. CLOWARD: Sure. And Your Honor, that's exactly what
24 we had kind of contemplated would have been allowed. But in the
25 discussions -- you know, the text exchange and so forth with Mr.

1 Roberts, it seemed to us as though it was a pre-defined you only get to
2 talk about this certain issue and these certain, I guess, discussions and
3 nothing else about that.

4 And another example was just the Pullen matter. Let's just
5 presume that they only presented evidence of that discussion and
6 nothing else. So no other hearings where Mr. Templer actually was
7 present in the courtroom with Commissioner Bulla when she ruled. Let's
8 say they didn't even -- they didn't delve into that discussion, they didn't
9 delve into her report and recommendations when the Court ordered that,
10 when the writ was denied. You know, all of those other very important
11 seminal events that took place in this process. It was my understanding
12 from Mr. Roberts that I would be simply prohibited from going into that.

13 So if he presented evidence on the Pullen matter and that
14 was it, I would be prohibited from discussing advice after a specific
15 ruling, or after the writ, or after the Court, you know, adopted and
16 affirmed the report and recommendations. And that was another reason
17 why I was unable to agree, because we did feel like, no, we should be
18 able to look into some of these other things, because my understanding
19 of the Court's ruling is it's not just the Pullen matter, but it's the other --
20 it's there are other things that were concerning.

21 THE COURT: Of course.

22 MR. CLOWARD: And so I didn't have any --

23 THE COURT: So let me --

24 MR. CLOWARD: Sorry.

25 THE COURT: No, no. You finish that thought, and then I

1 want to jump in with a thought.

2 MR. CLOWARD: You got it, Judge. So I guess I just didn't
3 want to be limited to just that one -- the Pullen incident. And I conveyed
4 that I would think that we should be able to explore some of the other
5 issues.

6 THE COURT: So again, just trying to think outside the box,
7 and I'm just throwing this out there. What if we had a hearing where,
8 you know, Mr. Roberts was allowed to put on whatever advice of counsel
9 evidence that he thought was appropriate, and then I allow you to do
10 some discovery, which may go beyond the scope of what Mr. Roberts
11 thinks is appropriate, but in any event, the discovery is conducted? And
12 then we have the evidentiary hearing -- the final evidentiary hearing, but
13 we can do it in a closed session so that none of that information is
14 released to the public or made available or disclosed outside the
15 confines of the Court.

16 Then at that point in time, once all of the evidence is in and
17 all the objections have been made, then a writ can be taken to the
18 Supreme Court, and then the Supreme Court can make a reasoned
19 decision on whether I improperly ordered a waiver of the privilege that --
20 you know, whether it was too broad of a waiver. And that way the
21 Supreme Court has the whole record with what evidence came in, and
22 how I ruled that the attorney-client privilege was waived because,
23 otherwise, if this were to go up to the Supreme Court now, how are they
24 going to decide whether, you know, my ruling on waiver was error
25 because they don't have enough specifics? Anyways --

1 MR. POLSENBERG: Hey Judge, can I ask some questions?

2 Can I ask --

3 THE COURT: Yes.

4 MR. POLSENBERG: -- some questions on what you're
5 proposing?

6 I'm sure that would be fine if the issue were trade secret, but
7 here we're talking about waiver. And so I'm disclosing it to the other
8 side rather than the public, is it not for waiver? So what you would be
9 ordering is us to waive the privilege, and then to go to the Supreme
10 Court and figure out the ramifications where it will be too late to unring
11 the bell.

12 THE COURT: I understand. That's a good point. I was just
13 trying to think outside of the box in a way that --

14 MR. POLSENBERG: I appreciate that. And you know,
15 interesting situations call for intriguing answers. I'm just afraid that
16 ground is going to hoist us on the petard.

17 MR. CLOWARD: I was just going to say that it --

18 THE COURT: All right. Let's continue.

19 MR. CLOWARD: Yeah. I simply was going to respond that
20 that seemed like a very reasonable suggestion, but if Jacuzzi does not
21 feel comfortable with that, then I don't know what else can be done. I
22 think that our position -- Plaintiffs' position is that the Court has bent
23 over backwards to really provide Jacuzzi with every opportunity. And I
24 think that every opportunity has been given. And I believe there's
25 enough for appellate review on this issue. And I don't think that the one

1 narrow issue of advice of counsel is dispositive of the sanctions issue.

2 So I don't think that it's mandatory that the Court have this
3 hearing. As the Court recalls, the Court made an issue -- or made a
4 sanctions order. And then Jacuzzi petitioned the Court saying, hey, hold
5 on, at the prior hearing the Court said that we could put on a phase two,
6 so we'll -- let's do that. The Court provided very reasonable parameters
7 to conduct that. And now Jacuzzi is coming to court saying, hey, never
8 mind, forget about it, we don't want to risk it.

9 And so I think there's enough. I think the Court can rule now.
10 I don't think that the Court needs to really do anything else. That's our
11 position. I think the Court's been --

12 THE COURT: Well, so --

13 MR. CLOWARD: -- overly reasonable.

14 THE COURT: -- one more thought again, outside the box.
15 Perhaps Jacuzzi could provide this Court with a statement of the
16 evidence, in camera, that it intends to present at the second phase of the
17 evidentiary hearing. And then I could respond to them with my ruling on
18 to what extent the attorney-client privilege would be waived if they
19 presented that evidence. And we could seal both their statement of the
20 proposed evidence, and my ruling on that.

21 And at that point in time, Jacuzzi could make a more
22 reasoned and rational decision on whether they actually want to proceed
23 with presenting that evidence, or what portion of that evidence. And that
24 submission and my response would be sealed subject to any appellate
25 review, which might require it to be reopened. But in that fashion then, I

1 think Jacuzzi gets to know, hey, Judge, here's what we want to present,
2 let us know how much you're going to allow the Plaintiff to do to explore
3 these. And if they don't like it --

4 MR. POLSENBERG: Does under that plan --

5 THE COURT: -- if they don't like it, then say, well, Judge, I
6 think you're going too far. If they do like it, then I think Jacuzzi's
7 satisfied. I know that would be a laboring project for me, but I'm willing
8 to do if that's one way of solving this.

9 Anyway, Mr. Polsenberg, you were going to jump in here.

10 MR. POLSENBERG: Yeah. Thank you, Your Honor. So does
11 Plaintiff get to know what we're proposing and your ruling?

12 THE COURT: No. No. That would have to be, in camera,
13 because you need -- because, otherwise, you're revealing your hand,
14 right. That would have to just come to me and be private. You would
15 say, Judge, we're proposing -- we want to put on this evidence that this
16 attorney told this official, you know, X, Y, and Z on this date, and they
17 relied upon that in making this decision. Judge, are you going to allow
18 them to do discovery on that piece of evidence, and if so what? And I'll
19 let you know, well, I am going to allow --

20 MR. POLSENBERG: That's fine.

21 THE COURT: -- them to do discovery, this is what I'm going
22 to allow. And then you get to decide, well, Judge, I think you're going
23 too far, or, hey, that's rational, let's do it. What about that methodology?

24 MR. POLSENBERG: Well, the Supreme Court get to know
25 what you're ruling on?

1 THE COURT: Well, sure, because it would be sealed, but
2 subject to them opening it up, right, for --

3 MR. POLSENBURG: But I really don't think the Supreme
4 Court would keep it confidential from Plaintiff, because they would
5 consider that to be an ex parte ruling.

6 THE COURT: I don't know what they would do in this
7 situation, but we are treading new ground here. Just another thing I
8 wanted to throw out there. I'm trying to accommodate you.

9 MR. POLSENBURG: Okay.

10 THE COURT: If you have any --

11 MR. POLSENBURG: Thank you, Your Honor. I appreciate it.

12 THE COURT: All right. Let's continue then, Mr. Cloward.
13 Anything else, sir?

14 MR. CLOWARD: Your Honor, I don't have anything else. As
15 far as the Court's last proposal, I don't know whether Jacuzzi is rejecting
16 that or, you know, entertaining that, but I guess the only request that we
17 would have is that the order of the Court be that all of the
18 communications regarding discovery be produced, not to increase the
19 burden on the Court, but just so that the Court has the full picture of
20 what was said and what Jacuzzi relied on.

21 I mean, at the end of the day the Court is trying to endeavor
22 to determine whether or not Jacuzzi relied on advice of counsel defense
23 or not. And so the Court should have all of the communications so that
24 it can make the proper ruling, not just the selected cherry picked
25 communications that Jacuzzi feels will best make its argument.

1 So if the Court is inclined to -- or I guess if Jacuzzi accepts
2 the Court's offer, which we think is a creative way to come about with
3 this issue, we would be okay with that, but only if Jacuzzi was required
4 to produce all of the communication because at this point, it wouldn't be
5 a --

6 THE COURT: So Mr. Cloward -- yeah.

7 MR. CLOWARD: -- it wouldn't be a -- it wouldn't be a
8 situation where we were giving input and doing discovery to kind of
9 obtain the counter-argument of this, for the Court's consideration. It
10 would be, again, Jacuzzi's sole obligation to provide the Court with what
11 it felt was important. And because we would not be involved in that
12 process we would just ask that the Court's ruling be broad enough that it
13 would encapsulate everything that the Court would need to make a
14 proper ruling.

15 THE COURT: So as to that point -- and again, this isn't an
16 order, this is just a reflection -- I don't know that I would go so far as to
17 order Jacuzzi to produce all advice of counsel given, because it would be
18 appropriate for this Court to assume that if they did not present evidence
19 of advice of counsel, then the advice wasn't indeed given, right. They
20 can't rely upon an advice of counsel defense unless they present me with
21 the actual advice that was given.

22 And so I have to make a decision based upon what advice
23 they say was given, and if they don't present any evidence of advice of
24 counsel then I have to assume that there was no advice given that was
25 relied upon by Jacuzzi.

1 MR. CLOWARD: And just a minor clarification, Your Honor, I
2 think that that's a cogent point. What I'm trying to consider would be
3 potentially competing advice that was given.

4 So for instance, back to the hypothetical, if Mr. Cools said,
5 hey, I don't think we've got to turn it over, and that's all the
6 communication that they provided, but Mr. Crawford sent a separate
7 email saying, no, you've got to turn it over, but they didn't provide that
8 to you, the Court really wouldn't have the full picture.

9 And so I was just simply saying, if the Court is going to
10 entertain that, then it should require Jacuzzi to provide all of the advice,
11 whether it was, you know, given by whoever, so that the Court can really
12 go through that and make a determination.

13 THE COURT: I don't think I would go that far. Like I said
14 earlier in my comments today, I'd probably allow you to depose Jacuzzi,
15 and say, was there any advice that you were given, or any instruction
16 that countermanded that initial piece of advice?

17 MR. CLOWARD: Understood.

18 THE COURT: Rather than you initially being able to go and
19 say, well, did you talk to anybody else -- any other attorneys on this
20 issue, and then kind of -- you know, kind of exploring in that manner. I
21 wouldn't go that far, but --

22 MR. CLOWARD: Okay.

23 THE COURT: All right. What about mandatory settlement
24 conference?

25 MR. CLOWARD: Well, our position --

1 MR. GOODHART: Your Honor, this is Philip Goodhart. I
2 don't mean to interrupt, but there's a lot more smarter people in the
3 room than me, obviously. Is there any way to have some type of a
4 clawback agreement that would allow the Court to make a ruling? And if
5 it is then taken up on writ, and the Nevada Supreme Court overturns the
6 ruling, that it's more detrimental to Jacuzzi, and requires them to
7 produce more information, that everything that was done at the
8 evidentiary hearing is clawed back, and then we don't proceed with the
9 evidentiary hearing?

10 THE COURT: Well, as general proposition, I think we could
11 do that. I think Mr. Polsenberg's concern was once information is out
12 then the harm's already been done, and you can't unring the bell.

13 But, Mr. Polsenberg, what did you want to say on that point?

14 MR. POLSENBERG: Well, that's absolutely true. And the
15 problem I had, among others, is that if you were to make a certain ruling,
16 and the Supreme Court were to say that the waiver is even broader, at
17 that point we've already done the waiver.

18 And one other point, because I have another hearing I have
19 get to, but --

20 THE COURT: Okay.

21 MR. POLSENBERG: -- you had said that you would make a
22 presumption that there was no advice, I don't think that's accurate. I
23 think what you -- if we weren't raising the issue, do you, because of the
24 concerns of waiver? I think it's simply not an issue you would decide.
25 You wouldn't actually make a presumption that there was advice.

1 THE COURT: Thank you for clarifying. I agree with that. I
2 think that was a better way of presenting the point. Thank you.

3 MR. POLSENBERG: Great. Thank you, Your Honor.

4 THE COURT: Okay. Precision is well appreciated.

5 All right. Mr. Cloward, I'm assuming you wanted to continue
6 with that comment about the settlement conference?

7 MR. CLOWARD: Yes. And the concern that we also had, is
8 the five-year rule is coming up, I think the first part of next year; that's a
9 concern. But regarding the settlement conference, I've always conveyed
10 this to -- well, I feel like I've always conveyed this in prior discussions, it's
11 difficult for me to engage in any sort of a settlement attempt, when I
12 don't know whether I have all of the information.

13 I mean, like Mr. Roberts indicated, the first time we went to
14 mediation we had about three or four, maybe five other similar incidents.
15 Well, now we've got 170 something. And so it's -- that changes the
16 dynamic of the case, and the settlement, and the posture. And when we
17 still have the outstanding issues, it's difficult for me to give advice to my
18 clients as to settlement when I don't have all of the information.

19 And so, you know --

20 THE COURT: Understood.

21 MR. CLOWARD: -- we respectfully would say, you know,
22 we're not interested. If the Court ordered us to go we would participate
23 in good faith, we always do, but it's not something that we're necessarily
24 asking for from the Plaintiff perspective.

25 Now, again, if the Court rules it, that's -- you know, we would

1 do that in good faith, but we would prefer to go back to, you know, a
2 private mediator, rather than through the Court annexed settlement
3 program. We feel that the mediation with a private mediator is probably
4 more effective, but --

5 THE COURT: All right. Thank you.

6 Now assuming we are not going to proceed with the
7 evidentiary hearing today and tomorrow, what is the order that you
8 would be seeking from the Court at this time?

9 MR. CLOWARD: We would ask the Court to enter the
10 sanction order that it already provided, and already prepared, and
11 already spent a lot of thoughtful time looking over all of the issues. We
12 feel that it's appropriate to enter that at this point.

13 Jacuzzi has been given an opportunity, and if there was a
14 concern about the waiver they could have petitioned the Supreme Court
15 via writ, to decide that issue. But instead, you know, we got an email on
16 Friday saying, hey, never mind, we want to take the -- we want to take
17 this off the calendar.

18 So we believe that it's -- you know, the Court's been overly
19 cautious to provide a very good appellate record, so that there is
20 thoughtful appellate review. We feel like the Court has done a nice job
21 doing that, and we feel like the Court should enter the order -- our order,
22 and if there is a need for another hearing to discuss the competing
23 orders, you know, we don't feel that that's necessary, we feel that our
24 order should be signed.

25 THE COURT: And how much time for discovery, and when

1 would you want a trial?

2 [Counsel confer]

3 MR. CLOWARD: For the discovery, I think that probably -- the
4 concern with the discovery is this, Your Honor, is that we have to
5 complete forensic search to feel comfortable proceeding with the
6 additional discovery. And, you know, Mr. Goodhart will learn of this
7 here shortly, but we're finalizing a motion. We just recently found that
8 First Street actually has recordings of our client that have never been
9 turned over, and we believe that there are some issues with respect to
10 First Street and Aging in the Home and turning over evidence there too.

11 Now we've continued to work on the case behind the scenes,
12 and so there are so some other concerns that we're going to bring to the
13 Court's attention, but I think that six months is probably what we need.
14 We also requested additional relief in our supplemental brief that was
15 filed yesterday. I believe that was set forth in our sanction motion, that I
16 don't think the Court ever ruled on those additional items of relief. They
17 were jury instructions, and motion in limine issues, and things of that
18 nature.

19 THE COURT: That was so long ago I don't remember which
20 of those I ruled on, and which I didn't, but, thank you. All right.

21 MR. CLOWARD: We did provide in the additional brief, all of
22 that additional --

23 THE COURT: I have it --

24 MR. CLOWARD: -- relief was provided. Thank you, Your
25 Honor.

1 THE COURT: I do have that. I do have it. Thank you very
2 much. And one last thing. Is it your position that you want the Court to
3 rule on each of those before we have a final discovery plan?

4 MR. CLOWARD: I think that would help. That would help
5 narrowly tailor the issues. I mean, if there were certain -- if there were
6 certain evidentiary findings then that would certainly moot some of the
7 potential discovery issues.

8 THE COURT: Can't some of the fees and cost issues be
9 postponed until after, or at the time of trial?

10 MR. CLOWARD: We think, yeah, they certainly could be, but
11 we wouldn't want that to be a lingering issue, and we don't see why
12 there would be any reason to not -- I guess, why would there be an
13 issue --

14 THE COURT: Well, because it might go to -- it might be
15 effective by who's the prevailing party. Perhaps that would be relevant
16 in ruling on some of these, but --

17 MR. CLOWARD: Well, let's just say that we lost the case, we
18 still think that there should be an award of fees and costs for the time
19 that we -- the tremendous amount of time and effort that we took doing
20 discovery that wasn't necessary, or doing discovery that was overly
21 complicated --

22 THE COURT: Understood.

23 MR. CLOWARD: -- due to Jacuzzi's action. So regardless of
24 whether we prevailed or not. And I guess the danger is, we think we're
25 going to prevail, we think it's going to be a very great result, based on

1 our focus groups. But the concern that I would have is -- Your Honor, is
2 that let's say we do -- when we do prevail, because I'm confident we
3 will --

4 THE COURT: Okay.

5 MR. CLOWARD: -- the Court may say, well, I'm awarding
6 attorney fees and costs, or whatever, because of the prevailing party,
7 and then the sanction issue takes a back seat, and it's minimized.

8 THE COURT: I understand.

9 MR. CLOWARD: You know, I --

10 THE COURT: Right. That's a very valid point. I think that's a
11 very valid point. Thank you.

12 MR. CLOWARD: And I've had that actually happen. I had a
13 mistrial --

14 THE COURT: Okay.

15 MR. CLOWARD: -- that was caused in Judge Bell's
16 courtroom. She awarded fees and costs and said, okay, we're going to
17 do a hearing, we'll postpone it. And then we have the trial, we get a
18 great result on the trial, and then it seems like the issues were kind of
19 just meshed, and so we don't really recover for the mistrial, and all of
20 those costs.

21 So I do think that it's more appropriate to handle that now,
22 then to wait just for that issue, but the Court's been very --

23 THE COURT: Okay.

24 MR. CLOWARD: -- fair and cautious, and so whatever the
25 Court desires we're happy with. Thank you.

1 THE COURT: Thank you. I appreciate that. All right. Very
2 well.

3 Mr. Goodhart, did you -- I know you didn't file any brief, but
4 we're discussing many issues that affect you and your client. Did you
5 want to add anything, sir?

6 MR. GOODHART: Yes, Your Honor. Thank you.

7 I've stayed out of this, because I really don't have a dog in
8 this fight, with the product defect claims. Jacuzzi manufactured and
9 designed the product, my client only marketed and advertised the
10 product, and through dealers actually consummated the sale to
11 Ms. Cunnison. So there's distinct issues between the claims against my
12 client and the claims against Jacuzzi.

13 Any product defect claims that were passed through to me
14 would obviously go back to Jacuzzi as the ultimate designer and
15 manufacturer of the product, but I've been focusing almost exclusively
16 on the advertising claims. And discovery on those claims has been
17 closed for months, and months, and months.

18 There has been absolutely nothing preventing Plaintiffs'
19 counsel from pursuing any type of advertising discovery related to those
20 specific claims against my client. They haven't done so. We also filed a
21 motion for summary judgment on the advertising claims, and motions in
22 limine related to the advertising claims. This was all done in anticipation
23 of trial, under the presumption that discovery was closed.

24 Mr. Cloward has not filed a motion to reopen discovery on
25 those types of claims. He made reference earlier to the fact that the

1 electronic forensic research has to be completed, but that electronic
2 forensic research deals exclusively and only with Jacuzzi. It doesn't deal
3 with my client, First Street, at all. It's never been requested. It's never
4 been asked.

5 So for the Court now to even consider reopening discovery
6 on the advertising issues, would really put my client behind the eight-
7 ball and prejudice it. We more or less revealed our hand in the motions
8 in limine and the motion for summary judgment, and now to allow
9 Plaintiff to go clean up whatever it is they did not do, based upon the
10 arguments made, will severely prejudice my client.

11 And a lot of the requests that Plaintiff is asking in his brief,
12 beginning on page 8, I guess of the most recently filed brief, would have
13 a direct impact on how the jury views my client, as well, as the
14 advertiser, marketer, and ultimately the seller of the product to Ms.
15 Cunnison. I don't think that's going to be fair. I don't think it's going to
16 be fair at all. I think each one of the items that Plaintiff has to delineate
17 needs to be briefed, not only from Jacuzzi's side, but also First Street's
18 side, because there is a difference, a big difference in the claims that are
19 being asserted against those two entities.

20 And quite honestly, Your Honor, I don't know what a trial is
21 going to look like. The Court may or may not issue sanctions against
22 Jacuzzi, which could result in liability against Jacuzzi for product defects,
23 because Jacuzzi did not, in good faith, participate in the discovery
24 process. It's a sanction.

25 Those sanctions should not apply to my client, First Street.

1 First Street has never, ever had an order by the discovery commissioner,
2 ordering First Street to produce certain documents that we have not
3 done. There is no order in place. And I think that was one of the big
4 things that the Court looked at in issuing its, I guess what we'll call now,
5 a preliminary order striking Jacuzzi's answer, was that there was an
6 order from the discovery commissioner that the Court found Jacuzzi
7 violated.

8 None of that has to do with First Street. There is no order
9 from the discovery commissioner that Jacuzzi -- or that First Street has
10 violated, because there's never been order from the discovery
11 commissioner. So, theoretically, because First Street is in the chain of
12 commerce, and because the product defect claims apply equally to First
13 Street, First Street should be able to put on a defense that there is no
14 product defect.

15 Well, I'm not sure how this trial is really going to look, and I
16 think the Court and the parties may be getting an understanding of how
17 the trial is going to look, before most, if not all of Plaintiffs requested
18 rulings be made. Because if, for example, you agree that number 16, for
19 example, on page 8 of Plaintiff's brief is: "The jury should be instructed
20 that a reasonable consumer would not expect that the seat of a walk-in
21 tub would be slippery enough to cause the consumer to slip off the seat
22 during normal use."

23 If that is an instruction to the jury that is going to severely
24 prejudice First Street's defenses, not only from the advertising side, but
25 also the product defect side. And, again, if there is liability in the striking

1 of the answer to Jacuzzi, that is not going to transpose and apply to First
2 Street's defenses, but doing so would, and would severely prejudice First
3 Street.

4 There's also several motions in limine that Plaintiff wants
5 automatically granted, but First Street joined in some of those motions in
6 limine. So again, its First Street's position that First Street is entitled to
7 or should be entitled to present a defense to all product claims, because
8 they are a named party of the product claims, and to all advertising
9 claims, and no ruling by this Court should prejudice First Street's ability
10 to present those defenses, because of Jacuzzi's alleged failure to comply
11 with discovery orders.

12 So I just have a lot of concerns now that we're at this phase,
13 that Plaintiff is seeking to lump First Street into the concern that the
14 Court has with Jacuzzi, and Plaintiff, for the first time mentions, well,
15 we're going to be filing a motion against First Street. But honestly, Your
16 Honor, Mr. Cloward has been threatening that for well over a year, and I
17 haven't seen it. Discovery is closed. The time for filing motions is
18 closed.

19 The issues before this Court now, and the only issues still
20 open relate exclusively to the striking of Jacuzzi's answer, and anything
21 related to that.

22 So, Your Honor, I would just object to any attempts by
23 Plaintiffs' counsel reopen discovery for all purposes. The only
24 discussion so far has been to reopen discovery, or keep discovery open,
25 as we relate to the issues surrounding striking Jacuzzi's answer, period.

1 That's it. Nothing else is reopened.

2 THE COURT: Thank you, Mr. Goodhart. I appreciate your
3 comments, and at the appropriate time I certainly will exercise great
4 caution to make sure that any order against Jacuzzi does not prejudice
5 your client's rights in any inappropriate manner. All right.

6 MR. GOODHART: Thank you, Your Honor.

7 THE COURT: I'll consider that. Yeah. I will work really hard
8 to make sure that any findings, that -- to the extent I might have to make,
9 that I will take into account, you know, how they affect your client and
10 whether they should exist, knowing that they might impair your client's
11 rights. We'll consider all that, all right?

12 MR. GOODHART: Thank you, Your Honor. I appreciate it.

13 THE COURT: Thank you.

14 Mr. Roberts, you get a chance to reply. You don't need -- I'm
15 sure you disagree with Mr. Cloward's statement that there are 170
16 similar incidents. You don't need to remark on that, but let's hear the
17 rest of your reply.

18 MR. ROBERTS: I was going to agree, except for the word
19 similar, Your Honor.

20 THE COURT: Okay. All right. Go ahead.

21 MR. ROBERTS: First, Your Honor, under the -- what I'll call
22 the expanded hypothetical where Mr. Cloward would get to inquire of
23 the witnesses that we put on, whether or not they received any
24 contradictory advice; Ron would say, did you ever get different advice
25 from any of your attorneys? He could ask Josh whether, to his

1 knowledge, Vaughn ever gave any contradictory advice. I think that's all
2 perfectly reasonable and would be within the reasonable intent of our
3 hypothetical.

4 I think the challenge is, is that, you know, Mr. Cloward says,
5 well, I'm not going to trust what they say. I want to look at all 2,000
6 emails to see for myself if there's any contrary advice. I want to look at
7 the emails between Ron and all his other attorneys to see if there's any
8 contrary advice, which gets back to his position that any waiver should
9 waive all discovery communications with all counsel. And that's what
10 we can't risk.

11 I think if Mr. Cloward were to agree to the hypothetical -- the
12 expanded hypothetical, that's something that Jacuzzi could live with.

13 THE COURT: But he's not the one who makes the decision
14 though. I make the decision, right, on whether I'll allow him to do that
15 discovery?

16 MR. ROBERTS: Well, you make the first decision, and then
17 he has a right of appeal. And as Mr. Polsenberg said, once we waive it, if
18 the Supreme Court says the scope of waiver is bigger than you think it is,
19 and I think it is, the cat's out of the bag, and now we have to produce
20 everything, and he gets to do discovery and maybe gets to go to the
21 jury, and that's the dilemma we find ourselves in.

22 The clawback agreement, well, initially, I thought, oh, that's a
23 good idea, but I think the problem with the clawback is the premises
24 there's been no intentional waiver because clawbacks are for inadvertent
25 disclosures. And in this case, there would be --

1 THE COURT: No, I get that, but --

2 MR. ROBERTS: -- an intentional disclosure.

3 THE COURT: Why don't you just proceed and see? I mean,
4 you might end up agreeing with all my decisions on the scope of the
5 extent of the waiver, and so this could all be moot, or you might
6 disagree, but think, oh, it's not that bad to -- for us to have to take it up
7 on a writ, and we'll deal with that later, or there might be -- you know,
8 we might get through most of the evidentiary hearing and there might
9 be like one issue that you want resolved, and you could either take it up
10 on a writ, or we can, you know, all sit down and negotiate it and resolve
11 it.

12 I mean, isn't there -- isn't there a way to move forward and
13 hope we get to a point where nothing has to go up to the Supreme Court
14 on a writ regarding waiver?

15 MR. ROBERTS: And that, Your Honor -- I mean, that's the
16 dilemma, Your Honor. And I discussed this thoroughly with Mr. Henriod
17 and Mr. Polsenberg.

18 THE COURT: Okay.

19 MR. ROBERTS: And in order to get there, once there's a
20 waiver, once there's an intentional disclosure of a privilege
21 communication to a third party, then the law determines whether or not
22 anything else is waived. And for example, your --

23 THE COURT: Understood.

24 MR. ROBERTS: -- your, in camera, solution sounds great to
25 me if Mr. Cloward would say I won't appeal it. That if we agree to your

1 in camera decision, he says that's fine, I won't claim a greater scope of
2 waiver.

3 THE COURT: Yeah.

4 MR. ROBERTS: But I don't think he's going to be willing --

5 THE COURT: Well, we can't ask him to do that.

6 MR. ROBERTS: No, we can't. That would be unreasonable
7 for me to demand that he do that because --

8 THE COURT: Right.

9 MR. ROBERTS: -- he's not going to know what information
10 you read, and he's not going to know what your decision is until we've
11 already introduced the evidence. So it truly is a dilemma, and I
12 appreciate the Court trying to work with us --

13 THE COURT: All right.

14 MR. ROBERTS: -- because, you know, we wanted to try to
15 figure out a way to do this. But at least right now, I'm in a quandary as
16 to how you could provide us the assurance that would be final and
17 binding without Mr. Cloward's stipulation. And I think Mr. Cloward and I
18 fundamentally disagree.

19 So for -- you know, on the expanded hypothetical, I don't
20 think we're going to get him to waive the right to do broad discovery
21 with people other than A and B that we put on to determine if there's
22 something else out there for himself. And I understand that.

23 Addressing the discovery, I don't think Jacuzzi has -- would
24 have any objection to the sixth month proposed. We agree that the
25 COVID restrictions are making things very difficult. The forensic

1 searches, in order to get those done, it's just hard to do when we have
2 travel restrictions in California, and Jacuzzi doesn't have anyone in the
3 offices right now, Your Honor. Due to COVID, they have everyone
4 working at home, and those restrictions are -- you know, we don't know
5 how long they're going to last, but there are much broader restrictions in
6 California than there are here.

7 And with regard to the five-year rule, I know it's been told
8 somewhat due to the general order issued by Judge Bell, and we would
9 certainly agree, we're not going to try to do a gotcha here. They're
10 entitled to do additional discovery, and we would agree to extend the
11 five-year rule to the extent necessary to allow them to do the discovery
12 they need under COVID restrictions.

13 Finally, Mr. Cloward addressed the order. This Court did
14 issue a minute order, but there are competing orders submitted by the
15 parties, so we don't think it's a matter of you just signing your order.
16 There's an order drafted by Mr. Cloward. There's an order drafted by us
17 that are before the Court, and I believe this Court had previously thought
18 a hearing to discuss those competing orders would be helpful to the
19 Court prior to entering one, the other drafting its own, and we believe
20 that that hearing can be set as early as possible to address that issue.

21 THE COURT: Will additional briefing be necessary in your
22 opinion?

23 MR. ROBERTS: It depends on the scope of the hearing. I
24 don't think that additional briefing would be necessary for the Court to
25 rule and get additional input on the competing orders; however, if the

1 Court were to address all remaining issues in Mr. Cloward's brief, the
2 sanctions, the motions in limine, the instructions to the jury, to
3 everything else that he asked for as part of that response, I think the
4 Court probably would benefit from additional briefing.

5 For example, he's asked basically to have motions in limine
6 entered as a sanction when those motions in limine have not even been
7 fully briefed before the Court, which seems premature to me, but we do
8 believe additional briefing, since those issues were not really flushed out
9 very well in the briefing before the Court.

10 MR. HENRIOD: And I'm joining in with --

11 THE COURT: I think he is asking me to make rulings on all
12 those as extra sanctions.

13 MR. ROBERTS: Yes.

14 THE COURT: And so he would want to argue that those be
15 included in his order. So I think that means you would want a briefing
16 on that.

17 MR. ROBERTS: Yes, Your Honor.

18 THE COURT: Well, and so he has 27 specific things that I
19 apparently didn't rule upon. I mean, if you took one page per item, that's
20 27 pages of briefing right there without even getting to all the other
21 numerous points of disagreement between your proposed order and his
22 proposed order. So what are you contemplating in terms of the number
23 of pages of briefing that you want the Court to read?

24 MR. ROBERTS: Thirty pages, Your Honor, is what I was
25 contemplating. Just something within the rules. I don't -- I think we

1 ought to be able to have that out to get --

2 THE COURT: All right. Thank you. Let me hear --

3 MR. ROBERTS: Joel looks pained. I don't think he's ever
4 written a 30-page brief.

5 THE COURT: All right.

6 MR. HENRIOD: Yeah, just on the jury instructions, I think, at
7 least a page per is at least that, if we get that far.

8 THE COURT: I understand.

9 MR. HENRIOD: I mean, I don't think we addressed jury
10 instructions at this point. And if the Court were to enter an order that
11 does not go into these motions in limine and jury instructions, but rather
12 puts those things off until we brief jury instructions, or I'm sorry, until we
13 brief motions in limine, and we deal with jury instructions at the time we
14 normally do at trial, I don't think we would need that much more
15 briefing.

16 We could deal with the sanction as it is. I actually don't think
17 we should let this spin out into this controversy over motions in limine
18 and jury instructions. If it does go that far, we have to address each of
19 these jury instructions on the merits and the motions in limine, we have
20 to anticipate what the briefing would be on that. I don't think 30 pages --
21 I mean, I can't agree arbitrarily to 30 pages if it spins out that far.

22 THE COURT: All right. Thank you.

23 MR. HENRIOD: Yeah.

24 THE COURT: So Mr. Cloward. Mr. Cloward?

25 MR. CLOWARD: Yes, Your Honor.

1 THE COURT: So I'm going to, you know, actually leave most
2 of that up to you since you're the one requesting that these items be
3 included in your order, and you actually asked that they be included in
4 your order in the original motion.

5 So what is your thinking on whether you actually want the
6 Court to resolve -- to rule on these since they were part of your motion,
7 or do you want to withdraw your request for the Court to decide now on
8 jury instructions and motions in limine and get to the -- you know, get to
9 the heart of the rest of the sanctions order that you're requesting?

10 Just bear in mind, if you do want me to rule on all these, I
11 will absolutely take the time to think through each of these, but then we
12 need to decide if Jacuzzi should have a right to further brief them, and
13 how many pages of briefing, and how much time this is going to push
14 out resolution of this. So give me your thoughts on the logistics there.

15 MR. CLOWARD: Well, could we simply just split the issues?
16 So the Court rules on the answer and the prior sanction order, and then
17 allows additional briefing on these other reliefs sought, and we can do
18 some additional briefing then? There may be some of these that, you
19 know, maybe the parties may agree to stipulate in some form or fashion,
20 but that way it doesn't tie up the Court, and it doesn't -- as Mr. Henriod
21 talks about, expand and kind of roll into this additional decision-making
22 process.

23 We just -- the Court rules on the issue before today of the
24 order striking the answer, and then we're able to petition the Court for
25 additional relief on these other issues. That would be --

1 THE COURT: All right. Anything else?

2 MR. CLOWARD: No, Your Honor, that would be our
3 proposal.

4 THE COURT: All right. Thank you.

5 Does anybody else have further comments before we
6 conclude for today?

7 MR. ROBERTS: Your Honor, Jacuzzi would have no objection
8 to a phased process such as Mr. Cloward suggested where the Court
9 were to rule simply on the striking of the answer, and then based on that
10 ruling, the parties could brief, and the Court could issue a second --
11 reserve the right to issue a second order with additional sanctions
12 requested by the Plaintiffs.

13 THE COURT: Thanks. I think we need to set down a hearing
14 for resolution of the competing orders. And I don't want any -- well, let
15 me think. I don't think I need any further briefing on just that. I'll reread
16 the briefs that are pertinent to this and that will give you each an
17 opportunity to argue. I'm thinking of pushing it out. Well, let me think
18 about that. And I'm thinking of giving each side 45 minutes to be split up
19 however they want. You could have one counsel, more than one
20 counsel, as long as you don't duplicate points.

21 And since -- I'm trying to decide. I think Cloward would go
22 first and then -- and I'll probably give each side an opportunity to speak
23 twice is what I'll probably do as to the competing orders. But plan on 45
24 minutes to be used however you want.

25 When should we do this, gentlemen? What is it now, it's

1 September 22nd? And I think -- let me check something.

2 MR. ROBERTS: I believe we were holding October 5th for
3 the -- Mr. Cloward's portion of -- or for a hearing related to the
4 evidentiary phase two. I know I've got that blocked out on my calendar.
5 I don't know if that date works for you still, Ben?

6 MR. CLOWARD: Yeah, that would be good.

7 THE COURT: What date was that?

8 MR. ROBERTS: I have that we had a hearing set for October
9 5th, at 9:00 a.m.

10 THE COURT: All right. Yeah, that's coming up pretty soon. I
11 was going to be out that -- you know what, yes, let's do October 5th,
12 9:00 a.m. I'll make it happen. You guys are entitled to a prompt
13 resolution of that part of the case. All right.

14 So let's -- Natalie, October 5th, 9:00 a.m., is the hearing
15 regarding the competing proposed orders re sanctions. No further
16 briefing on that.

17 THE CLERK: Okay.

18 THE COURT: The Court is bifurcating the issues of striking of
19 the answer from jury instructions and motions in limine. The Court is
20 going to set briefing schedules on Plaintiffs request for certain jury
21 instructions and the motions in limine. Let's talk about that briefly.

22 Mr. Cloward, I think you set forth in your original motion the
23 analysis that you need for each of these proposed jury instruction
24 rulings, and we could simply move on to any opposition, but you know
25 what, I think Jacuzzi had an opportunity to oppose those requests. And

1 would that be correct for both of you? Is there any further briefing that
2 we need then, other than what Mr. Henriod was saying, one page per
3 issue approximately? Do we still -- do we still need that then?

4 MR. CLOWARD: I think that's a fair limitation, Your Honor.

5 MR. HENRIOD: Well, it's -- no, I think that's ambitious, if we
6 are talking about the merits of each of those jury instructions, which we
7 would need to do the merits of each of the motions in limine. What we
8 briefed, right, is I think the impropriety of deciding on these jury
9 instructions now before the trial --

10 THE COURT: Okay.

11 MR. HENRIOD: -- and deciding on motions in limine before
12 they're even briefed. If we're going to get into this as part of the
13 sanction, I think it would take a while, and I probably would need more
14 than one page to summarize what our substantive opposition would be
15 to a motion in limine. Multiply times all the different --

16 THE COURT: So how many?

17 MR. HENRIOD: -- rulings in limine that they want.

18 MR. GOODHART: Your Honor, this is Philip Goodhart on
19 behalf of First Street and Mr. Benton. Again, I have not founded in, or
20 briefed any of those issues that were raised by Plaintiffs, which I believe
21 could be detrimental to the defense of First Street and Mr. Benton. So I
22 would definitely need to be in a position where I could brief those issues
23 fully for the Court to make an informed decision as to how any ruling
24 could impact the ability of another defendant in the case to defend his
25 client.

1 THE COURT: It looks like there's 17 of them, and some of
2 them are really similar. So I'm thinking if -- you know, there's 17. If I
3 were to give your side, Mr. Roberts, say 35 pages to address those, that
4 would probably be -- that would probably be enough. And, of course, I
5 would let you expand on that at any oral argument that we have on this,
6 and I would do oral argument. And then I could allow Mr. Cloward to
7 have the same amount of pages, 35, and then I think we have a better
8 record. And each you will have then apprised each other of the
9 arguments that you intend to make. And I'll let you actually go beyond
10 the scope of your briefs at any oral argument on this within reason. So I
11 think that's what I'm going to do.

12 And I think giving -- well, I think you would need 30 days, Mr.
13 Roberts. And I think giving, you know, a couple weeks after that or
14 maybe even 30 days to Mr. Cloward, and then have argument a couple
15 weeks after that. Gentlemen, just very quick thoughts on that.

16 Mr. Roberts?

17 MR. ROBERTS: Thirty days is fine with me, and I'll let Mr.
18 Cloward decide if he wants two weeks or 30 days.

19 THE COURT: Mr. Cloward?

20 MR. CLOWARD: How about three weeks, Your Honor?

21 THE COURT: Okay. All right. And then two weeks after that
22 for the hearing?

23 MR. CLOWARD: Yes, that would be great.

24 THE COURT: And if I were to give you both an hour for
25 argument, that should be enough, right?

1 MR. CLOWARD: Yes.

2 MR. GOODHART: Your Honor, this is Philip Goodhart again
3 for First Street.

4 THE COURT: Yeah, you have the same --

5 MR. GOODHART: I would --

6 THE COURT: Yeah.

7 MR. GOODHART: Okay.

8 THE COURT: Go ahead.

9 MR. GOODHART: Yeah. You just mentioned this for Jacuzzi
10 and for the Plaintiff, and I have indicated a concern that I have for First
11 Street on how these rulings would impact their ability to defend the
12 claims against them. How is this going to work with First Street then?

13 THE COURT: You get to file a brief also, 35 pages, dealing
14 with how you feel about each of these proposed jury instructions and
15 how that would prejudice your client. And I'll give you an hour as well.

16 MR. GOODHART: Thank you, Your Honor.

17 MR. HENRIOD: Can I suggest that we actually switch the
18 order of those? What we have in the motion and what's been submitted
19 by Plaintiffs already is basically a list of the jury instructions that they
20 want and the list of evidentiary orders that they want, but without the
21 rationale supporting each those. And since they are the ones asking for
22 those jury instructions, they are the ones asking for those orders in
23 limine and the evidentiary rulings, I don't think we should be arguing
24 against ourselves to assume we know what they mean by those things,
25 and why they think they're entitled to them. I'm thinking that they ought

1 to go first, as to why the sanction warrants each of the jury instructions
2 they are asking for and the orders and limine and that we would respond
3 to that.

4 THE COURT: Well, several of them deal with allegations that
5 Jacuzzi, you know, failed to produce certain evidence or willfully did this
6 or that, and so those are all certainly covered by the briefing.

7 All right. Mr. Cloward?

8 MR. HENRIOD: But not why would they be jury instructions.

9 THE COURT: Well, he's saying they should be jury
10 instructions, because you didn't produce something, so you should be --
11 you know, that there should be accountability, I think is his position, but,
12 Mr. Cloward?

13 MR. CLOWARD: We feel like our position is set forth in the
14 briefing and this is just another way for Jacuzzi to try and have the
15 Plaintiffs' frame -- I guess frame the issue for them to poke holes in the
16 issue. I mean, they really should be -- Jacuzzi should be the ones
17 explaining -- I mean, the whole basis for this request is based on the
18 conduct of Jacuzzi, so they should be the ones explaining to the Court
19 why their conduct was reasonable and why these sanctions are not
20 appropriate, in light of the numerous attempts or numerous failures, I
21 guess, to provide the evidence.

22 So we don't think that it's unreasonable for Jacuzzi to go
23 first, but whatever the Court feels would be most helpful, that's we want
24 to have happen. If the Court feels that it would be more helpful for us to
25 go first, so be it. If the Court feels that it would be more helpful for them

1 to go first, so be it. Whatever the Court desires.

2 THE COURT: Right. Yeah. No, I don't need to hear any more
3 on that. Look, I think there's been sufficient notice of what the Plaintiff is
4 requesting, why they're requesting it, and what's the evidence upon
5 which these statements are based. To me, it's clear enough that there's
6 been sufficient notice to Jacuzzi on each of those. So we're going to
7 stick to that briefing schedule. Thirty days for Jacuzzi and First Street,
8 three weeks for Plaintiff to respond, and then we'll have the hearing, I
9 guess, two weeks after that. So Natalie, can you give us the dates?

10 THE CLERK: Okay. So 30 days would be October 20th.

11 THE COURT: Okay.

12 THE CLERK: And then three weeks -- yes. Three weeks after
13 that would be November 10th.

14 THE COURT: Okay. And two weeks after that, without
15 interfering with Thanksgiving?

16 THE CLERK: Yes. That would be November 23rd. Monday,
17 November 23rd. That's the Monday of --

18 THE COURT: That all works.

19 THE CLERK: -- Thanksgiving week.

20 THE COURT: That all works for me. In terms of just
21 scheduling, gentlemen, Mr. Roberts, do those days work for you,
22 speaking just in terms of scheduling -- your schedule?

23 [Pause]

24 MR. GOODHART: Your Honor, this is Philip Goodhart again.
25 I apologize to interrupt, but maybe while Mr. Roberts is looking, I can

1 make comment that although Mr. Cloward is correct that Jacuzzi had
2 sufficient notice of and an understanding of how certain jury instructions
3 should apply to them, because of their failures and the sanctions the
4 Court's imposing, how would that apply to First Street? Because again,
5 unless Mr. Cloward is dismissing all product defect claims against First
6 Street, First Street has a right to defend the product defect claims that
7 have been asserted against it. For example --

8 THE COURT: I agree with that and put in that in your brief.
9 That's a valid point. You can discuss the --

10 MR. GOODHART: Well, at this juncture, I don't know why or
11 what the Plaintiffs' position is with respect to certain jury instructions
12 that would defeat First Street's ability to defend the product claims
13 against First Street. I don't know what his theory is. Is he lumping us in
14 with Jacuzzi? All the evidence, and documents, and everything
15 produced so far, there's no sanctions being levied against First Street.

16 THE COURT: Yeah. So let's --

17 MR. GOODHART: So I don't know what Mr. Cloward's theory
18 is --

19 THE COURT: Yeah.

20 MR. GOODHART: -- against First Street that I would be
21 responding to.

22 THE COURT: Yeah. Let's ask Mr. Cloward, because I'm sure
23 that he's not saying you should be punished for anything Jacuzzi did
24 wrong. And Mr. Cloward, can you elucidate that or perhaps you need to
25 put that in a brief to help First Street better understand why -- you know,

1 why you think they should be subject to some of these findings?

2 MR. CLOWARD: Well, as I understand it, the findings right
3 now are only applicable to Jacuzzi. And so --

4 THE COURT: Right, but if the jury hears them, they'll, to
5 some extent, hold that against First Street, right?

6 MR. CLOWARD: It's possible.

7 THE COURT: So how do we protect First Street?

8 MR. CLOWARD: Well, I don't -- I've tried to think about how
9 the Court would conduct a trial with a party that doesn't have the
10 sanction issue, and I don't know what that looks like. I really don't. I
11 think that that's going to take some time for everyone to kind of think
12 about how that trial proceeds, but I think the question that Mr. Goodhart
13 is asking now is, you know, what does the briefing look like for First
14 Street. And I don't know what Mr. Cloward's theories are.

15 Well, Mr. Goodhart has had a first -- a front row seat to all of
16 these issues. He's been present to all of the hearings. He knows the
17 relief that we're seeking. He knows what we're attempting to do, and so
18 he can distinguish in his briefing what it should look like and what the
19 Court's limitations should be with respect to First Street. I don't think it's
20 that complicated. I think that Mr. Goodhart can put all of that in his
21 briefing and --

22 THE COURT: Yeah, I don't know what more --

23 MR. GOODHART: Well, I think --

24 THE COURT: -- Mr. Goodhart, I don't know what more Mr.
25 Cloward can say on that. I mean --

1 MR. GOODHART: Okay.

2 THE COURT: -- he's basically saying, you know, hey, Jacuzzi
3 should be punished and held accountable, and these are all the things
4 that the Court should find, based upon their, you know, discovery
5 violations. And he's saying, you know, he understands that -- you know,
6 that you shouldn't be punished for these things. And we don't know
7 logistically how this is going to work, and we have to figure out
8 logistically how it's going to work. And I certainly want to hear from you
9 on that.

10 MR. GOODHART: Right. Well, for example, Your Honor, if
11 you look at bullet point number 13, on page 8 of the last filing from
12 Plaintiff, it states in the jury instruction that it was commercially feasible
13 for Jacuzzi to produce a tub with the same dimensions as Sherry
14 Cunnison's tub, but with an outward opening door, instead of an inward
15 opening door. Well of course, one of the defenses to a product liability
16 case for which claims, you know, for product liability are against First
17 Street is that it was not commercially feasible.

18 So if the Court gives a jury instruction such as that to the
19 jury, they're being told by the Judge it was not commercially feasible.
20 So that will essentially eliminate one of the defenses --

21 THE COURT: Right. Right. Right.

22 MR. GOODHART: -- that would be available to First Street.

23 THE COURT: No, I understand. That's -- and I understand
24 that and that's something we got to -- look, I don't want that to happen to
25 you, and I'm going to be really careful. We have to put our minds

1 together and think how we do this in a way that doesn't prejudice your
2 client. And so I'm looking to you for guidance on that.

3 MR. GOODHART: I understand. I understand. I just -- I
4 guess I need to know, and I've heard from Mr. Cloward a few moments
5 ago that there is no other reason, other than the fact that these sanctions
6 are being imposed against Jacuzzi. And if that's the only reason, then
7 yes, I can respond to it in due course and by the October 20th date --

8 THE COURT: Let's just --

9 MR. GOODHART: -- but I don't want --

10 THE COURT: Yeah. No. Go ahead. I spoke over you. I'm
11 sorry.

12 MR. GOODHART: Yeah. I apologize. I don't want to get a
13 brief coming back on November 10th saying oh, First Street did this, this,
14 this, and this --

15 THE COURT: Yep. If that happens --

16 MR. GOODHART: -- to which I don't know if we'll need to
17 respond.

18 THE COURT: Yeah, if there's fault pointed at you that Mr.
19 Cloward is relying upon for some of these jury instructions, then I
20 certainly will give you an opportunity to respond to that.

21 MR. GOODHART: All right. Thank you, Your Honor.

22 THE COURT: All right. So let's --

23 MR. GOODHART: I just want --

24 THE COURT: Yes. So right now, let's stick with you having
25 an opportunity to set your position in writing at the same deadline as

1 Jacuzzi. And if something comes up at the hearing that you feel strongly
2 about necessitating further briefing on your part, then let me know, and
3 we'll see what we have to do then, okay?

4 MR. GOODHART: Okay. I appreciate it, Your Honor. Again, I
5 don't mean to be --

6 THE COURT: Let's --

7 MR. GOODHART: -- a stick in the mud.

8 THE COURT: No. No.

9 MR. GOODHART: Thank you.

10 THE COURT: This is -- so now -- so that deals with jury
11 instructions. Now what about motions in limine? Was -- I heard from
12 Mr. Roberts or somebody that these were never fully briefed; is that
13 correct?

14 MS. LLEWELLYN: Your Honor, I could speak to that. This is
15 Brittany Llewellyn.

16 THE COURT: Oh, hi.

17 MS. LLEWELLYN: The -- hi. We did not fully brief the
18 motions in limine. We still have replies due. We had agreed to continue
19 the motions because of everything that was pending. So, no, we did not
20 finish briefing the motions in limine.

21 THE COURT: Why wouldn't we handle the motions in limine
22 separate as well from the jury instruction issues? We need to finish
23 briefing, so we need a deadline for replies to each of these motions in
24 limine, and then we need to set a hearing date. Perhaps we should keep
25 the same hearing date as we have for jury instruction issues, though.

1 That was Monday the 23rd. And then we can -- I mean, that's -- we don't
2 have to wait that long. These are Jacuzzi's motions. You just have
3 replies. How quickly can you get the replies in? You probably want to
4 wait until after the sanction order is done, which is going to be October
5 5th. How soon after that can you get your replies in?

6 MS. LLEWELLYN: I would also note that Plaintiffs did not
7 submit their replies for their motions also. I know that this is just
8 concerning Jacuzzi's MILs, but are we just setting this for the hearing for
9 the MILs that Mr. Cloward --

10 THE COURT: Let's do all of them --

11 MS. LLEWELLYN: -- is asking --

12 THE COURT: Let's do all of them.

13 MS. LLEWELLYN: Okay.

14 THE COURT: And we could say like all replies are due by
15 October 12th. Would that work?

16 MS. LLEWELLYN: I think that that works for Jacuzzi.

17 THE COURT: All right. And then --

18 MR. GOODHART: That should work for First Street, Your
19 Honor.

20 THE COURT: Let me check my schedule. And there's going
21 to be a lot of reading you're going to have for me to do, right? How
22 many motions are there in total? Maybe 30 motions?

23 MS. LLEWELLYN: Something around that, Your Honor.

24 THE COURT: Yeah. So if there's like 30 motions, I want like
25 30 days or -- because I've got a lot of other work I'm doing, too, but let

1 me see here.

2 MR. GOODHART: Your Honor, we could perhaps limit the
3 motion in limine issue to the five or six motions in limine specifically
4 referenced in Plaintiffs' last filing with the Court, I think at bullet points
5 22, 23, 24, 25, 26 and 27.

6 THE COURT: I don't understand. You don't want me to rule
7 on the others or you don't want to brief the others?

8 MR. GOODHART: Well, if -- Your Honor's concerned about
9 all the reading that it has to do and those are specifically the ones that
10 Plaintiff wants the Court to rule upon, based upon whatever the final
11 ruling is on the sanctions issue. I'm just throwing that out there, Your
12 Honor.

13 THE COURT: So rule on those and then just postpone
14 everything else?

15 MR. CLOWARD: We think that --

16 MR. GOODHART: Yes, Your Honor.

17 MR. CLOWARD: Plaintiffs think that would be a reasonable
18 suggestion to the Court -- you know, there's going to be a lot of reading
19 on everyone's part and that might be a reasonable way to kind of narrow
20 the issues.

21 THE COURT: Well, I have different numbers than yours. I'm
22 looking at Mr. Cloward's statement on page 9. It looks like he's talking
23 about 1 and 13 of Jacuzzi's, and then you had 21 or 16. So I don't -- I
24 mean -- and then he's talking about a First Street motion in limine. So
25 aren't those the ones we're talking about?

1 MR. GOODHART: Right. This is Philip Goodhart again.
2 Right, Your Honor, but if we limit the replies to just those six motions in
3 limine, and we limit the hearing on November 23rd, I believe, to just
4 those six motions in limine and the jury instructions that Plaintiff has
5 requested.

6 THE COURT: Mr. Cloward? Is that what you want, sir? Or
7 what are you thinking?

8 MR. CLOWARD: Your Honor, I think that's a reasonable
9 compromise that would work. I agree with that.

10 THE COURT: All right. So let's -- you know what, that
11 hearing on October 5th, there's going to be a lot of argument, and I'm
12 thinking maybe it might take me a week after that to put together my
13 order, so if I have the order on the competing orders done on the 12th,
14 let's say reply briefs -- all your reply briefs on all these are due by the
15 17th.

16 So I'm ordering that reply briefs be filed by October 17th, on
17 the following motions: Jacuzzi's motion in limine number 1, Jacuzzi's
18 motion in limine number 13, Jacuzzi's motion in limine number 21,
19 Jacuzzi's motion in limine number 4, Jacuzzi's motion in limine number
20 16. And then we have First Street's motion in limine number 4. So reply
21 briefs on all of those will be due October 17.

22 And then we might as well hear everything on -- we might as
23 well hear all of this the same days we resolve the jury instructions, I
24 guess, which would be November 23rd. Is that okay with everybody?

25 MR. CLOWARD: Yes.

1 THE COURT: Mr. Cloward?
2 MR. CLOWARD: Yes, Your Honor.
3 THE COURT: Mr. Roberts?
4 MR. ROBERTS: Your Honor, I apparently have a court
5 ordered mediation in Arizona on the 23rd and 24th.
6 THE COURT: Okay.
7 MR. ROBERTS: I'm available on the 25th, if that's not getting
8 too close to the holidays and the following week, I could also be
9 available.
10 THE COURT: I prefer not to do the 25th, because that's the
11 day before Thanksgiving. Do you want to -- I mean, we could move it to
12 the 20th, but then that's interfering with your preparation time, right?
13 MR. ROBERTS: I'm okay on preparation --
14 THE COURT: Or even the 18th.
15 MR. ROBERTS: Let me check, Your Honor. November 20th,
16 Your Honor?
17 THE COURT: Well, how about Thursday, the 19th?
18 MR. CLOWARD: That works for Plaintiff.
19 MR. ROBERTS: Yes, Your Honor. I'm available the 19th.
20 It's --
21 THE COURT: All right.
22 MR. ROBERTS: Ms. Bonnie's birthday that day, so we can all
23 celebrate.
24 THE COURT: All right. All right. So, Natalie --
25 THE CLERK: Yes.

1 THE COURT: -- Thursday, November 19th, is the date of the
2 hearing on those motions in limine that I identified.

3 THE CLERK: Okay.

4 THE COURT: And Thursday the 19th, will be the date for the
5 hearing on Plaintiffs' request for jury instructions. So we're changing
6 that date from November 23rd to November 19th, okay?

7 THE CLERK: Yes.

8 THE COURT: And we're going to set that down for 9:00 a.m.

9 THE CLERK: Okay.

10 THE COURT: All right. And I just have a note. So I think --
11 anything else that we need to discuss or talk about, we'll do that at the
12 October 5th hearing. And you guys continue to meet and confer
13 regarding any outstanding discovery. And to the extent you can,
14 proceed with any outstanding discovery that you can agree upon, all
15 right, so that we don't lose time.

16 I just got a note from my JEA. It says the -- and I don't know
17 if this is correct, the Jacuzzi case hits the five-year rule on February 3rd,
18 2021. I think that might be continued, based upon COVID. Anybody
19 have the new date?

20 MR. ROBERTS: I have not calculated --

21 THE COURT: If anyone knows.

22 MR. ROBERTS: -- the COVID extension, Your Honor.

23 THE COURT: Yeah.

24 MR. CLOWARD: I don't know, either, Your Honor, what that
25 would be.

1 THE COURT: All right. And then also, we have a firm trial
2 setting, which the Court is -- the Court's vacating that firm trial setting
3 that we had, I think for January 11, 2021. We'll discuss a new trial
4 setting on October 5th. Okay?

5 MR. CLOWARD: Thank you, Your Honor.

6 THE COURT: And, Natalie, so we vacate the current trial
7 setting, and vacate the calendar call, and vacate the pretrial conference.
8 And we'll have a status check regarding trial setting on October 5th. All
9 right.

10 THE CLERK: Yes.

11 THE COURT: Anything else, counsel?

12 MR. CLOWARD: No, Your Honor. Thank you.

13 THE COURT: No?

14 MR. ROBERTS: No, Your Honor. Thank you for all the time.

15 THE COURT: All right. Let's move forward, and I'll see you
16 all back here October 5th.

17 MR. ROBERTS: Thank you.

18 MR. CLOWARD: Thank you, Your Honor.

19 THE CLERK: Your Honor?

20 THE COURT: Natalie --

21 MR. HENRIOD: Thank you, Your Honor.

22 MS. LLEWELLYN: Thank you.

23 THE COURT: -- anything else from you?

24 THE CLERK: Can we vacate -- on the record, can we vacate
25 the evidentiary hearing set for September 23rd and 24th?

1 THE COURT: Yes. We're vacating the evidentiary hearing
2 that is set for the 23rd and 24th.

3 THE CLERK: Thank you.

4 THE COURT: All right. Thank you, counsel.

5 MR. ROBERTS: Oh, Your Honor, is the Court --

6 THE COURT: Yes.

7 MR. ROBERTS: Is the Court denying our request for a
8 mandatory settlement conference or --

9 THE COURT: Oh.

10 MR. ROBERTS: -- deferring on that?

11 THE COURT: I am deferring ruling on that until October 5th.

12 MR. ROBERTS: Thank you, Your Honor.

13 THE COURT: That seems to be the best way to go.

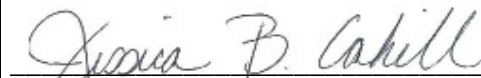
14 MR. ROBERTS: Thank you, Your Honor.

15 MR. CLOWARD: Thank you.

16 THE COURT: All right. Thank you. Court is adjourned.

17 [Proceedings adjourned at 10:50 a.m.]

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19
20
21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio-visual recording of the proceeding in the above entitled case to the
best of my ability.

23 

24 Maukele Transcribers, LLC
25 Jessica B. Cahill, Transcriber, CER/CET-708

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EXHIBIT “2”



www.jacuzzi.com

14525 Monte Vista Avenue / Chino, CA 91710

909.247.2187 (o) 909.606.4270 (f)

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From: Norm Murdock [mailto:norm.murdock@aihremodelers.com]

Sent: Tuesday, June 18, 2013 1:29 PM

To: Martinez, Audrey; Bachmeyer, Kurt

Subject: FW: Customer Satisfaction Surveys

Feedback below from AHD...maybe we can discuss on call as well...

Norm Murdock, CAPS, CSA

Vice President

firstSTREET
THE SENIORS' HOME

Phone: 303-222-3207

Cell: 602-403-6267

Email: norm.murdock@firststreetonline.com

Website: www.firststreetinc.com, www.firststreetonline.com

LinkedIn: www.linkedin.com/company/firststreet

designed for SENIORS®

All three of these customers ripped us in this questionnaire, and when they say these things on a guild survey, it affected my craftsmen's bonuses. all three of these customers are pissed *because they are not happy with the limitations of the Jacuzzi product, or because they have hot water issues*. We have addressed the hot water issue with the checkbox on the new contracts. I forward every product related concern to Jacuzzi via email, and I feel like they treat me as a nuisance, rather than a customer with legitimate concerns. once, *their customer service department told one of our customers they need an 80 gallon water heater*. I was in the home with the customer when he called the jacuzzi CS help line. I got on the phone and asked the CS rep why he said 80, when the jacuzzi literature says 50; and he said the recommendation was *"based on his own personal preference."*

Last week, the same *CS team erroneously told one of our customers that AHI had "installed a scrapped tub for her"* ?!?!??

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EXHIBIT “3”

Report #20160824-98A64-1589899

[Report Details](#)

Report No.

20160824-98A64-1589899

Report Date

8/24/2016

Sent to Manufacturer / Importer / Private Labeler

9/16/2016

Category of Submitter

Consumer

[Product Details](#)

Product Description

Jacuzzi Walk-In Tub

Product Category

Home Maintenance and Structures

Product Type

Plumbing & Bath

Product Code

Hot Tubs or Home Spas

Manufacturer / Importer / Private Labeler Name

JACUZZI BRANDS CORP.

Manufacturer / Importer / Private Labeler Address

13925 City Center Drive, Suite 200, Chino Hills, California, 91710, United States

Brand Name

Model Name or Number

LW45

Serial Number

BDPK7

UPC Code

Date Manufactured

Manufacturer Date Code

Retailer

Retailer State

Purchase Date

4/3/2016 This date is an estimate

[Incident Details](#)

Incident Description

Dear Gentlemen,

Ser # BDPK7, model: LW45, Job: 16198

Subj: DeathTrap - Jacuzzi Walk-In Tub.

On April 3, 2016, I signed a contract for installation of a Walk-In Tub. The agent was [REDACTED]. The Fairbanks construction Co. of Ocala FL., installed the unit 4-1-2016. I was advised never to use the tub without the 911 alert system in reach.

On July 18, 2016, after finally receiving the 911 alert, I decided to try the Walk-In Tub.

After 30 minutes the tub filled with 50 gal. of water. I opened the air jets at my back. At that moment, I was thrusted forward, landed on my knees and my head was underwater. I was in panic and tried frantically to get a hold of the bar to pull myself up. I could have drowned. The Alert 911 would have been totally useless out of reach. The Walk-In Tub is a death trap.

The tape demonstration and brochures given by the agent [REDACTED] do not compare to the tub installed. The Tub is an old model. The new models (copies encl.) require 30 gal of water and are half the size which was actually installed.

It takes 30 min. to fill the tub with 50 gallons. The shower head is barely in trickle mode and does not work properly. Numerous calls to the agent, the Fairbanks Construction Co., and [REDACTED], installation supervisor, [REDACTED]; were not returned. [REDACTED] of the Fairbanks Co, was rude, who returned the phone call stated "you got what you ordered, you do not get another tub!"

The agent [REDACTED], did not return any of my calls. Details re: water capacity was not disclosed and the publications were misrepresented.

I am a senior citizen, 85 yrs. + and a victim of exploitation of the elderly. I live on fixed income and invested \$15,500.- of my savings for health reasons, because my net worth does not qualify me for a senior establishment.

I live alone and after my experience of almost drowning, I have not used the tub since. I cannot afford the loss of \$15,500.- .

I would appreciate your help desperately. I have enclosed copies and documents for your review.

I look forward to your reply and a resolution of an exchange to my problem within the next 2 weeks.

Please contact me at your earliest at above address or by phone at [REDACTED]. Please, please help!

Sincerely,

[REDACTED]

Incident Date

7/18/2016

Incident Location

Unspecified

[Victims Involved](#)

Injury Information

Injury→Injury, Level of care not known

My Relationship to the Victim

Unspecified

If Not, Do You Plan To?
N/A

E-mail

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EXHIBIT “4”

1 Vaughn A. Crawford, Nevada Bar No. 7665
2 Morgan T. Petrelli, Nevada Bar No. 13221
3 SNELL & WILMER L.L.P.
4 3883 Howard Hughes Parkway, Suite 1100
5 Las Vegas, NV 89169
6 Telephone: (702) 784-5200
7 Facsimile: (702) 784-5252
8 Email: vcrawford@swlaw.com
9 Email: mpetrelli@swlaw.com
10
11 D. Lee Roberts, Jr., Nevada Bar No. 8877
12 Brittany M. Llewelyn, Esq., Nevada Bar No. 13527
13 WEINBERG, WHEELER, HUDGINS, GUNN
14 & DIAL, LLC
15 6385 South Rainbow Blvd., Suite 400
16 Las Vegas, NV 89118
17 Telephone: (702) 938-3838
18 Facsimile: (702) 938-3864
19 Email: lroberts@wwghd.com
20 Email: bllewelyn@wwghd.com

Attorneys for Defendant

Jacuzzi Inc. doing business as Jacuzzi Luxury Bath

DISTRICT COURT

CLARK COUNTY, NEVADA

15 ROBERT ANSARA, as Special Administrator
16 of the Estate of SHERRY LYNN CUNNISON,
17 Deceased; ROBERT ANSARA, as Special
18 Administrator of the Estate of MICHAEL
19 SMITH, Deceased heir to the Estate of
20 SHERRY LYNN CUNNISON, Deceased; and
21 DEBORAH TAMANTINI individually, and
22 heir to the Estate of SHERRY LYNN
23 CUNNISON, Deceased,

Plaintiffs,

vs.

22 FIRST STREET FOR BOOMERS &
23 BEYOND, INC.; AITHR DEALER, INC.;
24 HALE BENTON, individually; HOMECLICK,
25 LLC; JACUZZI INC., doing business as
26 JACUZZI LUXURY BATH; BESTWAY
27 BUILDING & REMODELING, INC.;
28 WILLIAM BUDD, individually and as
BUDDS PLUMBING; DOES 1 through 20;
ROE CORPORATIONS 1 through 20; DOE
EMPLOYEES 1 through 20; DOE
MANUFACTURERS 1 through 20; DOE 20
INSTALLERS 1 through 20; DOE
CONTRACTORS 1 through 20; and DOE 21

CASE NO.: A-16-731244-C
DEPT. NO.: II

**DEFENDANT JACUZZI INC. DBA
JACUZZI LUXURY BATH'S
RESPONSE TO PLAINTIFF ROBERT
ANSARA'S FOURTH REQUEST FOR
PRODUCTION OF DOCUMENTS**

1 SUBCONTRACTORS 1 through 20, inclusive,
2 Defendants.

3
4 AND ALL RELATED CLAIMS.

5 Defendant Jacuzzi Inc. dba Jacuzzi Luxury Bath (“Defendant” or “Jacuzzi”), by and
6 through its attorneys of record, Snell & Wilmer L.L.P., responds to Plaintiff Robert Ansara’s
7 (“Plaintiff”) Fourth Request for Production of Documents, as follows:

8 Defendant objects to each Request for Production to the extent it requires the
9 identification of documents already produced by Defendant in this matter. Such documents are as
10 accessible to Plaintiff as to Defendant.

11 Defendant specifically objects to the timeframe listed in Plaintiff’s Requests. Plaintiff
12 notes that **“UNLESS OTHERWISE NOTED, THE DOCUMENTS, RECORDS, AND DATA**
13 **REQUESTED ARE THOSE THAT APPLY TO AND/OR COVER ANY PART OF THE**
14 **TIME PERIOD FROM JANUARY 1, 2008 TO THE PRESENT.”** This timeframe is
15 arbitrary and extends years prior to Ms. Cunnison’s purchase and installation of the subject
16 bathtub.

17 Defendant responds to the Request for Production, subject to the following additional
18 reservations:

- 19 (a) The right to object on any ground whatsoever to the admission into evidence or
20 other use of any of these responses at the trial of this action or at any other
21 proceeding in this action or any other action;
- 22 (b) The right to object on any ground whatsoever at any time to any demand for
23 further responses to the requests for production, or any other discovery procedures
24 involving or relating to the subject matter of the requests for production;
- 25 (c) The right at any time to revise, correct, add to or clarify any of the responses set
26 forth herein; and
- 27 (d) The responses contained herein are based upon information presently known and
28 ascertained by Defendant. The responses herein are without prejudice to utilizing

1 subsequently discovered or recalled documents or information; and Defendant
2 reserves the right to amend, add to, delete from, or in any other manner modify
3 these responses after it has completed its discovery and investigation efforts and
4 ascertained all relevant facts.

5 Subject to these reservations, Defendant responds to each separate Request for Production
6 as follows:

7 **RESPONSES TO REQUESTS FOR PRODUCTION**

8 **REQUEST FOR PRODUCTION NO. 68:**

9 Produce documents showing any design changes You made to any Jacuzzi walk-in tub
10 after the subject incident.

11 **RESPONSE:**

12 Jacuzzi objects to the Request as overbroad because it seeks documents irrelevant to
13 Plaintiffs' claims or Jacuzzi's defenses. Additionally, Jacuzzi objects to the Request seeking
14 design changes to "any Jacuzzi walk-in tub" because it is overbroad in that it is not limited to the
15 subject tub. The request also seeks confidential and proprietary information of Jacuzzi.

16 Subject to and without waiving these objections, Jacuzzi refers Plaintiff to Jacuzzi
17 engineering drawings for portions of the subject model tub it believes to be the subject of
18 Plaintiffs' vague defect claims, bates no. JACUZZI004578-004583, which are **confidential and**
19 **subject to the protective order entered in this case.**

20 **REQUEST FOR PRODUCTION NO. 69:**

21 Produce documents showing any action You took or measures You implemented in
22 response to the subject incident which was intended to minimize the likelihood of an occurrence
23 similar to the subject incident from occurring other than measures relating to the design of the
24 subject walk-in tub. This request seeks documents relating to any procedural change, policy
25 change, or any other similar change which You made in response to the subject incident.

26 **RESPONSE:**

27 Jacuzzi objects to this Request because it is irrelevant to Plaintiff's claims because
28 Jacuzzi's actions in response to (and after) the Subject Incident have no bearing on the design or

1 manufacture of the Subject Bathtub, or Jacuzzi's action prior to the Subject Incident. The request
2 also seeks confidential and proprietary information of Jacuzzi.

3 Without waiving these objections, Jacuzzi states that it regularly updates policies and
4 procedures and looks for ways to improve, but there were no specific measures implemented in
5 response to the subject incident.

6 **REQUEST FOR PRODUCTION NO. 70:**

7 Produce documents showing any changes You made to Your policies or procedures
8 regarding the investigation, handling, or response to any claim of bodily injury involving walk-in
9 tubs which were made after the subject incident.

10 **RESPONSE:**

11 Jacuzzi objects to this Request because it is irrelevant to Plaintiff's claims because
12 Jacuzzi's actions involving handling or response to the Subject Incident, or changes made after
13 the subject incident, have no bearing on the design or manufacture of the Subject Bathtub,
14 Jacuzzi's action prior to the Subject Incident or Jacuzzi's investigation of the Subject Incident.
15 The request seeks proprietary and confidential information of Jacuzzi. The request also seeks
16 confidential and proprietary information of Jacuzzi.

17 **REQUEST FOR PRODUCTION NO. 71:**

18 Produce any documents showing changes, alterations, or adjustments to Your marketing
19 materials for Jacuzzi Walk-In Tubs which were made after the subject incident.

20 **RESPONSE:**

21 Jacuzzi objects to the Request as overbroad and irrelevant to Plaintiff's claims, as only the
22 specific marketing or advertisements that Plaintiff actually saw and relied upon can be feasibly
23 relevant to Plaintiff's claims, and the request is not tailored to the pertinent marketing or
24 advertisements. The request also seeks confidential and proprietary information of Jacuzzi.

25 Without waiving these objections, Jacuzzi states that prior to the subject incident
26 marketing material for the Subject Bathtub was created by another party. Jacuzzi refers Plaintiff
27 to the Brand Guidelines found in the correspondence with FirstStreet regarding walk-in tub
28 development and marketing from January 1, 2008-February 21, 2014, bates no.

1 JACUZZI002992-004521. Jacuzzi further refers Plaintiff to the current version of the Brand
2 Guidelines, which were implemented after the subject incident, bates no. JACUZZI004534-
3 004577.

4 **REQUEST FOR PRODUCTION NO. 72:**

5 Produce any documents showing changes, alterations, or adjustments to Your marketing
6 guidelines for Jacuzzi Walk-In Tubs which were made after the subject incident.

7 **RESPONSE:**

8 Jacuzzi objects to the Request as overbroad and irrelevant to Plaintiff's claims, as only the
9 specific marketing or advertisements that Plaintiff actually saw and relied upon can be feasibly
10 relevant to Plaintiff's claims, and the request is not tailored to the pertinent marketing or
11 advertisements. The request also seeks confidential and proprietary information of Jacuzzi.

12 Without waiving these objections, Jacuzzi states that prior to the subject incident
13 marketing material for the Subject Bathtub was created by another party. Jacuzzi refers Plaintiff
14 to the Brand Guidelines found in the correspondence with FirstStreet regarding walk-in tub
15 development and marketing from January 1, 2008-February 21, 2014, bates no.
16 JACUZZI002992-004521. Jacuzzi further refers Plaintiff to the current version of the Brand
17 Guidelines, which were implemented after the subject incident, bates no. JACUZZI004534-
18 004577.

19 **REQUEST FOR PRODUCTION NO. 73:**

20 Produce any documents showing changes, alterations, or adjustments to Your advertising
21 guidelines to any distributor of Jacuzzi Walk-In Tubs which were made after the subject incident.

22 **RESPONSE:**

23 Jacuzzi objects to the Request as overbroad and irrelevant to Plaintiff's claims, as only the
24 specific marketing or advertisements that Plaintiff actually saw and relied upon can be feasibly
25 relevant to Plaintiff's claims, and the request is not tailored to the pertinent marketing or
26 advertisements. The request also seeks confidential and proprietary information of Jacuzzi.

27 Without waiving these objections, Jacuzzi states that prior to the subject incident
28 marketing material for the Subject Bathtub was created by another party. Jacuzzi refers Plaintiff

1 to the Brand Guidelines found in the correspondence with FirstStreet regarding walk-in tub
2 development and marketing from January 1, 2008-February 21, 2014, bates no.
3 JACUZZI002992-004521. Jacuzzi further refers Plaintiff to the current version of the Brand
4 Guidelines, which were implemented after the subject incident, bates no. JACUZZI004534-
5 004577.

6 **REQUEST FOR PRODUCTION NO. 74:**

7 Produce any documents showing changes, alterations, or adjustments to any user manuals
8 for any Jacuzzi Walk-In Tub which were made after the subject incident.

9 **RESPONSE:**

10 Jacuzzi objects to this Request as overbroad and irrelevant to Plaintiff's claims, as it seeks
11 information relating to "any Jacuzzi Walk-In Tub," and not the specific model of bathtub at issue
12 here.

13 Without waiving these objections, Jacuzzi refers Plaintiff to the subsequently issued
14 versions of the user manual for the Subject Bathtub, bates no. JACUZZI004584-004695.

15 **REQUEST FOR PRODUCTION NO. 75:**

16 Produce any communications between You and FirstStreet which relate to any changes to
17 marketing methods or advertising materials for Jacuzzi Walk-In Tubs which were made after the
18 subject incident.

19 **RESPONSE:**

20 Jacuzzi objects to the Request as overbroad and irrelevant to Plaintiff's claims, as only the
21 specific marketing or advertisements that Plaintiff actually saw and relied upon can be feasibly
22 relevant to Plaintiff's claims, and the request is not tailored to the pertinent marketing or
23 advertisements. In no way are the advertisements or advertising guidelines *after* the Subject
24 Incident relevant to Plaintiff's claims.

25 **REQUEST FOR PRODUCTION NO. 76:**

26 Produce any communications between You and FirstStreet which relate to any changes to
27 Your required marketing methods or advertising materials regarding Jacuzzi walk-in tubs which
28 were made after the subject incident.

RESPONSE:

Jacuzzi objects to the Request as overbroad and irrelevant to Plaintiff's claims, as only the specific marketing or advertisements that Plaintiff actually saw and relied upon can be feasibly relevant to Plaintiff's claims, and the request is not tailored to the pertinent marketing or advertisements. In no way are the advertisements or advertising guidelines *after* the Subject Incident relevant to Plaintiff's claims. Jacuzzi further objections to the phrase "Your required marketing methods or advertising" as argumentative and misstating the evidence in the case.

REQUEST FOR PRODUCTION NO. 77:

Produce documents relating to the 911 Call system discussed by the parties at the September 19, 2018 hearing before the Discovery Commissioner. *See generally*, Sept. 19, 2018, Transcript of Proceedings at 14-16. This request seeks documents, including internal and external communications, regarding Your analysis and/or Your decision-making process relating to the implementation of the 911 call system.

RESPONSE:

Jacuzzi objects to the Request as it is misleading and misstates what transpired at the subject hearing, as plaintiffs' counsel (not Jacuzzi's counsel) was the attorney that discussed a 9-1-1 system.

Without waiving said objections, the "911 Call system" raised by plaintiffs' counsel at the hearing is not a Jacuzzi product.

REQUEST FOR PRODUCTION NO. 78:

Please produce documents evidencing Your development, design, pre-implementation analysis, and implementation of the 911 Call system which was discussed by the parties at the September 19, 2018, hearing before the Discovery Commissioner. *See generally*, Sept. 19, 2018, Transcript of Proceedings at 14-16.

RESPONSE:

Jacuzzi objects to the Request as it is misleading and misstates what transpired at the subject hearing, as plaintiffs' counsel (not Jacuzzi's counsel) was the attorney that discussed a 9-1-1 system.

1 Without waiving said objections, the “911 Call system” raised by plaintiffs’ counsel at the
2 hearing is not a Jacuzzi product.

3 **REQUEST FOR PRODUCTION NO. 79:**

4 Please produce all marketing materials – in any form of media – which include any
5 reference to the 911 Call system which was discussed by the parties at the September 19, 2018
6 hearing before the Discovery Commissioner. *See* generally, Sept. 19, 2018, Transcript of
7 Proceedings at 14-16.

8 **RESPONSE:**

9 Jacuzzi objects to the Request as it is misleading and misstates what transpired at the
10 subject hearing, as plaintiffs’ counsel (not Jacuzzi’s counsel) was the attorney that discussed a 9-
11 1-1 system.

12 Without waiving said objections, the “911 Call system” raised by plaintiffs’ counsel at the
13 hearing is not a Jacuzzi product.

14 **REQUEST FOR PRODUCTION NO. 80:**

15 Please produce all communications between You and FirstStreet regarding the 911 Call
16 system which was discussed by the parties at the September 19, 2018, hearing before the
17 Discovery Commissioner. *See* generally, Sept. 19, 2018, Transcript of Proceedings at 14-16.

18 **RESPONSE:**

19 Jacuzzi objects to the Request as it is misleading and misstates what transpired at the
20 subject hearing, as plaintiffs’ counsel (not Jacuzzi’s counsel) was the attorney that discussed a 9-
21 1-1 system.

22 Without waiving said objections, the “911 Call system” raised by plaintiffs’ counsel at the
23 hearing is not a Jacuzzi product.

24 **REQUEST FOR PRODUCTION NO. 81:**

25 Produce a copy of the specifications for the “sit-down seats for shower stalls” referenced
26 during the deposition of the NRCP 30(b)(6) designee, Michael A. Dominguez. *See* Michael A.
27 Dominguez Depo. Tran., at Vol. I, 10:10.

28

1 **RESPONSE:**

2 Jacuzzi objects to this Request as irrelevant and seeks confidential and proprietary
3 documents. The request improperly seeks documents regarding a product that is not the subject
4 of this action and is not even a walk-in tub; it seeks information regarding a shower seat.

5 **REQUEST FOR PRODUCTION NO. 82:**

6 Section 2.G of the Manufacturing Agreement between FirstStreet and Jacuzzi, Bates-
7 stamped as Jacuzzi001588 thru Jacuzzi001606, refers to “Additional Products” for which Jacuzzi
8 granted a written trademark to FirstStreet. Please provide any and all documents related to the
9 “Additional Products” that Jacuzzi granted a written trademark agreement to FirstStreet.

10 **RESPONSE:**

11 Jacuzzi objects to this Request as overbroad, irrelevant and seeks confidential and
12 proprietary information, as “Additional Products” that Jacuzzi granted a written trademark
13 agreement to FirstStreet” is not relevant to Plaintiff’s claims, as it does not involve the Subject
14 Bathtub. Furthermore, this Request is a fishing expedition, requesting documents related to
15 “Additional Products” that have no relevance and that Plaintiff has no basis to believe are related
16 to the litigation.

17 **REQUEST FOR PRODUCTION NO. 83:**

18 Section 2.A of the Manufacturing Agreement between FirstStreet and Jacuzzi, Bates-
19 stamped as Jacuzzi001588 thru Jacuzzi001606, refers to the development and placement of
20 advertisements in “various sources and media, including but not limited to direct mail, Internet,
21 catalog, television, radio and print media.” Please produce all advertisements regarding Jacuzzi
22 walk-in tubs that You placed, distributed, or otherwise caused to be circulated in Clark County,
23 Nevada through “various sources and media, including but not limited to, direct mail, Internet,
24 catalog, television, radio and print media.”

25 **RESPONSE:**

26 Jacuzzi objects to this Request as duplicative, as Plaintiffs continue to ask for marketing
27 and advertisements that Jacuzzi “placed, distributed, or otherwise caused to be circulated,” and
28 Jacuzzi continues to respond that FirstStreet had the exclusive right to market and advertise “and

1 place” marketing and advertising related to the Subject Bathtub. *See* Jacuzzi’s Responses to
2 Plaintiffs’ Third Request for Production of Documents, Requests Nos. 48. Jacuzzi further objects
3 as the request is not limited in scope to the time during which Ms. Cunnison may have observed
4 such materials.

5 Jacuzzi did not place or distribute marketing or advertising materials related to the Subject
6 Bathtub in Clark County prior to Ms. Cunnison’s purchase of the product.

7
8 DATED this 9th day of January, 2019.

9 SNELL & WILMER L.L.P.

10
11 By: /s/ Morgan T. Petrelli

12 Vaughn A. Crawford, Nevada Bar No. 7665
13 Morgan T. Petrelli, Nevada Bar No. 13221
14 3883 Howard Hughes Parkway, Suite 1100
15 Las Vegas, NV 89169

16 *Attorneys for Defendant Jacuzzi Inc. doing*
17 *business as Jacuzzi Luxury Bath*
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CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I caused to be served a true and correct copy of the foregoing **DEFENDANT JACUZZI INC. DBA JACUZZI LUXURY BATH'S RESPONSE TO PLAINTIFF ROBERT ANSARA'S FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS** by the method indicated below, addressed to the following:

- ☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.
- ☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

Benjamin P. Cloward, NV Bar No. 11087
Richard Harris Law Firm
801 S. Fourth Street
Las Vegas, NV 89101
(702) 444-4444; (702) 444-4455 fax
Benjamin@RichardHarrisLaw.com
catherine@richardharrislaw.com
Attorneys for Plaintiffs

Charles H. Allen (*pro hac vice*)
Charles Allen Law Firm, P.C.
3575 Piedmont Road, NE
Building 15, Suite L-130
Atlanta, GA 30305
(404) 419-6674; (866) 639-0287 fax
callen@charlesallenlawfirm.com
Attorneys for Plaintiffs

Meghan M. Goodwin, NV Bar No. 11974
Thorndal, Armstrong, Delk, Balkenbush & Eisinger
1100 East Bridger Avenue
Las Vegas, NV 89101-5315
Mail to: P.O. Box 2070
Las Vegas, NV 89125-2070
(702) 366-0622; (702) 366-0327 fax
mmg@thorndal.com
*Attorneys for Defendants/Cross-Defendants
First Street for Boomers & Beyond, Inc. and
AITHR Dealer, Inc.*

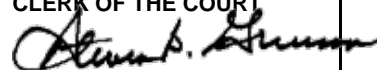
Hale Benton
26479 West Potter Drive
Buckeye, AZ 85396
halebenton@gmail.com
Defendant Pro Per

DATED this 9th day of January, 2019.

/s/ Julia M. Diaz
An Employee of Snell & Wilmer L.L.P.

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EXHIBIT “5”



TRAN

EIGHTH JUDICIAL DISTRICT COURT
CIVIL/CRIMINAL DIVISION
CLARK COUNTY, NEVADA

ROBERT ANSARA, et al,

Plaintiffs,

vs.

FIRST STREET FOR BOOMERS
& BEYOND, INC., et al,

Defendants.

CASE NO. A-16-731244

DEPT. NO. II

BEFORE THE HONORABLE BONNIE BULLA, DISCOVERY COMMISSIONER

WEDNESDAY, SEPTEMBER 19, 2018

TRANSCRIPT RE:

DEFENDANT JACUZZI, INC. dba JACUZZI LUXURY BATH'S
MOTION FOR PROTECTIVE ORDER ON OST

APPEARANCES:

For the Plaintiffs:

BENJAMIN P. CLOWARD, ESQ.

For Defendant Jacuzzi, Inc.:

JOSHUA D. COOLS, ESQ.

For Defendants First Street for Boomers
& Beyond, Inc. and Aithr Dealer, Inc.:

MEGHAN M. GOODWIN, ESQ.

RECORDED BY: Francesca Haak, Court Recorder

1 LAS VEGAS, NEVADA, WEDNESDAY, SEPTEMBER 19, 2018, 10:04 A.M.

2 * * * * *

3 DISCOVERY COMMISSIONER: Ansara.

4 MR. CLOWARD: Good morning, Your Honor.

5 DISCOVERY COMMISSIONER: Good morning. Everyone state their
6 appearances for the record, please.

7 MR. CLOWARD: Ben Cloward for the plaintiff.

8 MR. COOLS: Joshua Cools for defendant Jacuzzi, Inc.

9 MS. GOODWIN: Meghan Goodwin on behalf of defendant First Street
10 and AITHR.

11 DISCOVERY COMMISSIONER: So what I have is defendant's motion for
12 a protective order and then I did receive the opposition late yesterday, which I've
13 reviewed in part. And I don't know if you were able to reach any agreement at all
14 on some of the issues that you have apparently not been able to resolve. Here's
15 what I'm really concerned about, is that we don't get too far afield, but that the
16 information that I think that the plaintiff really would like to have is made available
17 to them. I know -- and I appreciate the opposition and the chart that was put
18 together on the different claims where the information was produced following the
19 last hearing, so that was helpful. I think with regard to -- and I'm not sure how you
20 want to start in tackling some of the discovery, but I'd like to talk a little bit about
21 Request No. 39 and 40.

22 MR. CLOWARD: You got it, Judge.

23 DISCOVERY COMMISSIONER: Let's see, I'm not sure I'm right on that.
24 I apologize, I think -- No, I'm sorry, it's Request No. 17, the forensic hard drives of

1 the two employees. I think what I was looking for specifically from last time as it
2 relates to Request No. 17 was a motion on why the forensic analysis --

3 MR. CLOWARD: Sure.

4 DISCOVERY COMMISSIONER: -- of the records was relevant. I think
5 I have a better understanding of that now based on the subsequent production that
6 took place. But what I would like both sides to do is to contact an expert in the field
7 and give me a cost of what it would take. I'm not really excited about mirroring hard
8 drives because I think we run into too much difficulty, but what I am considering is
9 a forensic analysis of the computers to do the search terms that the plaintiff had
10 previously requested so that we make sure that there are no additional incidents or
11 documents that would be relative -- or relevant to this case. But I'd like both sides
12 to put together a proposal, so then I can make a reasoned decision --

13 MR. CLOWARD: Sure.

14 DISCOVERY COMMISSIONER: -- on who should be doing it and what the
15 scope of the forensic inquiry would be. I think as I understand the plaintiff --

16 MR. CLOWARD: May I sit down, Your Honor?

17 DISCOVERY COMMISSIONER: Yes. Everybody can have a seat.

18 MR. CLOWARD: Thank you.

19 DISCOVERY COMMISSIONER: I think as I understand the plaintiff, the
20 real concern is do we have all the incident reports or complaints or problems related
21 to this tub and have they been produced.

22 MR. CLOWARD: Correct.

23 DISCOVERY COMMISSIONER: And, defense counsel, I am not faulting
24 you, so I don't want you to take this as a personal affront, but I do think that there is

1 a good faith basis for making the argument that they don't have everything because
2 of how the information was produced, or they may or may not have everything,
3 depending on what's in the computer and how it was stored and who did what to
4 address the issues.

5 MR. CLOWARD: Your Honor, may I just briefly?

6 DISCOVERY COMMISSIONER: Yes.

7 MR. CLOWARD: We never, ever thought that Mr. Cools or his firm -- we
8 have a great relationship, Mr. Cools has always been very, very good to work with,
9 and any intimation at all that we've inferred that it's him or his firm, we have not tried
10 to make that at all because we've never felt that that was the case at all.

11 DISCOVERY COMMISSIONER: That's why I want both sides to put
12 together a proposal.

13 MR. CLOWARD: Sure.

14 DISCOVERY COMMISSIONER: And maybe you can even work together
15 on it. I just want to know -- I mean, I might be willing to let you spend up to \$5,000
16 or 7,500, depending on how extensive the search has to be, to have an independent
17 forensic guy or gal come in and look at the computer and tell us I did these search
18 terms. I think we're going to have to get better search terms and parameters
19 because I think I do agree with defense counsel if we just do slip, fall, elderly,
20 overweight, we're going to have to put some additional parameters in place, and
21 that's what I'd like you to work on.

22 MR. CLOWARD: Okay.

23 DISCOVERY COMMISSIONER: I mean, this tub has to be somehow
24 defined within that subset of categories. Having said that, I was really surprised,

1 I guess, at the number of incidents. I mean, it sounds like it isn't that many, but
2 eleven and the extent of some the injuries and what happened, I'm not saying it's
3 identical to this one, but that's not a reasonable basis for not disclosing.

4 MR. CLOWARD: Yeah.

5 DISCOVERY COMMISSIONER: The truth of the matter is there were
6 problems with this tub and it caused injury. Maybe not in the exact way that the
7 injury occurred here, but there were enough issues that might suggest, hey, we have
8 a problem. So that's what concerns me and until we had the last hearing we didn't
9 have the production of that information.

10 MR. CLOWARD: Yeah. In fairness to counsel, I have spoken to one of the
11 claimants. I found the name of one of the claimants and spoke to the son of that
12 claimant and the information that I received from him was that they provided a whole
13 bunch of information to Jacuzzi, and none of that's been produced. So that's a
14 whole another reason -- you know, that will be information that, you know, we hope
15 to go and depose him so that they have equal access to that information. But I'm
16 not trying to create an issue, I'm not trying to harass them. I have a good faith belief
17 and basis for what I'm trying to pursue, Your Honor.

18 DISCOVERY COMMISSIONER: Well, the products liability cases are
19 complex and they're difficult. And as you point out, the person that has the
20 information is on the defense side.

21 MR. CLOWARD: Yeah.

22 DISCOVERY COMMISSIONER: So you are relying on them to give you
23 this information. And I am concerned, I want to make sure it's all disclosed.
24 Whether or not it ultimately plays a role in terms of supporting or denying liability,

1 I don't know.

2 MR. CLOWARD: Sure.

3 MR. COOLS: Your Honor, if I could just -- the issue that I see, one of the
4 main issues with these requests is that there's kind of a -- I don't know that it's
5 intentional, but there's this false premise that Jacuzzi has made representations
6 about subsequent incidents throughout this litigation. That is just not true. You
7 can see from the meet and confer letter that is attached to my affidavit, you know,
8 Mr. Cloward and I's meet and confer in February of this year in which Jacuzzi
9 had agreed to produce -- to do that search with those terms for prior incidents,
10 not subsequent incidents.

11 So while he can go through the subsequent incidents and say, yeah,
12 these terms show up, but that was never the agreement that that's what we were
13 going to search. And he never -- he never made it apparent to me that that was
14 a sufficient -- he never met and conferred over production of subsequent incidents.
15 So to say that these should have been produced earlier, when the agreement
16 between the parties that we were going to produce prior incidents and the fact that
17 now these subsequent incidents have been produced, there's a big leap there that
18 just isn't warranted.

19 And I understand your desire to make sure that they have all of the
20 information, but, you know, as you see from the list of those terms -- you know, this
21 is a bathtub company. There are -- you know, if you're searching the term tub or
22 slip or a handful of these terms, it's going to, I mean --

23 DISCOVERY COMMISSIONER: We have to somehow define the
24 parameters of the search to the tub at issue or a similar type of tub, but really the

1 products liability case, I guess the design is one of the issues. But it's not just what
2 happened before this event, it's actually, you know, what is relevant to the design
3 of the product that it could also be what occurs after the event.

4 MR. COOLS: Certainly. But the admissibility of those is on a different
5 basis.

6 DISCOVERY COMMISSIONER: Absolutely. I agree with that.

7 MR. COOLS: So my point, Your Honor, is that that's what we did. We
8 searched not only this tub but other walk-in tubs for anything prior to this incident
9 using those search terms and there's nothing related -- no personal injuries related
10 to plaintiff's claim.

11 DISCOVERY COMMISSIONER: Okay.

12 MR. COOLS: So I guess it seems very vague to me to say, you know, do
13 the forensic analysis -- of whose computer? I mean, he lists Mr. Dominguez and
14 Mr. Demeritt. Mr. Dominguez wasn't involved in this. He's a 30(b)(6) designated
15 on other topics and is the Director of Engineering but does not have anything to do
16 with customer complaints. Mr. Demeritt is the Director of Risk Management and a
17 vice-president of Jacuzzi, Inc., but he is not the person that reviewed those. It was
18 counsel. You know, I've seen the spreadsheet that was generated. It was Jacuzzi's
19 internal counsel that actually reviewed the claims.

20 DISCOVERY COMMISSIONER: So in the ordinary course of business,
21 where does the complaint go? If there is a complaint that's made on a tub, I slip
22 and fall in the tub and I get wedged between the door and I can't get out of it
23 because of the way the tub is designed and I get injured, where do I make my
24 complaint?

1 MR. COOLS: Well, the complaints would go into Jacuzzi's call center --

2 DISCOVERY COMMISSIONER: Okay.

3 MR. COOLS: -- and then, you know, stored in whatever particular --

4 DISCOVERY COMMISSIONER: So can we look at one of the computers
5 in the call center? Is there a main computer there that would have -- that somebody
6 could actually look at what's saved in that computer for complaints?

7 MR. COOLS: I can get that information. That is not something that was
8 asked of the 30(b)(6) at his deposition, to explain how those -- the process for those
9 calls or what was done with them when they came in.

10 DISCOVERY COMMISSIONER: So that seems to me a logical place to
11 start if we have to figure out which computers to look at. And it seems to me in the
12 ordinary course of business we're looking at the call-in center computers or whoever
13 is taking the initial claim as part of the ordinary course of business before it gets to
14 the lawyer. The lawyer is a different issue and we'll have to talk about that in a
15 minute. But I think that for now we have to have some way of searching the initial
16 claims that were made or reported to Jacuzzi that were documented in the computer
17 system. Now, it's possible if you go back to that computer system, you, without the
18 assistance of an I.T. person, although I would probably have one do it, just search
19 and find out what's on there. And I think we need to put them in a particular time
20 frame and I think I had actually done that at the last hearing.

21 MR. COOLS: 2008 to the present is what you previously indicated.

22 DISCOVERY COMMISSIONER: Okay. So can we use that time frame
23 and find out in searching the computers in the call center or a call center computer?
24 And again, I don't know how you're linked or your systems are linked, but I would

1 think there would be one main computer, a mainframe or some -- you know --

2 MR. COOLS: At some --

3 DISCOVERY COMMISSIONER: -- some host computer that all of these
4 calls would be saved in or, you know, records would be saved.

5 MR. COOLS: Sure. To the -- and I don't have an exact answer. I know
6 that at some point it was even just paper documents that were kept and then if there
7 was something that warranted opening a claim, then a claim was opened.

8 DISCOVERY COMMISSIONER: Where they scan the paper documents in?

9 MR. COOLS: But I don't know the status. I know that that was part of what
10 was reviewed initially when we did the initial review based on the meet and confer
11 with Mr. Cloward.

12 DISCOVERY COMMISSIONER: How long do they keep the paper
13 documents for?

14 MR. COOLS: I don't -- I mean, obviously they wouldn't have destroyed
15 anything since this litigation, but I don't know what the normal --

16 DISCOVERY COMMISSIONER: Don't know if we can go back to '08?

17 MR. COOLS: Yeah. Right.

18 DISCOVERY COMMISSIONER: Well, see what you have.

19 MR. COOLS: Okay.

20 DISCOVERY COMMISSIONER: And report it to Mr. Cloward so he has
21 a better understanding. For now I'm going to protect Request to Produce No. 17,
22 but with the idea that alternative relief will be provided in that the defendant will
23 work to isolate what computer or computers were used to take complaints over the
24 phone or document complaints as they came in to the company. And we need to

1 do a search of all those complaints from 2008 to the present, to the extent that they
2 exist, and that would include both documents on computers as well as any hard
3 copies that were maintained separately of letters, letter complaints or whatever else
4 you have. I mean, what your client needs to understand, defense counsel, is it's
5 their knowledge that becomes relevant, what they knew about this particular product
6 prior to the fall.

7 MR. COOLS: Right.

8 DISCOVERY COMMISSIONER: And so we don't know the answer to that
9 right now. A lot of what we have, as you indicate, the incidents were after the fall.
10 So we don't know with any certainty exactly what specific knowledge was known
11 before the fall. And I usually have this with me and I don't, when did this fall actually
12 take place? February 14th -- or February 19th of 2014. Okay. So we don't know
13 from like '08 to '14 --

14 MR. COOLS: Well, we've run that. We have searched that and it's
15 Jacuzzi's position that there are none.

16 DISCOVERY COMMISSIONER: Oh, okay.

17 MR. COOLS: So, I mean, that is our representation in discovery responses
18 and to counsel. So I understand that you're saying that that may not be enough,
19 but --

20 DISCOVERY COMMISSIONER: Well, I'm saying I don't know because
21 one of the things -- it may be correct, but I think what is concerning to me is what
22 occurs in the regular course of business. Where does a complaint get filed or
23 made? To whom it gets made, have we searched those computers, those call in
24 or intake computers to make sure that we've gotten all the information off that might

1 be relevant. And that's something that I am going to require the defendant to
2 follow up on.

3 Then when I get to Request No. 24, 25, 41, 42 and 43, which were
4 basically grouped together as well, I think part of the concern was it was overly-
5 broad. I think we need to limit them, those requests to this particular tub, 2008
6 to the present. And I think I had already defined serious bodily injury or wrongful
7 death. I think instead of putting the serious in front of it I'm just going to say bodily
8 injury or wrongful death. I think somebody broke a toe or something.

9 MR. CLOWARD: Yeah.

10 DISCOVERY COMMISSIONER: I mean, I think that's something that
11 would have been or should have been disclosed and it was now disclosed. It's
12 a subsequent accident, though, it's not a previous one.

13 MR. CLOWARD: Sure.

14 DISCOVERY COMMISSIONER: But I think to the extent that somebody
15 had an injury in one of these tubs and/or wrongful death, I think that's your
16 parameter. And the time frame is from 2008 to the present. So with those two
17 conditions in place, I think if you need to you need to supplement Request to
18 Produce 24, 25, 41, 42 and 43.

19 MR. COOLS: To be clear, Your Honor, are you -- I mean, the information
20 about the individuals involved in this, it would be our position that that's private
21 information that should not be disclosed.

22 DISCOVERY COMMISSIONER: If you're making a call-in complaint,
23 I don't think you have any expectation of privacy of your name and your information.
24 I'm happy to put it under a Rule 26(c) protective order.

1 MR. CLOWARD: Sure.

2 DISCOVERY COMMISSIONER: And that way it needs to be protected
3 within the confines of the litigation, but no redaction. That information needs to be
4 disclosed.

5 MR. CLOWARD: So, could we --

6 DISCOVERY COMMISSIONER: If there are 100 people prior to this
7 incident that had injuries in this tub that turn out to be reported in complaints that
8 were not disclosed, Commissioner Bulla is not going to be happy.

9 MR. COOLS: Sure. I understand.

10 DISCOVERY COMMISSIONER: I'm just going to say that so there's no
11 misunderstanding of where I'm coming from.

12 MR. CLOWARD: Could we just get the eleven that have been already
13 produced to be in unredacted form? Because none of those had the forms -- or
14 had the names.

15 DISCOVERY COMMISSIONER: Is that before me in one of the requests
16 today, do you think?

17 MR. CLOWARD: Well, they were -- I would --

18 DISCOVERY COMMISSIONER: They should be unredacted except for
19 Social Security numbers or --

20 MR. CLOWARD: Sure.

21 DISCOVERY COMMISSIONER: You know, the problem is, again, I would
22 put that under a protective order --

23 MR. CLOWARD: And we're happy to do that.

24 DISCOVERY COMMISSIONER: -- so it could not be, you know, put in a

1 public document. It would be maintained privileged and confidential until such time
2 as otherwise ordered by the district court judge. And then I'm fine with unredacted
3 incident reports. Again, I think part of my viewpoint is that somebody making a
4 complaint doesn't have an expectation of privacy.

5 MR. CLOWARD: Sure.

6 DISCOVERY COMMISSIONER: They expect the company to follow up
7 on their complaint.

8 MR. CLOWARD: Okay, thank you.

9 DISCOVERY COMMISSIONER: So, yes, the answer is yes, you may have
10 the unredacted version, except I will allow the defendant to maintain redaction of
11 Social Security numbers --

12 MR. CLOWARD: Certainly.

13 DISCOVERY COMMISSIONER: -- or any other personal identifying
14 information in that regard. But the name and the address and the phone number
15 or anything else should be disclosed to the plaintiff and we'll put it under a 26(c)
16 protective order. And obviously if you feel differently about that, you're welcome to
17 object to the district court judge, but I think that's reasonable because you have to
18 be able to follow up.

19 MR. CLOWARD: Thank you.

20 DISCOVERY COMMISSIONER: All right. So I've dealt with 17, which
21 I'm protecting for now but I'm providing that alternative relief.

22 Requests 24 to 43, some of these requests do have time frames in
23 them. I'll leave those alone. But for the ones that don't, it's 2008 to the present
24 and it's where there is wrongful death or bodily injury. So with those parameters

1 in place, I do expect supplements to the extent there are any.

2 Request to Produce 26, 27 and 36, I understand that similar requests
3 have already been answered. Fortunately we live in the computer era; cut and
4 paste to answer them, even if it's the same answer.

5 Request to Produce No. 39 and 40, I think to me there's not a big
6 difference between post-incident protocols, post-incident root cause analysis and
7 subsequent remedial measures. I mean, I think that's what it is. But to the extent
8 that there's some concern that it might involve lawyer analysis or something to that
9 extent, I would say disclose your subsequent remedial measures on this particular
10 tub.

11 MR. COOLS: Well, there are no subsequent remedial measures in terms
12 of the design. I mean, the design of the tub is the same. The labels, warnings are
13 the same.

14 DISCOVERY COMMISSIONER: Did you all do anything differently? Did
15 you change a warning?

16 MR. COOLS: I don't believe so.

17 MR. CLOWARD: Your Honor --

18 MR. COOLS: But my point was that, you know, subsequent remedial
19 measures are relevant for product liability cases to show feasibility of a change.
20 So, you know --

21 DISCOVERY COMMISSIONER: They can be relevant in negligence cases,
22 too.

23 MR. COOLS: Sure. But there's nothing here that would suggest, you
24 know, that that has any relevance to anything that they did in terms of an analysis

1 afterwards. If it didn't result in a subsequent remedial measure, it hasn't any
2 bearing on the plaintiff's case whatsoever.

3 DISCOVERY COMMISSIONER: Then how would it be privileged?

4 MR. COOLS: It's just not relevant.

5 DISCOVERY COMMISSIONER: It's not relevant that they discussed the
6 incident or they came up with a protocol or --

7 MR. COOLS: If it's not --

8 DISCOVERY COMMISSIONER: -- made some policy change as a result?
9 It could be a policy change. It doesn't even have to be necessarily with the product.
10 It could be a policy change.

11 MR. CLOWARD: And, Your Honor, I didn't mean to cut anyone off earlier.
12 Our understanding is that they actually did implement a 9-1-1 alert system after that
13 nobody else has had. Some of the incident reports, the lady calls in and says, you
14 know, the 9-1-1 alert system that they talked about wouldn't have helped me in this
15 situation because I, you know, fell down. So we do believe that there have been
16 things that have been changed, and we'd like to know in addition to that what else
17 was done.

18 DISCOVERY COMMISSIONER: So why don't we do this. I'm going to
19 protect 39 and 40 right now as written. Can you send out another request for
20 production of documents that deal both with that 9-1-1 alert system as well as --
21 just call it subsequent remedial measures or changes --

22 MR. CLOWARD: Okay.

23 DISCOVERY COMMISSIONER: -- and let him answer those requests for
24 production. I think the problem with some of this is they have in-house counsel,

1 so it's possible that this falls into the realm of attorney-client or work product.

2 MR. CLOWARD: Sure.

3 DISCOVERY COMMISSIONER: And I just -- I don't know the answer to
4 that. But I also think it would be better to try to really focus on what you know,
5 the information you know. So have them produce information on this 9-1-1 new
6 protocol.

7 MR. CLOWARD: You got it, Judge. Thank you.

8 DISCOVERY COMMISSIONER: And re-write or send another request on
9 subsequent remedial measures.

10 MR. CLOWARD: You got it.

11 DISCOVERY COMMISSIONER: Okay. And then on No. 46, these are the
12 photos of the tub. And I know I didn't sanction the party. That's not the question.
13 But what they want is all documents to show any efforts you made to preserve or
14 protect. I'm not sure if you're asking for the records retention policies or what the
15 investigative policies are; what type of photographs have to be taken with the
16 investigative policies. It almost seems to me that 46 could be re-written as a topic
17 area in a 30(b)(6) deposition.

18 MR. CLOWARD: Okay, fair enough.

19 DISCOVERY COMMISSIONER: I think I would do that --

20 MR. CLOWARD: Fair enough, Judge.

21 DISCOVERY COMMISSIONER: -- because I think I know what you're
22 looking for. I think you'll get it more efficiently in a 30(b)(6) deposition.

23 MR. COOLS: Your Honor, they already know that the only photos that
24 we have are those taken by counsel, which was the subject of the previous motion

1 in front of you.

2 DISCOVERY COMMISSIONER: I think they're looking for your policies
3 and procedures on records retention and investigation, but I think that that could be
4 easily formatted in terms of a 30(b)(6) deposition topic. So I think that's -- or if you
5 are really looking for the policies and procedures, Mr. Cloward, can you send out
6 separate requests for production for both of those?

7 MR. CLOWARD: I can rewrite that, Your Honor.

8 DISCOVERY COMMISSIONER: All right. So working our way backwards,
9 then, I think I've dealt with quite a bit of the outstanding discovery. I think what
10 I have not dealt with yet is what deals with the lawyer, and that's Request 11, 12,
11 13, 14, 15 and 16. I think, again, the distinction is what's done in your ordinary
12 course of business versus what is legally related. And to me, all of these really fall
13 into the category of wanting to know what the records retention policies are, what
14 the investigative policies are. I think some of these topics are perfect for a 30(b)(6)
15 deposition.

16 MR. CLOWARD: Yeah. And that was part of the reason what we brought
17 -- that we filed this was that we asked those questions of William Demeritt. We
18 said, hey, you know, what did you do, what kind of documents did you get? And
19 his answer was basically I don't know; I know that it was voluminous but what they
20 contained and what they were, I don't know, I passed them on to Ron Templer.
21 So we did try to inquire through the 30(b)(6) and we did have a topic on that issue,
22 but his response was kind of like I don't know. And so that's why we sent out the
23 additional requests, based on his testimony. And that's why we also set the
24 depositions of the other three folks.

1 MR. COOLS: Your Honor, but that's as to prior incidents, not what you're
2 talking about, what are the policies and procedures. Those questions were not
3 asked. And --

4 DISCOVERY COMMISSIONER: I think what I'd like to do just for now,
5 because I think I understand what the information is that's being desired, but I think
6 it could be done either in a second 30(b)(6) deposition, which I would permit --

7 MR. CLOWARD: Okay.

8 DISCOVERY COMMISSIONER: -- as it relates to policies and procedures
9 of, you know, investigating claims and/or retaining --

10 MR. COOLS: I believe that was already a topic in their deposition that they
11 already took and they just didn't ask those questions.

12 DISCOVERY COMMISSIONER: Well --

13 MR. CLOWARD: Your Honor, we did ask the questions but his response
14 was ultimately I don't know; I gave a voluminous group of documents to Ron
15 Templer.

16 MR. COOLS: That's not about the policies and procedures, that's about
17 what did you discover when you tried to look for prior incidents with these tubs.

18 DISCOVERY COMMISSIONER: So I think what needs to happen is maybe
19 some follow up. I'm going to protect 11, 12, 13, 14, 15 and 16 for now. I've given
20 some alternative relief in that we are already going to check the intake computers,
21 I hope, for the complaints that happened, using some search terms or protocol. But
22 I also think maybe another 30(b)(6) deposition on, you know, what are the policies
23 and procedures for investigating a claim? What do you do? What is your records
24 retention policy? How do you handle that? When information comes in on a claim,

1 what happens to it, where does it go? But I'm really not willing to do more than that.
2 If you want to ask separate requests for production of documents for the records
3 retention policies or the investigation of a claim policies and procedures, that's fine.
4 Send new requests for production on those issues. But right now what my concern
5 is with any communications is it necessarily may involve work product and/or
6 attorney client privilege, as I understand the way these are written. So I'm --

7 MR. COOLS: And we've already produced a privilege log for all prelitigation
8 communications regarding this claim. So the only thing left is specifically, you know,
9 litigation communications.

10 DISCOVERY COMMISSIONER: Okay. So for now I'm going to protect any
11 further response, with the understanding that I am recommending some alternative
12 relief in that we either do a second 30(b)(6) deposition regarding, you know, how is
13 a complaint made, how does it get processed in the ordinary course of business,
14 what do you do? You know, what do you do in terms of an investigation; what are
15 the policies and procedures? What is your records retention policy and procedure?
16 You know, and then you can ask in relation to the photographs in this case if --
17 you know, if that is an issue. But that's what I think needs to happen here.

18 In terms of the depositions that are set currently, I am going to protect
19 the deposition of the corporate counsel, which I believe is --

20 MR. CLOWARD: Ron Templer.

21 DISCOVERY COMMISSIONER: I'm sorry?

22 MR. CLOWARD: Ron Templer.

23 DISCOVERY COMMISSIONER: Ron Templer. Well, who do we have left
24 to depose? Is that -- I'm sorry.

1 MR. COOLS: They depose seven individuals over the next two days. Four
2 of them are prior Jacuzzi employees. I don't know if counsel served them.

3 DISCOVERY COMMISSIONER: Which ones are you moving for protection
4 on? Let me ask that.

5 MR. COOLS: Just the three current employees. Jess Castillo --

6 DISCOVERY COMMISSIONER: Give me their names.

7 MR. COOLS: Jess Castillo, Curt Bachmeyer and Regina Reyes.

8 DISCOVERY COMMISSIONER: Okay. And who's the lawyer?

9 MR. COOLS: Ron Templer is the lawyer.

10 DISCOVERY COMMISSIONER: Okay, so these three are not lawyers.

11 MR. COOLS: They're not.

12 DISCOVERY COMMISSIONER: Why are you moving to protect them?

13 MR. COOLS: Because their involvement in the litigation was only doing the
14 search at the direction of counsel. They don't have any knowledge about the claim,
15 other than what they did for counsel at, you know, my direction, essentially. And
16 so I think it would be a waste of everyone's time to even have these depositions.

17 DISCOVERY COMMISSIONER: So I'm going to grant protection but
18 without prejudice to the plaintiff renewing the deposition request, depending on
19 what we find out in terms of the intake of different claims. And then I think we need
20 to have somebody search -- you know, my thought was to have an independent I.T.
21 person do the searching --

22 MR. CLOWARD: Sure.

23 DISCOVERY COMMISSIONER: -- on the computer and let's wait and
24 see what they find. If they don't find anything else, if this is it, then I don't think the

1 depositions of these three individuals are necessary. If they do find more information,
2 then we'll cross that bridge when we come to it.

3 MR. CLOWARD: Okay. And just, Your Honor, I wanted to explain just
4 briefly why I wanted to depose these folks. We asked Bill Demeritt during the
5 deposition, you know, what was done to search for these documents? And he said
6 Ron Templer instructed me to ask these three folks to search for these things. This
7 person, this person, this person. They all had different -- one was over I.T., one was
8 over warranty and so forth. So they asked for that. Bill Demeritt then got voluminous
9 documents on the search terms and passed those through to Ron Templer. And we
10 asked Bill, well, tell me what the claims were; how many documents. And he had
11 no knowledge at all whatsoever, the 30(b)(6), about those.

12 And so my attempt was to, well, okay, Mr. Demeritt, if you don't have
13 information, if you can't testify about these things, if you're not prepared to testify
14 about these things pursuant to the Rule 30(b)(6) notice, then I'm going to depose the
15 folks that were instructed to do it and ask them what do those documents contain,
16 how many pages were there, how many incidents were there, what were the types
17 of incidents? Because as the Court just said, they have an obligation to testify
18 about those things. If he's unable to testify about those things -- that was the whole
19 purpose of setting that deposition was to get testimony from somebody that does
20 know. His position was I got the stack of stuff; I gave the stack of stuff.

21 DISCOVERY COMMISSIONER: What was the stack of stuff?

22 MR. COOLS: There's a spreadsheet of claims with -- or hits, essentially,
23 with the terms. Most of that with the bathtub company is warranty claims, so
24 involving leaks with the door or something breaking on the faucet.

1 DISCOVERY COMMISSIONER: How many pages?

2 MR. COOLS: And I believe Mr. Demeritt even testified to that.

3 DISCOVERY COMMISSIONER: How many pages is that spreadsheet?

4 MR. COOLS: I don't know, Your Honor.

5 DISCOVERY COMMISSIONER: All right. Can you produce it for in camera
6 inspection, please?

7 MR. COOLS: Sure.

8 DISCOVERY COMMISSIONER: Because I take it that spreadsheet has
9 obviously not been given to plaintiff's counsel.

10 MR. CLOWARD: No, it has not.

11 DISCOVERY COMMISSIONER: But it is a result of the searches that were
12 done by these three individuals?

13 MR. COOLS: Yes. And for the purpose of then determining if there was
14 anything -- any injury claims or any claims related to plaintiff's claims in this case.

15 DISCOVERY COMMISSIONER: So I'm going to grant protection of these
16 depositions for now, Mr. Cloward, but without prejudice to you moving to renew them
17 should it become necessary. Let me review the in camera spreadsheet of all the
18 claims that they did find and see if -- and I have the eleven that have been produced,
19 plus your claim, plus the other subsequent case that apparently is in litigation. So let
20 me take a look at the spreadsheet and see what's on it and then we'll go from there.
21 But I'll go ahead and protect those three depositions for now, but again, without
22 prejudice to the plaintiff renewing to take the depositions should it be necessary.

23 I would like to see what the additional computer searches yield from
24 the computers that take the intake information. I don't know if they're on the same

1 set, I don't know if they're connected. So I don't know if in the prior search they
2 should have shown up anyway. I don't know the answer to those questions. And
3 I also want to make sure you double check to see, if you had any written complaints
4 that came in, where those are because I think that's something that you need to take
5 a look at again with fresh eyes. You know, 2008 to the present, was there a physical
6 injury involved or a wrongful death.

7 MR. CLOWARD: And then did you want us to just get you a quote, I guess,
8 of an independent --

9 DISCOVERY COMMISSIONER: Right.

10 MR. CLOWARD: -- just by a supplement, by a letter? How do you want
11 that information presented?

12 DISCOVERY COMMISSIONER: I think we should do a supplement and
13 file it with the Court and I'll bring you back in a couple of weeks, maybe, and we
14 can take a look at it.

15 MR. CLOWARD: Okay.

16 DISCOVERY COMMISSIONER: I'll give you a couple of weeks. I've got
17 to give the defendant time to supplement some of the answers that I've ordered
18 supplemented.

19 MR. COOLS: We actually haven't even responded to this discovery yet
20 because we --

21 DISCOVERY COMMISSIONER: Okay.

22 MR. COOLS: -- filed the motion as soon as we got the request, so.

23 DISCOVERY COMMISSIONER: Okay. So what I did tell you, I hope you
24 can recall. I don't want to have to go back through all of it. You need to supplement

1 -- I think the ones that are just duplicative you just need to supplement those, even if
2 you give the same answers. I'm protecting the three depositions for now. I'm going
3 to look at your spreadsheet in camera. I'm protecting Request to Produce 11, 12,
4 13, 14, 15 and 16 for now. And then, again, I'm going to look at the in camera on
5 the spreadsheets.

6 We're also going to get a quote on what it's going to take -- and
7 defendant's counsel, you'll need to get one as well for somebody to go through
8 whatever the intake computers are -- and again, I don't know if the whole system
9 is networked or if they're separate -- to do a computer search with terms that make
10 sense. I think the terms that were given are a little bit concerning, but maybe you
11 all can work together to try to provide some better parameters. I think they're okay.
12 I just think we've got to deal with the tub or a similar design tub at issue.

13 Request to Produce No. 17, again, I'm protecting that for now but
14 we've got the alternative relief in searching the computers where initial complaints
15 would have been documented. For No. 24, 25, 41, 42 and 43, you need to answer
16 those with the parameters of if there is not a date given in the request, it's from 2008
17 to the present. Any of the requests that involve wrongful death or serious bodily --
18 not serious, must bodily injury. Bodily injury; wrongful death.

19 Request 26, 27 and 36, you need to answer, even if it's duplicative.
20 39 and 40 are going to be rewritten to ask for the policies and procedures and
21 subsequent remedial measures. And Request No. 46 is going to possibly be placed
22 in a separate 30(b)(6) deposition; a second one which I will allow as alternative
23 relief, and/or another request for production of documents that deal with the policies
24 and procedures at issue. And I think I've covered everything, I hope.

1 MR. CLOWARD: I think so.

2 MR. COOLS: Can I just clarify something in regards to something like 43?
3 All documents relating to complaints made to you about your walk-in tubs from
4 January 1, 2012 to the present.

5 DISCOVERY COMMISSIONER: I don't have 43 on my list.

6 MR. COOLS: Okay. It's in the 24 through 25 and then 41 through 43.

7 DISCOVERY COMMISSIONER: Okay, got it.

8 MR. COOLS: My question is obviously, you know, that could also pertain
9 to internal communications via email about that. Are you requiring us to also do an
10 ESI search and privilege log for all privileged communications about those claims
11 as well?

12 DISCOVERY COMMISSIONER: Ordinary course of business is what I'm
13 talking about.

14 MR. COOLS: Okay.

15 DISCOVERY COMMISSIONER: Okay? To the extent that the complaint
16 gets passed on to the lawyer and the lawyer is making opinions about it, I would
17 say you need to do a privilege log.

18 MR. COOLS: That's just extremely costly and burdensome to have to go
19 through and do --

20 DISCOVERY COMMISSIONER: Okay, but we're limiting it to the time
21 frame, and this one is January 1st of 2012 and it deals with wrongful death or bodily
22 injury. So it wouldn't involve any of the warranties, it wouldn't involve anything
23 where there's no injury. How many claims could you possibly have?

24 MR. COOLS: I'm just saying even doing the search based off of the ten

1 or eleven claims, subsequent claims that have been produced, having to go through
2 and find all the custodians that may have touched that claim do a search, have
3 counsel review for privilege, those are just very burdensome and costly endeavors.
4 If that's part of your ruling, I understand.

5 DISCOVERY COMMISSIONER: Well, I don't want this to be overly
6 burdensome and costly for the defendant, but you cannot hide behind a privilege
7 not to produce documents that were in the ordinary course of business. And when
8 you say something like that, it worries me.

9 MR. COOLS: I don't know that -- frankly, Your Honor, I don't know that
10 any exist. I'm just saying I'm sure there's emails about it. So, you know, if a claim
11 came in and it's escalated or whatever --

12 DISCOVERY COMMISSIONER: Well, then I think you just need to
13 identify --

14 MR. COOLS: I mean, these aren't about our claim, so we're getting into
15 a granular level on these other claims that --

16 DISCOVERY COMMISSIONER: All documents related to complaints
17 made to you about your walk-in tubs from January 1st, 2012 to the present. The
18 complaints have to be about wrongful death or bodily injury. So any warranty
19 claims, any non-injury claims are not part of this production. Documents that are
20 produced or prepared in the ordinary course of business have to be produced. If
21 some point the claim goes to the legal department, you just need to identify the fact
22 that any other documents are part of the legal -- it went to legal and are covered by
23 work product privilege or whatever it is. I mean, I don't know how many we're talking
24 about. I don't expect you to do this for every warranty claim.

1 MR. COOLS: I guess is it possible to -- you know, since we've already
2 given, for instance, the subsequent incident claims, is it possible to have plaintiff
3 identify which ones they're arguing are substantially similar, which is the criteria
4 for any admissibility of subsequent claims, and then have us drill down on those
5 particular claims versus, you know any claims? And I use that one as an example,
6 but, you know, even like Request No. 24, which would involve prior and subsequent.

7 DISCOVERY COMMISSIONER: I don't know the answer because I don't
8 know the scope of the information we're dealing with. So what I think you need to
9 do is a little bit of research and tell me exactly what we're dealing with. In terms
10 of the other information on the eleven claims, Mr. Cloward, take a look, find out
11 which claims you want information on. I wouldn't ask for information on all eleven
12 because I don't think that's really that exciting. All of them are not that exciting for
13 you. But I think you can, you know, pare down what you need.

14 MR. CLOWARD: Okay.

15 MR. COOLS: Thank you, Your Honor.

16 DISCOVERY COMMISSIONER: All right. I really can't do any more today.

17 MR. CLOWARD: Thank you, Judge.

18 DISCOVERY COMMISSIONER: So the motion to compel -- or the motion
19 for a protective order, I'm sorry, is granted in part and denied in part within the
20 parameters discussed. If you start -- defense counsel, if you start looking at things
21 and it's going to be overly burdensome or difficult, then have a conference call with
22 me with plaintiff's counsel and we'll figure out a plan.

23 MR. COOLS: And can we also, if we're unable to -- hopefully we can come
24 to agreement regarding which computers are searched and so forth, but if we're not,

1 can we have a call with you?

2 DISCOVERY COMMISSIONER: Have a conference call with me.

3 MR. COOLS: Okay.

4 DISCOVERY COMMISSIONER: And I do want you to both get bids. I want
5 to keep the cost of it down and make it reasonable. So I think we need to see what
6 we're dealing with. And it could be, defense counsel, that you can have your
7 company run a search. I just don't know. Again, you know, is this call center
8 separate and apart? What about the 9-1-1 call center, did you search the complaints
9 or the calls that came in on that? I know it was enacted after this incident, but did
10 you search for whether or not complaints or calls came in on that?

11 MR. COOLS: I'm not familiar with that product, so I don't know.

12 DISCOVERY COMMISSIONER: So, plaintiff's counsel said that was a
13 product that was implemented by your company, but you're not familiar with it?

14 MR. COOLS: No.

15 DISCOVERY COMMISSIONER: Then you'll need to follow up with your
16 company to see what that was and if there are any claims that came in, how can
17 you search for those.

18 Plaintiff's counsel, I need you to prepare my Report and
19 Recommendation, please, and run it by defense counsel --

20 MR. CLOWARD: You got it.

21 DISCOVERY COMMISSIONER: -- to approve as to form and content,
22 and I need it in ten days.

23 MR. CLOWARD: You got it. I'm going to request a copy of the transcript.

24 DISCOVERY COMMISSIONER: That's fine. Thank you very much.

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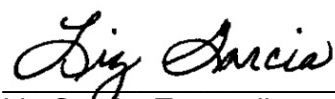
MR. CLOWARD: Thank you, Judge.

MR. COOLS: Thank you, Your Honor.

(PROCEEDINGS CONCLUDED 10:49 A.M.)

* * * * *

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Liz Garcia, Transcriber
LGM Transcription Service

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EXHIBIT “6”

9:39



Phil >

Aug 6, 2019, 7:16 PM

Hey I'm prepping for this drop tomorrow. Did you ever find out from firstSTREET who was proving the 911 Alert that Curnutte mentioned? Was that a Jacuzzi product? FS product? Or something that was independent of both?

No on at FirstSTREET promoted that with WIT customers. It might have been the installer? Or she could have just thought of that.

Are you sure?

Yes. That is what Dave told me. But he can only speak about AITHR. The independent dealers may have done some other things that was not a part of the FirstSTREET program.



iMessage



PA0200

9:40



Phil >

You mean like the companies that Jacuzzi was working with outside the FirstSTREET umbrella?

Cuz I thought Fairbanks was in that umbrella.

Maybe he was rouge.



I think that Some of the independent dealers may have done some small differences. We do know that the independents would report things directly to Jacuzzi and not notify FirstSTREET.

I think Gordon might have. He mentioned the RNT system when I talked to him a month or so ago



iMessage



PA0203

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EXHIBIT “7”

DISTRICT COURT
CLARK COUNTY, NEVADA

CASE NO.: A-16-731244-C
DEPT NO: II

ROBERT ANSARA, as Special Administrator of the Estate of SHERRY LYNN CUNNISON, Deceased; MICHAEL SMITH, individually, and heir to the Estate of SHERRY LYNN CUNNISON, Deceased; and DEBORAH TAMANTINI, Individually; and heir to the Estate of SHERRY LYNN CUNNISON, Deceased,

Plaintiffs,

vs.

FIRST STREET FOR BOOMERS & BEYOND, INC.; AITHR DEALER, INC.; HALE BENTON, Individually; HOMECLICK, LLC; JACUZZI INC., doing business as JACUZZI LUXURY BATH; BESTWAY BUILDING & REMODELING, INC.; WILLIAM BUDD, Individually and as BUDDS PLUMBING; DOES 1 through 20; ROE CORPORATIONS 1 through 20; DOE EMPLOYEES 1 through 20; DOE MANUFACTURERS 1 through 20; DOE 20 INSTALLERS 1 through 20; DOE CONTRACTORS 1 through 20; and DOE 21 SUBCONTRACTORS 1 through 20,

Defendants.

VIDEO DEPOSITION OF: RUTH R. CURNETTE

TAKEN BY: PLAINTIFFS

DATE: WEDNESDAY, AUGUST 7, 2019

TIME: 9:05 A.M. - 12:13 P.M.

**LOCATION: 17498 SE 110th COURT
SUMMERFIELD, FLORIDA 34491-8022**

**REPORTED BY: Courtney L. Wear, RMR, CRR
Stenographic Court Reporter
Notary Public, State of Florida**

OWEN & ASSOCIATES COURT REPORTERS
P.O. BOX 157, OCALA, FLORIDA 34478
352.624.2258 owenassocs@aol.com

APPEARANCES:

BENJAMIN P. CLOWARD, Esquire

RICHARD HARRIS LAW FIRM

801 South Fourth Street

Las Vegas, Nevada 89101

E-mail: benjamin@RichardHarrisLaw.com

E-mail: catherine@RichardHarrisLaw.com

APPEARING ON BEHALF OF PLAINTIFFS

PHILIP GOODHART, Esquire

THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER

1100 East Bridger Avenue

Las Vegas, Nevada 89215

E-mail: png@thorndal.com

APPEARING ON BEHALF OF DEFENDANTS FIRST STREET
FOR BOOMERS & BEYOND, INC., AITHR DEALER, INC.,
and HALE BENTON**BRITTANY M. LLEWELLYN, Esquire**

WEINBERG WHEELER HUDGINS GUNN & DIAL

6385 South Rainbow Boulevard, Suite 400

Las Vegas, Nevada 89118

E-mail: bllewellyn@wwhgd.com

APPEARING ON BEHALF OF DEFENDANT JACUZZI, INC.

ALSO PRESENT:

Greg Waugh, Videographer

Sara Niland, Caregiver

I N D E X

<u>EXAMINATION OF RUTH R. CURNETTE</u>	<u>PAGE</u>
Direct Examination by Mr. Cloward.....	7
Cross Examination by Mr. Goodhart.....	65
Cross Examination by Ms. Llewellyn.....	80
Redirect Examination by Mr. Cloward.....	90
Recross Examination by Mr. Goodhart.....	94
CERTIFICATE OF REPORTER.....	99
CERTIFICATE OF OATH.....	100

E X H I B I T S

<u>PLAINTIFFS' EXHIBITS</u>	<u>PAGE</u>
No. 1 (Deposition Subpoena Notice.)	9
No. 2 (Jacuzzi_002965 and 2966.)	11
No. 3 (3/10/17 Letter.)	12
No. 4 (911 Alert/Label Documentation.)	14
No. 5 (Jacuzzi/Aging in the Home Remodelers Letter.)	16
No. 6 (Guardian Alert 911 - A Quick Start and Use Guide.)	17
No. 7 (What You Should Know About Safety in the Bathroom.)	18
No. 8 (Nine Color Photos.)	98
No. 9 (Are You Experiencing Tingling or Prickly Sensations Ad.)	22
No. 10 (Photocopy of Two Checks.)	22
No. 11 (Responses Received from Different Entities.)	24
No. 12 (Handwritten Slippery Floor Notes.)	26
No. 13 (3/8/17 Letter to Office of the General Counsel.)	27
No. 14 (9/14/16 Fairbanks Construction Letter to Ms. Curnutte with Envelope.)	27

E X H I B I T S C O N T I N U E D

<u>PLAINTIFFS' EXHIBITS</u>	<u>PAGE</u>
No. 15	28
(Two Jacuzzi Pamphlets/Brochures.)	
No. 16	30
(Jacuzzi FAST FILL/FAST DRAIN BROCHURE.)	
No. 17	34
(Fairbanks Construction Items Initialed by Ms. Curnutte that Installer Explained Document.)	
No. 18	46
(Your Jacuzzi Walk -- In Tub Pamphlet/Brochure Folder with Documents.)	
No. 19	38
(Notice of Right to Cancel Document/Fairbanks Construction CRC #050304 Document.)	
No. 20	41
(Fairbanks Construction Letter of 3/10/16, Change Order and Envelope.)	
No. 21	42
(4/2/16 Ruth Curnutte Letter to Jacuzzi/Warranty Registration Card.)	
No. 22	43
(Ruth Curnutte Letter to Warranty Service Department with Certified Mail Receipt.)	
No. 23	44
(9/1/16 Ruth Curnutte Letter to US Consumer Product Safety Commission.)	
No. 24	45
(8/11/16 La Plaza Grande Postage Receipt.)	
No. 25	46
(Jacuzzi - Safety. Comfort. Independence. Advertisement.)	
No. 26	47
(Jacuzzi Walk - In Bathtub Series - Installation and Operation Instructions.)	
No. 27	47
(9/9/16 Letter from Pam Bondi, Attorney General.)	
No. 28	49
(3/6/17 Ruth Curnutte Letter to The Office of the General Counsel.)	
No. 29	51
(Handwritten Notes of Serial Number, Model Number, Several Entities.)	
No. 30	52
(Correspondence with Department of Business and Professional Regulation with Certified Mail Receipt.)	

E X H I B I T S C O N T I N U E D

<u>PLAINTIFFS' EXHIBITS</u>	<u>PAGE</u>
No. 31	53
(Correspondence between Fairbanks Construction and Ruth Curnutte with Certified Mail Receipt.)	
No. 32	55
(Building Permit Correspondence.)	
No. 33	56
(4/18/17 Letter to Attorney Osteen and 2/15/17 DBPR Letter to Ms. Curnutte.)	
No. 34	57
(Fairbanks Construction #CRC050304- HC0002524 Documents and Jacuzzi Lifetime Warranty Certificate.)	
No. 35	58
(8/25/16 DBPR Letter to Ms. Curnutte.)	
No. 36	60
(Documents Regarding Senior Vs. Crime, Business Cards, Elder Helpline, Special Report - Tips on Living to be 100 Pamphlet, Handwritten Notes on Fairbanks Construction Change Order Form, Contractor's Final Payment Affidavit, Care and Cleaning Instructions, Photocopy of a Check.)	
No. 37	60
(Fairbanks Construction Walk-In Tub Specs.)	
No. 38	61
(Business Card - Jacuzzi, Kevin Lewis, Design Consultant.)	
No. 39	61
(First Street for Boomers and Beyond Envelope.)	
No. 40	98
(Four Color Photos.)	

P R O C E E D I N G S

THE VIDEOGRAPHER: All right. This is tape number one to the videotaped deposition of Ruth Curnutte taken in the matter of Robert Ansara and others, versus First Street For Boomers & Beyond Inc., and others.

Deposition is being held at 17498 Southeast 110th Court in Summerfield, Florida on August 7th, 2019. The time's approximately 9:05 p.m. -- or a.m.

My name is Greg Waugh, I'm the videographer. Court Reporter is Courtney Wear.

So, Counsel, please introduce yourself for the record, beginning with the plaintiff.

MR. CLOWARD: Benjamin Cloward for the Cunnison family.

MR. GOODHART: Philip Goodhart for First Street, AITHR and Hale Benton.

MS. LLEWELLYN: Brittany Llewellyn for Jacuzzi, Inc.

THE VIDEOGRAPHER: Madam Court Reporter will now swear in the witness and we'll proceed.

THE REPORTER: Ma'am, can you raise your right hand.

Do you swear the testimony you're about to

1 give will be the truth, the whole truth, and
2 nothing but the truth, so help you God?

3 THE WITNESS: I do.

4 Whereupon,

5 RUTH R. CURNUTTE,

6 a witness herein having been first duly sworn, was
7 examined and testified as follows:

8 DIRECT EXAMINATION

9 BY MR. CLOWARD:

10 Q. Okay. Hi, Ms. Curnutte. How are you?

11 A. I'm fine, thank you.

12 Q. Can you hear me okay?

13 A. Yes.

14 Q. Okay. If you need me to speak up just let me
15 know.

16 A. Yes.

17 Q. Okay. So this video is taking your recording
18 to show to the jurors in a case in Las Vegas. And so if
19 during the process if you say uh-huh or huh-uh I may ask
20 is that a yes or is that a no, it's just to make sure
21 that everybody is clear what you mean. Okay?

22 A. Yes, sir.

23 Q. Okay. So have you ever been deposed before?

24 A. No.

25 Q. Okay. So this is the first time?

1 took them three months after I sent letters of reminders
2 that I cannot use the bathtub, the walk-in tub without
3 that unit because of safety reasons.

4 Q. Okay.

5 A. So it was sent from California.

6 Q. Okay. So I'm going to show you some
7 documents that are your documents that I want to attach,
8 we'll attach as Exhibit 4.

9 And is this the -- I guess the label, or the
10 documentation that came with the 911 alert?

11 A. Yes, it is.

12 MR. CLOWARD: Okay. So mark that as
13 Exhibit 4.

14 (Plaintiffs' Exhibit No. 4 marked for
15 identification.)

16 BY MR. CLOWARD:

17 Q. And who is the company that is listed that
18 that document -- that that came from?

19 A. Well, it says here, First Street.

20 MR. CLOWARD: Mark that as Exhibit 4 and I'll
21 hand that to counsel so he can talk to his client
22 and find out what's going on with that.

23 MR. GOODHART: Well, Ben, I never said that
24 First Street did not sell it to her. My comment
25 was neither First Street nor AITHR were directly

1 off on that. Sometimes that creates more work for
2 the court reporter. Most people just waive that.
3 It's basically checking her work. But, you know,
4 that's entirely up to you. It just creates more
5 work for actually both of you because you'd have to
6 go line by line, you know.

7 THE WITNESS: Yeah, right.

8 MR. CLOWARD: So do you want to waive that?

9 THE WITNESS: Yes, I waive -- I waive it,
10 yeah.

11 MR. CLOWARD: Okay. So we'll go off the
12 record now. And anything else, Counsel?

13 MR. GOODHART: I think we're concluding the
14 deposition. Correct?

15 MR. CLOWARD: Yes, correct.

16 MR. GOODHART: Thank you. I appreciate your
17 help.

18 THE WITNESS: You're quite welcome.

19 MS. LLEWELLYN: Thank you, Ms. Curnutte.

20 THE VIDEOGRAPHER: This ends the deposition.
21 Time is 12:13. We're off the record.

22 (Plaintiffs' Exhibit Nos. 8 and 40 marked for
23 identification.)

24 (This proceeding concluded at 12:13 p.m.)
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3 CERTIFICATE OF REPORTER

4 STATE OF FLORIDA }

5 COUNTY OF MARION }

6 I, COURTNEY L. WEAR, RMR, CRR, do hereby
7 certify that I was authorized to and did
8 stenographically report the foregoing video deposition
9 of RUTH R. CURNETTE; that a review of the transcript
10 was not requested; and that the foregoing transcript,
11 pages 7 through 98, is a true record of my stenographic
12 notes.

13 I FURTHER CERTIFY that I am not a relative,
14 employee, attorney or counsel of any of the parties',
15 nor am I a relative or employee of any of the parties'
16 attorneys or counsel with the action, nor am I
17 financially interested in the action.

18 Signed this day of 8-12-2019, Marion County,
19 Florida.
20
21
22

23 /s/ Courtney L. Wear
24 COURTNEY L. WEAR, RMR, CRR
25

1 CERTIFICATE OF OATH

2
3 STATE OF FLORIDA}

4 COUNTY OF MARION}

5 I, COURTNEY L. WEAR, Registered Merit
6 Reporter, Certified Realtime Reporter, a Notary Public
7 for the State of Florida, and Court Reporter, certify
8 that the witness, RUTH R. CURNETTE, personally appeared
9 before me this day of 8-7-2019 and was duly sworn.

10 WITNESS my hand and official seal this day
11 of 8-12-2019.

12
13 Identification: FL Driver's License

14
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16
17 /s/ Courtney L. Wear
18 COURTNEY L. WEAR
19 Notary Public-State of Florida
Comm No: GG 260936

20 Comm. Expires: December 12, 2022
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23
24
25



1998 Ruffin Mill Road
Colonial Heights, VA 23834

ACCOUNT #: 0018274019 ORD#: P088560200015
BILL TO: RUTH CURNUTTE
17498 SE 110TH CT
SUMMERFIELD, FL 34491-8022

SHIP TO:
RUTH CURNUTTE
17498 SE 110TH CT
SUMMERFIELD, FL 34491-8022

QTY	ITEM NO.	DESCRIPTION	UNIT PRICE	EXT. PRICE	WHSE. LOC.
1	16194	Guardian Alert 911 with Jacuzzi WIT	0.00	0.00	
1*	16195	Literature Bundle for Guardian Alert 911			STAGING
1*	16119	Guardian Alert 911			E1010224
The following items have been cancelled per your request					
1	16141	Chatterbug			
1	16197	Cordless Amplified Phone Extra Handset			

05/25/16 2DEFAULT00000000 05/26/16 0000441502 11 01

Exchange/Return Label

SHIP TO: RUTH CURNUTTE
17498 SE 110TH CT
SUMMERFIELD, FL 34491-8022

PLEASE CHECK:
EXCHANGE _____
RETURN _____
PM: NC _____

FIRST STREET
1998 RUFFIN MILL ROAD
COLONIAL HEIGHTS, VA 23834

RA# _____

EXHIBIT
PX# 4
R. Curnutte m/a

PA0210

Should you need to return your purchase, here's how...

1 - To prepare your return:

- Call the customer service department at (800) 958-8324. Request a "Return Authorization: (RA#) number and write this number in the (RA#) box located on the front label to ensure proper tracking of your return.
- Save your package materials for return shipping.
- Complete the return section below and include this invoice in the package to speed the processing of your transaction. Be sure to retain a copy for your records.
- Place the "Return Authorization" (RA#) number label provided on the outside of your return package.
- Please return via a trackable ship method (UPS, Fed/Ex, or Registered Mail). Keep all tracking numbers and retain information for your records. We are not responsible for lost return shipments. Sorry, we cannot accept COD's.

2 - Item(s) being returned:

ITEM#	QUANTITY	REASON CODE	RETURN PROCESS#	DESCRIPTION

Reason Codes:
03 Damaged
04 Quality Not As Expected (please comment)
05 Misleading Ad (please comment)
06 Did Not Order
07 Order Previously Cancelled
08 Perceived Value "Price" (please comment)
09 Arrived Too Late
16 Sales Misinformed Customer (please comment)
18 Incorrect Item(s) Entered On Invoice
20 Defective (please comment)

1 - Replacement
2 - Exchange
3 - Merchandise Credit
4 - Refund - (Reimbursement is made by your original method of payment. Please allow time for processing.)
21 Too Complex to Install or Program
24 Wrong Item(s) Shipped
35 Item(s) Missing
51 Changed Mind
52 Other (please comment)

Unconditional Risk-free guarantee...

Your 100% satisfaction is our goal. If there is ever anything we can do to serve you better, please let us know. We are not satisfied until you are. If for any reason you are not fully satisfied with your purchase, return it within the specified trial period. We will gladly offer an exchange or provide a full credit for the purchase price of your product.

Technical and Customer service departments...

If you have any questions regarding your order or the installation of your product, please contact us for assistance.

Phone: Service Representative (800) 958-8324

Mon-Fri 9:00 am - 6:00 pm (est)

Internet: www.firststreetonline.com

E-mail: customerservice@firststreetonline.com

3 - To exchange or to place a new order, please complete the following:

ITEM#	QTY	DESCRIPTION	PRICE/EA

Payment Method - Balance due on exchange or new order:

☐ Check enclosed ☐ Visa ☐ Mastercard ☐ Discover ☐ Diner's Club

☐ American Express ☐ Other - _____

Your Card #:

Expiration Date:

MO YR

Signature: _____

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EXHIBIT “8”