

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.

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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 3 TO PETITION FOR WRIT OF MANDAMUS

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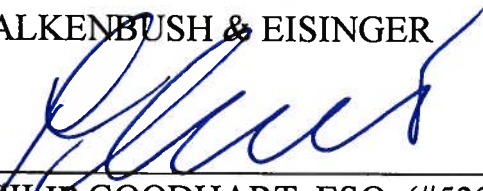
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DATED this 16th day of August, 2021.

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER



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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 August 16, 2021, I caused to be served a true and correct copy of the foregoing APPENDIX VOLUME 3 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.

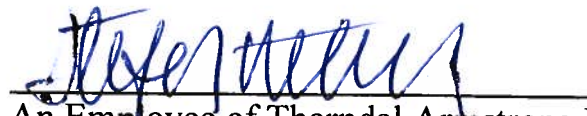
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1 the record, as to what information Plaintiffs' counsel was seeking.¹⁶

2 After the break, Mr. Modena again cleared up the apparent confusion by advising counsel
3 he had been focused on similar incidents that had taken place prior to the Cunnison date of loss.

4 A: After the Cunnison is – because I think I was working a little bit prior –
5 prior to the Cunnison – up to that point, I think I was more concerned about that,
6 but – in answering that, but there – there had been two, one in Texas, Baez or
7 something, and I was – I wasn't directly notified on that one, but eventually so –
8 and that went to legal counsel, and – not even sure that was an injury – we're not
9 sure that's even an injury case.

10 The – probably the more significant one is Max Smith.¹⁷

11 Mr. Modena's response to a question that **was not** one of the 53 topic areas in Plaintiffs'
12 deposition notice, was 100% consistent with firstSTREET's written discovery responses, wherein
13 the Baize and Smith incidents were disclosed. There simply was nothing evasive about Mr.
14 Modena's answers to Plaintiffs' questions. Even if there were, the appropriate course of conduct
15 would have been to (1) conduct an EDCR 2.34 discovery conference followed by (2) an
16 appropriate motion with the Discovery Commissioner. On this issue, Plaintiffs did nothing.

17 firstSTREET's position and argument on this issue is further underscored by Mr. Modena's
18 deposition testimony when he was asked directly by Plaintiffs' counsel why he had not remembered
19 the Baize and Smith incidents:

20 A: Well, again, I was thinking about up to that point. I thought that's how I
21 answered it. I thought we were just trying to – up to that point, what we were
22 aware of.¹⁸

23 As noted, in the NRCP 30(b)(6) deposition notice, Plaintiffs limited the scope of inquiry on
24 this issue to **prior incidents**, not subsequent incidents. Nevertheless, once again, the truth and the
25 testimony taken in the proper context does not support Plaintiffs argument.

26 ¹⁶ *Id.*, at 28:18-25.

27 ¹⁷ *Id.*, at 30:1-10.

28 ¹⁸ *See Exhibit 10*, at 32:14-19.

1 **B. Guild Surveys**

2 On July 3, 2019, Plaintiffs sent out a Request for Production of Documents requesting
3 documents that firstSTREET's NRCP 30(b)(6) witness had testified about seven months earlier –
4 December 11, 2018. **See Exhibit 13.** These requests sought communications regarding customer
5 complaints **or** concerns over the slipperiness of the tub, the seat and other issues discussed during
6 the NRCP 30 (b)(6) deposition. Then, on July 28, 2019, Plaintiffs sent another set of Requests for
7 Production of Documents wherein they requested that all customer surveys, regardless of content,
8 be produced. **See Exhibit 14.** This was the very first time Plaintiffs sought the production of
9 customer surveys, even though a number of surveys had been referenced during the NRCP 30(b)(6)
10 deposition and produced on April 3, 2019.

11 firstSTREET produced all the requested surveys on August 21, 2019. Prior to 2015,
12 firstSTREET used their own hard surveys, and all of those in firstSTREET's possession were
13 produced. In 2015, firstSTREET started to use a third party vendor, Guild. **See Exhibit 1**, at ¶13
14 and **Exhibit 15.** In all, approximately 1,677 "hard surveys" and over 690 Guild "electronic surveys"
15 were produced. Moreover, the Guild surveys were produced as a ***searchable Excel Spreadsheet***.¹⁹

16 Plaintiffs claim that under NRCP 16.1 firstSTREET had an affirmative obligation to
17 produce these surveys. Yet Plaintiff can cite to no Nevada case authority supporting this argument.
18 Had Plaintiffs believed that firstSTREET's prior discovery responses were inadequate or
19 unresponsive, they most certainly would have filed the necessary motions with the Discovery
20 Commissioner. Had Plaintiffs believed that more particular discovery was needed to pinpoint the
21 information they needed, and then they would have sent out additional discovery requests, as they
22 did in July 2019.

23 Plaintiffs also claim that firstSTREET has not turned over all Guild surveys because a
24 firstSTREET employee, Norm Murdock, mentioned Guild in a June 18, 2013 email. In looking at
25 the exhibit, it would appear as though Mr. Murdock did not refer to Guild – his signature line for
26 the June 18, 2013 email is above that "comment". Nevertheless, according to firstSTREET's

27
28 ¹⁹ This means that there is a search function where all you have to do is type in a word and the document will take you to every location where that word appears.

1 NRCP 30(b)(6) witness, Guild was not retained until early 2015. In 2013, firstSTREET was utilizing
2 its own in-house survey system that generated the hard copies of the surveys that were produced
3 first in April 2019 and then again in August 2019. **See Exhibit 1**, at ¶13 and **Exhibit 15**.

4 As yet another example of Plaintiffs' unfounded hyperbole about firstSTREET they claim
5 that only one year (2015) of Guild Surveys were produced. This is a flat out lie. The spreadsheet
6 produced to Plaintiffs contains 3,476 lines of data from customers. Some of the customers take up
7 more than one line (that is why there is only 690 plus surveys). The spreadsheet contains columns –
8 A through AV – which various data and information. One of the columns, AG, is entitled “Survey
9 Sent”. Another, AH, is the titled “Survey Completion”. The spreadsheet is ordered by these dates.
10 If you go to the last survey on the spreadsheet, you see that the date the survey was completed is
11 January 24, 2017. Plaintiffs seek to see conspiracies and improper conduct by Defendants at every
12 turn, where none exists.

13 **C. firstSTREET's “Front Row” Seat**

14 Plaintiffs' claim that firstSTREET had a ‘front row seat’ for Plaintiffs' discovery disputes
15 with Jacuzzi. Even though Plaintiffs cite to absolutely no authority supporting their argument that
16 firstSTREET is equally bound by the discovery orders issued against Jacuzzi, a close look at those
17 issues supports firstSTREET's position.

18 In their motion, Plaintiffs have attached the hearing transcript from the September 19, 2018
19 hearing before the Discovery Commissioner concerning discovery disputes between Jacuzzi and
20 Plaintiffs. *See* Exhibit 5 to Plaintiffs Motion, a copy of which is attached as **Exhibit 16**. In looking
21 at that transcript, at page 11, lines 5 through 18 of the transcript (page 087 of the Appendix),
22 Commissioner Bulla clearly sets forth the parameters of Jacuzzi's production to “***bodily injury or***
23 ***wrongful death***”. At line 14 the Commissioner states “But I think to the extent that ***somebody***
24 ***had an injury in one of those tubs and/or wrongful death***, I think that's your parameter.”

25 To make sure everyone was clear, these limitations are reiterated on page 13, line 22
26 through line 23; page 23, line 5 through 6; page 24, lines 15 through 18; page 25, lines 20 through
27 23. Finally, at page 26, lines 16 through 19, the Commissioner sums it up:

28 All documents related to complaints made to you about your walk-in tubs

1 from January 1st, 2012 to the present. ***The complaints have to be about***
2 ***wrongful death or bodily injury***. So any warranty claims, any non-injury
3 claims are not part of this production. (emphasis added).

4 **D. Alert 911 Non-Disclosure**

5 Plaintiffs have created out of thin air a conspiracy/non-disclosure theory concerning the
6 911 pendant that was referenced by Ruth Curnutte during her deposition. Plaintiffs have concocted
7 an unfounded and unsubstantiated theory that because Ms. Curnutte (who lives in Florida and was
8 sold her tub by an independent dealer, Fairbanks Construction) received a 911 Alert Pendant,
9 firstSTREET must have known how dangerous the tub really was. This is simply NOT the case. As
10 noted by Mr. Modena in his affidavit, The 911 Alert Pendant was used as a “free gift” to purchasers
11 of the Jacuzzi Walk In Tub in some territories. **See Exhibit 1**, at ¶12. As noted by Mr. Modena,
12 between July 2014 and October 2015, the pendant was the \$200 gift referenced in print advertising
13 used by firstSTREET. *Id.* **See also Exhibit 17**. firstSTREET never viewed the pendant as a
14 “subsequent remedial measure” or as a way to warn customers of the dangers of the tub. It was a
15 marketing tool, an added value benefit that many marketing and advertising companies use on a
16 regular basis.

17 Moreover, Ms. Curnutte lives in Florida. The Florida territory is the responsibility of an
18 independent dealer, wholly separate and apart from firstSTREET or AITHR, named Fairbanks
19 Construction. Ms. Curnutte’s complaints went directly to either Fairbanks Construction or
20 firstSTREET, and firstSTREET did not have access to Fairbanks customer relations system and
21 would have relied on the surveys to learn that something was wrong. **See Exhibit 1**, at ¶4 and ¶12.
22 Ms. Curnutte purchased her tub in March 2016, and a search of the Guild spreadsheet does not
23 reveal any survey submitted by Ms. Curnutte.

24 Finally, during the September 19, 2018 discovery hearing Plaintiffs’ counsel made a vague
25 reference to a 911 alert system and the Commissioner advised Plaintiff’s counsel to send out
26 discovery for that information. **See Exhibit 16**, at 15:11-24. Certainly, had any party been required
27 by NRCP 16.1 to produce that information without a written discovery request, the Discovery
28 Commissioner would not have required Plaintiffs’ counsel to send a written request.

In fact, Plaintiffs followed the Commissioner’s order, and served written discovery on

1 Jacuzzi on November 30, 2018. Plaintiffs appear to infer in their motion that similar discovery was
2 propounded on firstSTREET, but the fact of the matter is, Plaintiffs never sent written discovery
3 to firstSTREET concerning the 911 Pendant until **July 3, 2019**. **See Exhibit 13**. firstSTREET
4 responded to this written discovery request on August 21, 2019 (an extension was obtained).

5 This is yet another attempt by Plaintiffs to simply create a conspiracy or non-disclosure
6 allegation without disclosing to the Court the real facts.

7 **E. Bathmat Non-Disclosure**

8 firstSTREET, through discovery, advised Plaintiffs that neither it, nor AITHR, sold
9 bathmats to Walk In Tub customers. That is a fact. A fact that does not support Plaintiffs'
10 narrative. So, Plaintiffs attempt to dispute this fact first through an inaccurate account of Ms.
11 Rouillard's testimony. In their brief, Plaintiffs cite word for word Ms. Rouillard's testimony that the
12 mats she had come with the tub to mislead this Court. *See* Plaintiffs Motion at 7:12-15.

13 They failed, however, to cite Ms. Rouillard's follow up response she provided to counsel at
14 the end of her deposition, when she first stated, "I got it [bathmat] right away because I didn't want
15 to step in it and slide." **See Exhibit 18**, at 30:10-12. She then clarified this even further and
16 testified, "That's what I bought – I guess I did go out and buy it the next day." *Id.* at 30:18-19.
17 Then, this was confirmed by the fact that Ms. Rouillard had an identical mat for her shower. *Id.* at
18 33:2-3.

19 In yet another attempt to confuse the Court and lump firstSTREET in with Jacuzzi and its
20 misdeeds, in its brief Plaintiffs cite to Jacuzzi's response to written discovery concerning the bath
21 mat. In that response, Jacuzzi states that ***Jacuzzi shipped a bathmat for optional use with the***
22 ***tub***. *See* Plaintiffs Motion beginning at 8:9. This is Jacuzzi's response, and it can in no way
23 implicate firstSTREET with the direct sale and marketing of bath mats.

24 As support for linking firstSTREET to Jacuzzi, Plaintiffs cite to a Jacuzzi produced email
25 discussing non-skid options. *See* Plaintiffs Motion, Exhibit 16, attached hereto as **Exhibit 19**. In
26 reviewing the email string, it begins with an email from Norm Murdock of AITHR to Audrey
27 Martinez of Jacuzzi and Dave Modena of firstSTREET dated July 10, 2013. But then the next email
28 in the "string" is from Ray Torres of Jacuzzi to Audrey Martinez of Jacuzzi. The "cc" line contains

1 the names of 5 other individuals – *all are employees of Jacuzzi*. In other words, the initial email
2 was not sent to firstSTREET or AITHR. Moreover, this particular email makes absolutely no
3 reference to the July 10, 2013 that was prepared by Mr. Murdock. In fact, Mr. Torres’ email
4 references “two test reports”. In other words, pages 166, 167, 168 and 169 is a completely separate
5 and distinct email string from the July 10, 2013 email from Mr. Murdock, and is yet another attempt
6 by Plaintiffs to manipulate a document to make it fit their narrative.

7 The second email, the response to Mr. Torres is another email between Jacuzzi employees –
8 *no firstSTREET or AITHR employees are included in the string*. Similarly, the third email
9 also involves only Jacuzzi employees. The last email, with the attachment that is actually printed in
10 Plaintiffs’ motion, is between Audrey Martinez of Jacuzzi and Joseph Davis, also of Jacuzzi. Again,
11 no firstSTREET or AITHR employees are included.

12 In spite of this obvious fact, Plaintiffs yet again mislead this Court into believing that
13 firstSTREET somehow hid this email exchange from Plaintiffs, and then argue that firstSTREET
14 should be sanctioned because it did not produce this information.

15 **F. Plaintiffs’ Table On Pages 11 and 12 of Motion**

16 Beginning on page 12 of Plaintiffs’ Motion, Plaintiffs purport to claim that firstSTREET
17 was on notice of 63 incidents before the Cunnison incident. Plaintiffs produce a portion of a table
18 showing 7 of these incidents. firstSTREET is presently unable to comment on this allegation, as the
19 source of Plaintiffs’ table is unclear. There is no supporting documentation referenced anywhere
20 for this table, and each of the “Bates” numbers begin with Jacuzzi, indicating that it is a document
21 produced by Jacuzzi.²⁰

22 Nevertheless, regardless of the source of the information contained within the table,
23 firstSTREET and AITHR maintain that they have produced all documents in its possession
24 wherein any person has claimed injury or damage from his use of the Walk In Tub as noted in
25 footnote 31 of Plaintiffs motion.

26
27
28 ²⁰ As discussed above, the emails that Plaintiffs produced regarding bathmats (Exhibit 16) included anyone that worked for firstSTREET or AITHR.

1 IV.

2 LEGAL STANDARD

3 firstSTREET and AITHR have properly responded to discovery throughout this action,
4 raising objections when deemed proper, otherwise Plaintiffs would have surely filed the necessary
5 Motion to Compel with the Discovery Commissioner.²¹ There are no Discovery Orders issued
6 against firstSTREET or AITHR. In fact, the sole basis for Plaintiffs' Motion is that Plaintiffs claim
7 firstSTREET and AITHR should have produced certain documents as part of their NRCP 16.1
8 Early Case Conference disclosures.

9 While NRCP 37(d) does allow for the imposition of sanctions, the Nevada Supreme Court
10 has stated, “[g]enerally, NRCP 37 authorizes discovery sanctions only if there has been **willful**
11 **noncompliance with a discovery order of the court.**” Importantly, case-ending sanctions require
12 a heightened standard of review. *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042 (2010).
13 Fundamental notions of fairness and due process require that discovery sanctions be just and that
14 sanctions relate to the specific conduct at issue. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92
15 (1990). Additionally, any case-terminating order requires “an express, careful and preferably written
16 explanation of the court’s analysis of the pertinent factors.” *Id.*, at 93. The *Young* factors the Court
17 must consider include:

18 The degree of willfulness of the offending party, the extent to which the non-
19 offending party would be prejudiced by a lesser sanction, the severity of the sanction
20 of dismissal relative to the severity of the discovery abuse, whether any evidence has
21 been irreparably lost, the feasibility and fairness of alternative, less severe sanctions,
22 such as an order deeming facts relating to improperly withheld or destroyed evidence
23 to be admitted by the offending party, the policy favoring adjudication on the merits,
24 whether sanctions unfairly operate to penalize a party for the misconduct of his or
25 her attorney, and the need to deter both the parties and future litigants from similar
26 abuses.

24 *Id.*

25 While dismissal need not be preceded by other less severe sanctions, it should only be

27 ²¹ This is perhaps best evidenced by the numerous Motions to Compel and the discovery disputes
28 between Plaintiffs and Defendant Jacuzzi that have taken place over the last year and a half.

1 imposed after thoughtful consideration of all the factors involved in a particular case. *Id.*, at 92. The
2 dismissal of a case, based upon a discovery abuse such as the destruction or loss of evidence
3 “should be used only in extreme situations; if less drastic sanctions are available, they should be
4 utilized. *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 645 (1992).

5 In *Young*, plaintiff Bill Young willfully fabricated evidence during discovery. 106 Nev. At 90,
6 787 P.2d at 778. He added two sets of notations to his business diaries just before turning the
7 diaries over but claimed that he added the entries over a year prior to production. *Id.* The district
8 court offered Young the opportunity to clarify his position, but Young never did. *Id.* The district
9 court issued terminating sanctions only after a finding that Young had willfully fabricated evidence
10 and refused to clarify his position. *Id.* at 91, 787 P.2d at 778. But the Supreme Court of Nevada
11 recognized the importance of resolving cases based on their merits and cautioned that district
12 courts must be hesitant when contemplating terminating sanctions: “[w]here the sanction is one of
13 dismissal with prejudice . . . we believe that a somewhat heightened standard of review should
14 apply.” *Id.* at 92, 787 P.2d at 779. The reason for this is two-fold. First, fundamental notions of due
15 process require that “discovery sanctions for discovery abuses be just and that the sanctions relate
16 to the claims which were at issue in the ***discovery order which is violated.***” *Id.* at 92, 787 P.2d at
17 780 (emphasis added). Second, dismissal should be imposed “only after thoughtful consideration of
18 all the factors involved in the particular case.” *Id.*

19 More critically, before this Court can enter case terminating sanctions, the Nevada Supreme
20 Court requires the District Court hold an evidentiary hearing on the issue of sanctions. *McDonald v.*
21 *Shamrock Investments, LLC*, 127 Nev. 1158, 373 P.3d 941 (2011) (“the district court abused its
22 discretion in striking [defendant’s] answer without holding an evidentiary hearing to consider the
23 pertinent Young factors.”) (citing *Nevada Power v. Fluor Illinois*, 108 Nev. 638, 645, 837 P.2d 1354,
24 1359 (1992) (“If the party against whom dismissal may be imposed raises a question of fact as to
25 any of [the Young] factors, the court must allow the parties to address the relevant factors in an
26 evidentiary hearing.”); *Young*, 106 Nev. at 93, 787 P.2d at 780 (noting that the case concluding
27 sanction imposed was fair because “a full evidentiary hearing” relating to the discovery abuses was
28 conducted)).

V

ARGUMENT

A. **Striking firstSTREET's and AITHR's Answers Are Not Supported by Nevada Law**

Nevada law does not support striking firstSTREET or AITHR's answers because firstSTREET and AITHR have not engaged in any discovery abuse, nor have there been any NRCP 16.1 violations. Rather, striking firstSTREET or AITHR's answers is particularly disproportionate to any of their alleged conduct in this case, particularly because Plaintiffs have filed no motions with the Discovery Commissioner seeking redress from any of the alleged misconduct. firstSTREET and AITHR have clearly disclosed to Plaintiffs' counsel the basis for not producing certain documents. Simply put, the parties have agreed to disagree. "Fundamental notions of fairness and due process require that discovery sanctions be just and that sanctions relate to specific conduct at issue." *GNLV Corp. v. Service Control Corp.*, 900 P.2d 323, 111 Nev. 866 (1995). There is no basis under NRCP 16.1 or NRCP 37 for sanctions. In fact, Plaintiffs have not cited to one single case which would support their argument that firstSTREET has violated NRCP 16.1.

Moreover, as discussed and outlined in greater detail above, none of the alleged discovery abuses are supported by the real facts of this case and this issue.

1. ***Sanctions are not warranted under the Young factors.***

firstSTREET and AITHR have responded to all discovery requests propounded by Plaintiffs. Plaintiffs have not disputed any of these discovery responses, nor the basis for any objections or limited disclosures, with the Discovery Commissioner, or with this Court, prior to the filing of the instant motion. firstSTREET and AITHR have engaged in good faith meet and confer conferences with Plaintiffs' counsel and clearly explained their position on the disputed discovery. Certainly, firstSTREET and AITHR's conduct cannot be compared to the conduct that occurred in *Young*. Plaintiffs' cursory analysis of the *Young* factors further confirms this.

(a) **Degree of Willfulness**

Plaintiffs' analysis of the first *Young* factor is nothing more than supposition, without any cite to an actual fact in this case. When asked questions via depositions or written discovery,

1 firstSTREET and AITHR have responded. When those questions sought the production of
2 documents, those documents were produced.

3 Plaintiffs have never provided firstSTREET or AITHR with a concise statement of their
4 theory of the case, the trial themes they intend to utilize, the liability theories they will be pursuing.
5 Without this insight, firstSTREET cannot be required to simply guess what information and
6 documentation Plaintiffs are seeking and then voluntarily disclose that information via NRCP 16.1.
7 That is what written discovery is for. That is precisely what Plaintiffs did in this case. They sent out
8 22 separate written discovery requests to firstSTREET and AITHR, comprising of 87
9 Interrogatories; over 340 Requests for Production of Documents; and over 25 Requests for
10 Admission. All were answered. Yes, there were disagreements over the responses and two EDCR
11 2.34 Conferences were held, but ***not one single motion to compel was filed by Plaintiffs.***

12 It is also telling that when Plaintiffs were in front of the Discovery Commissioner on
13 September 18, 2018 and the issue of the 911 Pendants was raised, rather than instruct counsel to
14 produce that information in NRCP 16.1 supplements, the Discovery Commissioner ordered
15 Plaintiff to submit written discovery addressing that issue. Certainly, if that type of information/
16 documentation were mandated by NRCP 16.1, as Plaintiffs suggest, the Discovery Commissioner
17 would not have ruled in such a way.

18 Throughout this litigation, firstSTREET and AITHR have participated in discovery in good
19 faith, and have produced documents when they have become available. As noted in firstSTREET's
20 Opposition to Plaintiffs' original Motion to Strike, which was denied, the timing of the disclosure
21 of email communications was simply a matter of counsel being able to complete a review and
22 analysis of over 200,000 emails. When firstSTREET was asked to produce documents that pre-
23 dated the Plaintiffs' date of loss for the first time in discovery that was sent out in September 2018,
24 firstSTREET did not have the capacity to isolate out the relevant emails. Throughout this litigation,
25 firstSTREET provided counsel with over 200,000 emails that covered the relevant time period.
26 Counsel then had to review each email individually to determine if it was responsive to Plaintiffs'
27 discovery requests. As this Court can imagine, reviewing and examining for relevance over 200,000
28 emails can take much longer than anticipated, especially when efforts to apply simple search terms

1 to narrow the task proved unsuccessful.

2 **(b) Plaintiff Has Not Been Prejudiced**

3 Plaintiffs' arguments regarding the prejudice of a lesser sanction are predicated on falsities.
4 For example, Plaintiffs waited until July 2019 to send out discovery requests for all surveys,
5 regardless of content. They waited until July 2019 to send firstSTREET and AITHR written
6 discovery on the 911 Pendant and bathmats. There was nothing stopping Plaintiffs from sending
7 out this discovery request much sooner, as there is no obligation for a Defendant to voluntarily
8 produce this type of documentation absent a request for it.

9 Plaintiffs also elected to wait until December 11, 2018 to take the deposition of
10 firstSTREET and AITHR's NRCP 30(b)(6) witness. Then, they waited another eight months
11 before they decided to conclude the deposition in July 2019. There was nothing stopping Plaintiffs
12 from completing this deposition in 2017 or earlier in 2018 and at the very least in early 2019.
13 firstSTREET and AITHR responded to all discovery requests and played no part in Plaintiffs
14 strategy/decision to delay the NRCP 30(b)(6) deposition, other than standard scheduling issues
15 coordinating travel with three parties.

16 Plaintiffs infer that their ability to litigate has been irreparably damaged. This is false. First,
17 and foremost, as to Plaintiffs' product liability claims (negligence and strict), Plaintiffs have already
18 secured a victory over the manufacturer of the tub, Jacuzzi.²² This Court has already stricken
19 Jacuzzi's Answer as to liability, and the only question now are what damages Jacuzzi will have to
20 pay. In this regard, Plaintiffs damages will be whatever the jury determines. If the Jury determines
21 that Plaintiff's damages are \$500,000 because of the product defect, then Jacuzzi will pay \$500,000.
22 Under no scenario would firstSTREET or AITHR have to pay any additional monies for Plaintiffs
23 damages that are the result of the product defect. So, in this regard there has been absolutely no
24 prejudice.

25 Although Plaintiffs' Complaint does not contain a specifically delineated cause of action for
26 improper advertising or marketing, it does contain a cause of action for negligence, which surely

27
28 ²² firstSTREET and AITHR were included in these causes of action because they were in the chain
of commerce as retailers.

1 Plaintiffs will argue encompasses these claims. However, the only notice that firstSTREET or
2 AITHR have of possible advertising and/or marketing claims come from paragraphs 77 through 84
3 of Plaintiffs “Punitive Damages” allegations. With respect to this particular potential claim that
4 arguably would be unique to firstSTREET and AITHR, it is axiomatic that Ms. Cunnison could not
5 have relied upon any marketing or advertising materials that post-dated her death in February 2014.

6 firstSTREET has produced all pre-February 2014 marketing and advertising materials. That
7 has never been in dispute, and, in fact, of the 30 pages of Plaintiffs’ Motion, the only argument that
8 even tangentially relates to marketing and advertising is the 911 Pendant. However, the Pendant
9 was not used until July 2014 – 5 months after Ms. Cunnison had passed away. Therefore, Plaintiffs’
10 motion is devoid of any allegation or argument that firstSTREET’s and AITHR’s Answer as it
11 relates to the advertising and marketing allegations contained in paragraphs 77 through 84 of the
12 Fourth Amended Complaint should be stricken.

13 This motion deals exclusively with alleged discovery malfeasance with respect to the
14 production of documents and information relative to Plaintiffs product liability causes of action –
15 which firstSTREET and AITHR vehemently deny. Therefore, regardless of whatever ruling this
16 Court makes on the instant motion, firstSTREET must still be entitled to an opportunity to defend
17 any alleged marketing and advertising claims presented by Plaintiffs.

18 **(c) Striking firstSTREET and AITHR’s Answers Are Grossly**
19 **Disproportionate to firstSTREET and AITHR’s Alleged Actions**

20 firstSTREET and AITHR’s alleged actions—that were not discovery abuses—do not
21 warrant this heavy sanction under the *Young* factors, as demonstrated by Plaintiffs’ own cursory
22 analysis. As outlined above, Nevada courts have struck a party’s answer when the party has willfully
23 violated a court order—not when a party did not disclose irrelevant documents and consistently
24 informed the opposing party exactly what they were disclosing and what they were not disclosing.
25 Moreover, Plaintiffs have not cited to a single Nevada Supreme Court case that would support their
26 arguments that firstSTREET and AITHR had an obligation under NRCP 16.1 to voluntarily
27 produce the documents and information identified in their motion. In fact, based on rulings by the
28 Discovery Commissioner in this case, that is not the rule of law in Nevada. Again, it cannot be

1 stressed enough, but Plaintiffs have not filed a single discovery motion against firstSTREET or
2 AITHR. There are no discovery orders that could have been violated.

3 **(d) Nevada's Policy Favors Adjudication on the Merits**

4 Plaintiffs entirely ignore *Young's* acknowledgment of Nevada's policy favoring adjudication
5 on the merits. Striking firstSTREET and AITHR's Answers would controvert that policy. Striking
6 their Answers without a single motion being filed with the Discovery Commissioner or any
7 evidence that firstSTREET or AITHR violated a court order or a mandated discovery disclosure
8 would be an egregious error by this Court. This is not a case like *Young* where a party tampered with
9 evidence or entirely destroyed it, which the courts found may warrant total dismissal. Plaintiffs give
10 no reason why this case—that the parties have been dutifully litigating since March 2016—should
11 not be given the opportunity to be adjudicated on its merits.

12 **(e) Punishment of a Party for Counsel's Conduct**

13 Punishment of a party for its counsel's conduct, is inapplicable here. There have been no
14 such abuses. No one has withheld any evidence.

15 **(f) Sanctioning the Parties Will Not Deter Other Litigants Because**
16 **firstSTREET and AITHR Have Done Nothing Wrong**

17 There is no need (or reason) to sanction firstSTREET or AITHR to deter other litigants.
18 Discovery abuses should be sanctioned, but there is no discovery abuse here. No Motions to
19 compel were filed, let alone ruled upon by the Discovery Commissioner. firstSTREET and AITHR
20 have not violated any court order. firstSTREET and AITHR have not manufactured any evidence,
21 altered any evidence, or destroyed any evidence. In fact, if the Court were to grant Plaintiffs'
22 motion it would encourage Plaintiffs to forego any type of written discovery at all, as Plaintiffs
23 would simply lie in wait and then argue that Defendants violated NRCP 16.1 as they should have
24 voluntarily disclosed the documents. Such a ruling by this Court would also eviscerate EDCR 2.34
25 discovery dispute conferences and the filing of motions to compel with the Discovery
26 Commissioner, as it would encourage Plaintiffs into putting all of their eggs in one basket – file a
27 Motion to Strike a Defendant's Answer and obtain case terminating sanctions.

28 ///

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VI

CONCLUSION

As explained above, Plaintiffs base their motion for the most severe sanctions imaginable on contrived arguments that are not supported by a single Nevada Supreme Court case. Moreover, Plaintiffs arguments here apparently never rose to the level of filing a motion before the Discovery Commissioner. The facts are undisputed that firstSTREET and AITHR responded to all written discovery requests. Two EDCR 2.34 Conferences were held and the parties agreed to disagree. As evidenced by the fact that Plaintiffs, not once, have disputed firstSTREET and AITHR's discovery responses with the Discovery Commissioner, it is apparent that Plaintiffs' Motion is meritless and a waste of the parties' and the Court's resources.

Furthermore, as noted in this Opposition, the numerous instances of Plaintiffs misleading this Court in their motion to advance their narrative cannot justify this Court entertaining this type of terminating sanction. This is yet just another example of the desperate tactics engaged in by Plaintiffs and their efforts to overcome what they know is a "losing" case against firstSTREET and AITHR. Therefore, firstSTREET and AITHR respectfully request this Honorable Court DENY Plaintiffs' Motion in its entirety.

DATED this 6th day of November, 2020.

THORNDAL ARMSTRONG DELK
BALKENBUSH & EISINGER

/s/ Philip Goodhart

PHILIP GOODHART, ESQ.
Nevada Bar No. 5332
MICHAEL C. HETHEY, ESQ.
Nevada Bar No. 5668
MEGHAN M. GOODWIN, ESQ.
Nevada Bar No. 11974
1100 East Bridger Avenue
Las Vegas, Nevada 89101
Attorneys for Defendants/Cross-Defendants,
FIRSTSTREET FOR BOOMERS AND BEYOND,
INC., and AITHR DEALER, INC.

1 **CERTIFICATE OF SERVICE**

2 I HEREBY CERTIFY that on the 6th day of November, 2020, service of the above and
3 foregoing DEFENDANTS' FIRSTSTREET AND AITHR'S OPPSOITION TO PLAINTIFFS'
4 RENEWED MOTION TO STRIKE DEFENDANTS FIRSTSTREET AND AITHR'S
5 ANSWERS TO PLAINTIFFS' FOURTH AMENDED COMPLAINT was made upon each of
6 the parties via electronic service through the Eighth Judicial District Court's Odyssey E-File and
7 Serve system.

8
9 Benjamin P. Cloward, Esq.
10 Richard Harris Law Firm
11 801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

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13 Morgan Petrelli, Esq.
14 Snell & Wilmer LLP
15 3883 Howard Hughes Pkwy., Ste. 1100
16 Las Vegas, Nevada 89169
Attorneys for Defendant,
JACUZZI INC. dba JACUZZI
LUXURY BATH

Hale Benton
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Buckeye, AZ 85396

17
18 D. Lee Roberts, Jr., Esq.
19 Brittany M. Llewellyn, Esq.
20 Weinberg, Wheeler, Hudgins,
21 Gunn & Dial, LLC
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Attorneys for Defendant,
JACUZZI INC. dba JACUZZI
LUXURY BATH

23
24 */s/ Stefanie Mitchell*

25 An employee of THORNDAL ARMSTRONG
26 DELK BALKENBUSH & EISINGER
27
28

EXH

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MICHAEL C. HETHEY, ESQ.
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Attorneys for Defendants/Cross-
Defendants, FIRSTSTREET FOR
BOOMERS AND BEYOND, INC.,
AITHR DEALER, INC., and HALE BENTON

DISTRICT COURT

CLARK COUNTY, NEVADA

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; HOMECCLICK, LLC;
JACUZZI INC., doing business as JACUZZI
LUXURY BATH; BESTWAY BUILDING &
REMODELING, INC.; WILLIAM BUDD,

CASE NO. A-16-731244-C
DEPT. NO. 2

**EXHIBITS TO DEFENDANTS
FIRSTSTREET AND AITHR'S
OPPOSITION TO PLAINTIFFS'
RENEWED MOTION TO STRIKE
DEFENDANTS FIRSTSTREET AND
AITHR'S ANSWER TO PLAINTIFFS'
FOURTH AMENDED COMPLAINT**



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DELK BALKENBUSH & EISINGER

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EXHIBIT 1

[illegible]

2. In October 2011, my title was Senior Vice President of firstSTREET. I was primarily responsible for the negotiation of the Manufacturing Agreement entered into between firstSTREET and Jacuzzi concerning the Walk In Tub that was ultimately purchased by Decedent Sherry Cunnison. Under the Marketing Agreement, firstSTREET's responsibility was limited to marketing and advertising the Walk In Tub; AITHR's responsibility was to sell and install the Walk In Tub through AITHR employees and independent subcontractors; whereas Jacuzzi's responsibility was to design and manufacture the Walk In Tub.

3. In November 2011, AITHR was created as a wholly owned subsidiary of firstSTREET to sell and install the Jacuzzi Walk In Tub. Sometime in 2013, I held the title of President for AITHR. As part of the Manufacturing Agreement with Jacuzzi, firstSTREET was the developer of the marketing and advertising materials used to promote and sell the Jacuzzi Walk In Tub. firstSTREET would provide AITHR with customer leads, and AITHR's sales team would follow up with the customer leads and schedule in-home sales appointments. Once a sale had been made, AITHR would then coordinate the scheduling of the installation of the Jacuzzi Walk In Tub with various installation subcontractors. The Jacuzzi Walk In Tub would usually be delivered directly to the subcontractor that was hired to install the tub.

1 4. AITHR's sales territory is delineated in **Exhibit A**, attached to this Affidavit. Since
2 Ms. Cunnison resided in Las Vegas, Nevada, firstSTREET provided AITHR with the sales lead.
3 There were other wholly independent and separate dealers for other sales territories throughout the
4 continental United States, as evidenced in **Exhibit A**. Since these other dealers were not wholly
5 owned subsidiaries of firstSTREET, each of them had their own unique customer relations
6 management system. firstSTREET did not have access to any of these unique systems.

7 5. Nick Fawkes was hired in 2011 as the General Manager of AITHR, and based in
8 Denver, Colorado. His duties and responsibilities included oversight of the AITHR Denver office as
9 it relates to the sales and installation of the Jacuzzi tub. Mr. Fawkes' employment with AITHR
10 terminated in May 2015. I was personally involved in the decision to terminate Mr. Fawkes after it
11 had been determined that he had not been following company policies and procedures, and that he
12 had been undermining not only employees that were under him, but also his superiors. It was
13 determined that Mr. Fawkes was disorganized, failed to follow through on issues, failed to complete
14 tasks, and failed to notify his superiors when significant issues arose – choosing instead to hide them
15 to protect his own errors. In one particular instance, Mr. Fawkes failed to notify his superiors that
16 AITHR had been served with a lawsuit. As a result, a default was entered against AITHR and AITHR
17 was forced to pay a judgment without the opportunity to defend itself.

18 6. After Mr. Fawkes was terminated, and against company policy, he took his company
19 computer (a PC) with him and failed to timely return it as was required. When it was ultimately
20 returned, it was evident that all personal information on the PC hard drive had been scrubbed.
21 However, because of Mr. Fawkes' actions, neither AITHR nor firstSTREET are able to determine
22 precisely what additional information or documentation Mr. Fawkes removed from his company PC
23 prior to returning it.

24 7. As President for AITHR, I was familiar with company policy and procedures
25 concerning telephone calls from customers. It was AITHR's policy that all employees that received
26 a telephone call from an existing customer were instructed to enter the call, and the contents of the
27 call, into AITHR's customer management program, LeadPerfection (LP). Employees were to type all
28 discussions into the comment section and were not to omit any relevant information. AITHR

1 employees may have also received telephone calls on their cell phones. Again, if such a call took
2 place, the employee was instructed to input all discussions that took place during the call into the
3 comment section of LP. It was critical that AITHR employees utilize the LP system as that was how
4 AITHR could track customers whenever they called in. AITHR's search capacity of the LP system
5 was limited to searching customer names. Therefore, when a customer would call in, the recipient of
6 the call would bring up that customer utilizing LP and be able to see the history of that customer's
7 calls. When viewing LP the AITHR employee could see when the customer had previously called,
8 who the customer had talked to, what the customer had discussed, and whether anyone at AITHR
9 had taken any action regarding the customer's concerns.

10 8. Upon information and belief, or about April 18, 2014, firstSTREET's corporate
11 counsel received a letter of representation from Plaintiffs' counsel. On April 21, 2014, Nick Fawkes
12 was told by counsel to retain anything and everything related to Sherry Cunnison in AITHR's files,
13 including all recorded calls, emails, lead info, sales info, notes, documents. Mr. Fawkes was further
14 instructed to ensure that nothing related to Ms. Cunnison was destroyed. On May 1, 2014, in response
15 to this request, Mr. Fawkes emailed all documents that AITHR had relative to Ms. Cunnison to
16 firstSTREET's corporate counsel. In the email, Mr. Fawkes provided counsel with a summary of
17 AITHR's communications with Ms. Cunnison, including a summation of the allegedly faulty drain
18 handle. Missing from this summation is any reference to Ms. Cunnison begin trapped in the tub,
19 having to "dive under", or having any other issue with the tub as referenced in the Affidavits of Mr.
20 Fawkes and Ms. Doubek. All of the information and documentation from Mr. Fawkes was
21 subsequently turned over to counsel. None of the materials provided by Mr. Fawkes included a voice
22 recording of Ms. Cunnison, or any reference to this "other" incident of being trapped in the tub.

23 9. Based on the LP notes provided by Mr. Fawkes, firstSTREET and AITHR learned
24 that Annie Doubek had telephone conversations with Ms. Cunnison concerning some installation
25 issues. At no point in time did Ms. Doubek advise firstSTREET or AITHR that Mr. Fawkes had
26 instructed/coached her to alter an LP note (this would have been a clear violation of AITHR's
27 policies). Additionally, Ms. Doubek never advised firstSTREET or AITHR that the LP notes were
28 missing a telephone conversation with Ms. Cunnison wherein she claimed to have gotten stuck in the

1 tub because it would not drain. The very first time I was aware of this alleged conversation was when
2 I read Ms. Doubek's September 10, 2020 Affidavit.

3 10. Mr. Fawkes' affidavit also makes reference to Five9 and RingCentral. Five9 was
4 utilized by AITHR and firstSTREET to receive inbound sales calls from toll free numbers published
5 in various direct to consumer advertising materials. The contract with Five9 states that Five9 will
6 only keep recorded calls for thirty (30) days after the call came in. **See Exhibit B**, at page 6. During
7 the time period that the firstSTREET / Jacuzzi Manufacturing Agreement was in place, firstSTREET
8 and AITHR are not aware of any recordings being offloaded to any server owned or utilized by
9 firstSTREET or AITHR. Since notes for all calls were made and recorded in the LP notes, there was
10 no need to offload these recordings.

11 11. RingCentral is a cloud based company phone system that was used by firstSTREET
12 and AITHR for inter office communications. Under this system, calls could be immediately sent to
13 the proper person based on the caller's entry of an extension for that individual. This is similar to
14 "on premise" systems where the caller would hear a pre-recorded greeting and be allowed to enter
15 an extension number, as opposed to going through a live receptionist. The "auto recording" feature
16 provided by RingCentral, if it was requested, was not made available to firstSTREET and AITHR
17 until late August 2015. **See Exhibit C**, email from RingCentral.

18 12. The 911 Alert Pendant was used as a "free gift" to purchasers of the Jacuzzi Walk In
19 Tub in some territories. Between July 2014 and October 2015, the pendant was the \$200 gift
20 referenced in print advertising used by firstSTREET. This was only a sales promotion and was not a
21 part of firstSTREET's marketing, sales or advertising campaign for the Jacuzzi Walk In Tub.
22 firstSTREET believed that this promotion was an "added value" for the tub purchaser. In order to
23 save on costs, the pamphlets that accompanied any gift or add-on were usually printed with AITHR
24 trademarked registration.

25 13. After sales of the Jacuzzi Walk In Tub started. firstSTREET utilized a customer
26 survey to obtain feedback on the customer's experience. As sales increased, so did the number of
27 surveys that were being received. As a result of this increase, in early 2015, firstSTREET retained
28 Guild to electronically perform the surveys. The Guild surveys were available to any consumer

interested in reviewing them, by going to Guild's website at www.guildquality.com/AgingInTheHomeRemodelers.

14. Bath mats were never a part of firstSTREET's marketing, advertising or sale of the Jacuzzi Walk In Tub. After customers expressed concerns over the slipperiness of the floor of the Tub, firstSTREET notified Jacuzzi of these concerns. Jacuzzi responded by assuring firstSTREET that the tub's surface met all industry slip resistant standards. firstSTREET and Jacuzzi also had discussions relative to the use of a "Kahuna Grip" product in the tub. Again, this product was not a part of firstSTREET's marketing, advertising or sales campaign. It was considered an "added" feature to address customer's requests concerning making the tub less slippery. All emails and documents in firstSTREET and AITHR's possession concerning "Kahuna Grip" were turned over to counsel when it was requested.

15. firstSTREET and AITHR did not knowingly hide or destroy any materials that may be relevant to this litigation. All documents and information in firstSTREET and AITHR's possession have been produced to counsel.

16. I declare under penalty of perjury under the law of the State of Virginia that the foregoing is true and correct.

DAVID MODENA

SUBSCRIBED and SWORN to before me
this ____ day of November 2020

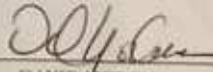
NOTARY PUBLIC in and for said
County and State

1 Guild to electronically perform the surveys. The Guild surveys were available to any consumer
2 interested in reviewing them, by going to Guild's website at
3 www.guildquality.com/AgingInTheHomeRemodelers

4 14. Bath mats were never a part of firstSTREET's marketing, advertising or sale of the
5 Jacuzzi Walk In Tub. After customers expressed concerns over the slipperiness of the floor of the
6 Tub, firstSTREET notified Jacuzzi of these concerns. Jacuzzi responded by assuring firstSTREET
7 that the tub's surface met all industry slip resistant standards. firstSTREET and Jacuzzi also had
8 discussions relative to the use of a "Kahuna Grip" product in the tub. Again, this product was not a
9 part of firstSTREET's marketing, advertising or sales campaigns. It was considered an "added"
10 feature to address customer's requests concerning making the tub less slippery. All emails and
11 documents in firstSTREET and ATTHR's possession concerning "Kahuna Grip" were turned over
12 to counsel when it was requested.

13 15. firstSTREET and ATTHR did not knowingly hide or destroy any materials that may
14 be relevant to this litigation. All documents and information in firstSTREET and ATTHR's
15 possession have been produced to counsel.

16 16. I declare under penalty of perjury under the law of the State of Virginia that the
17 foregoing is true and correct.

18 
19 DAVID MODENA

20 SUBSCRIBED and SWORN to before me
21 this ____ day of November 2020

22
23 NOTARY PUBLIC, in and for said
24 County and State
25
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**THORNDAL
ARMSTRONG**
DELK BALKENBUSH & EISINGER

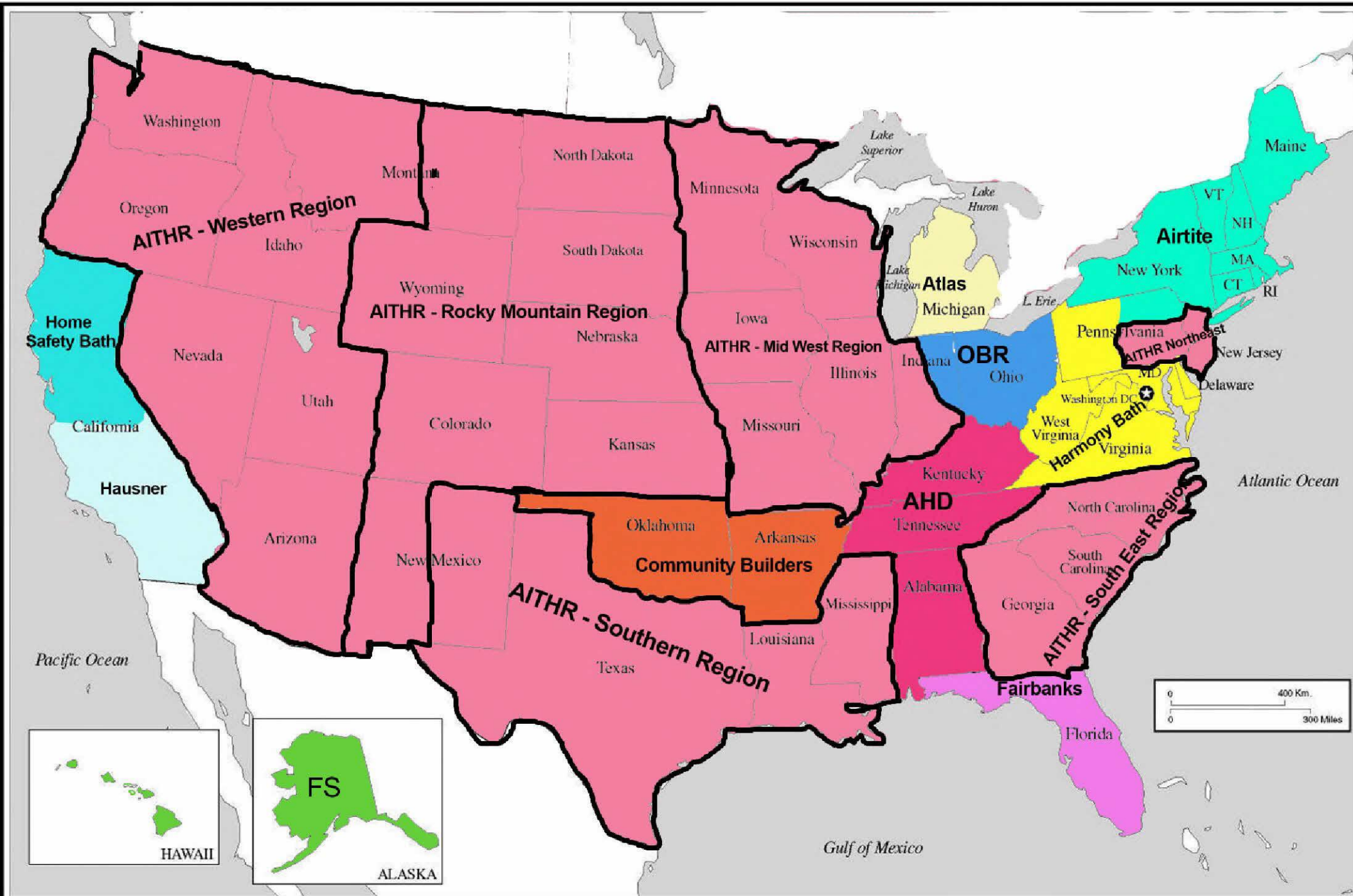
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EXHIBIT A

The United States





Here were our dealers at various times:

Alure Home Improvements
1 Commercial Court
Plainview, NY 11803

Airtite
1013 Wood Street
Scranton, PA 18508

Anthony home improvement
530 Stahr Road
Elkins Park, PA 19027

Atlas Home Improvement
10824 Plaza Drive
Whitmore Lake, MI 48189

Community Builders, Inc.
8220 E. Skelly Drive
Tulsa, OK 74129

Harmony Bath Solutions
11842 Rock Landing Drive, Suite 124
Newport News, VA 23606

Hausner Construction
1541 Parkway Loop, Suite E
Tustin, CA 92780

Home Safety Baths
448 DuBois Street
San Rafael, CA 94915

LeafGuard by Beldon Inc.
5039 West Avenue
San Antonio, TX 78213

RAI Holdings, Inc.
7101 Cheviot Hills Drive

Raleigh, NC 27616

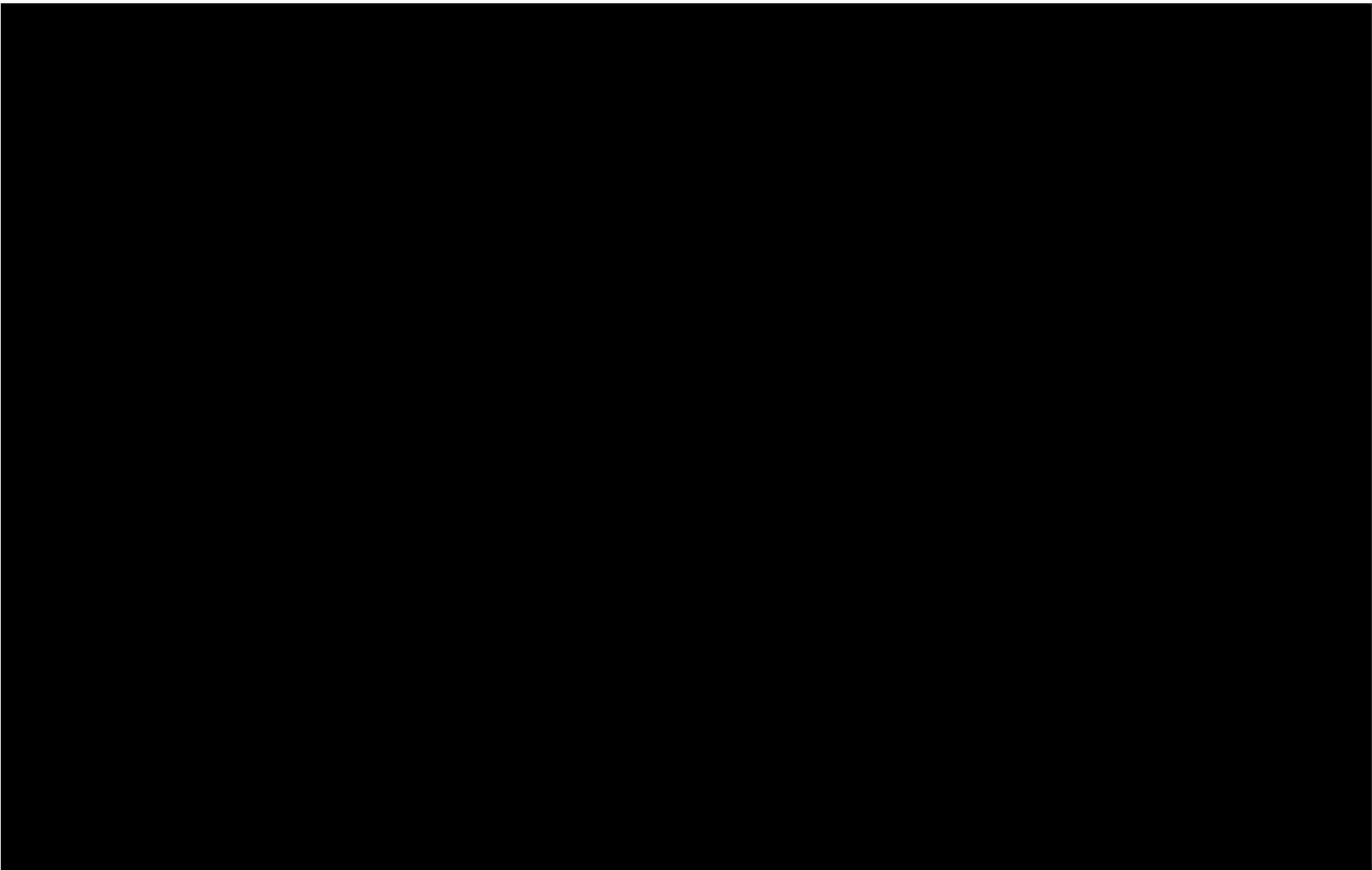
Ohio Build and Remodel
5901-D Chandler Court
Westerville, Ohio 43082

Affordable Home Improvements
880 Conference Drive
Goodlettsville, TN 37072

Fairbanks Construction
1720 NW 4th Ave, Suite 100
Ocala, FL 34475

Merk Services, Inc.
453-1 Columbia Ind. Blvd.
Eans, GA 30809

I've attached the map we were able to locate which was from March 2014. Some of these dealers may have already stopped working with us by then, but the above dealers are all the dealers we worked with at some point of another.





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EXHIBIT B

Addendum B

Service Order

This form, Addendum B, collectively with the Five9 Customer License Agreement and its Addendums, the "Agreement", is entered into by and between Five 9, Inc. (Five9) and Aithr Dealer Inc. For a new customer account, an Addendum B is not valid without a signed Customer License Agreement. For an existing account, this form shall be an addendum to the existing contract of this Account, coterminous with the original Agreement. This Addendum is not valid until signed by both parties. The services ordered under this Addendum B shall be governed in all cases by the Customer Agreement.

Customer Name: Aithr Dealer Inc

Agreement Type (Term): Month-to-Month

Customer Address (Billing):

Billing Frequency: Monthly

VA, United States

Customer Email: roger.falardeau@firststreetonline.com

Customer Number: 45651

Payment Method:

Account Executive Daniel Donovan

Quote Expires: November 30, 2011

Monthly Recurring License Charges	Quantity	Unit Price	Amount Due
Blended Call Center License	1	\$150.00	\$150.00
<i>Total Monthly Recurring License Charges</i>			<i>\$150.00</i>
Monthly Recurring Long Distance and Service Charges	Quantity	Unit Price	Amount Due
Rate Plan II	1	\$0.00	\$0.00
<i>Total Monthly Recurring Long Distance and Service Charges</i>			<i>\$0.00</i>
One Time and Implementation Charges	Quantity	Unit Price	Amount Due
Prepaid Long Distance	1	\$75.00	\$75.00
Standard Implementation Package	1	\$1,000.00	\$1,000.00
DID Set-Up	1	\$0.00	\$0.00
<i>Total One Time Charges</i>			<i>\$1,075.00</i>
<i>Total Amount Due:</i>			<i>\$1,225.00</i>

Provisioned Items

Your account will be provisioned with the following elements.

Element	Amount Included	Additional Notes and Fees
Phone lines	3 per seat	A monthly recurring line charge will apply to any additional lines ordered
Campaigns	5 per Domain	Additional Campaigns can be ordered based on the charges outlined below
Skill Groups	5 per Domain	

PA0433

CRM Fields	18 per Domain	Additional CRM Fields can be ordered at no charge
Named Agents	3 Named Agents per seat	Additional Named Agents can be ordered based on the charges outlined below
Named supervisor/admin logins	Unlimited	

Local and Long Distance Rate Table

All rates shown below are “pre-tax” rates quoted by telephone providers. Actual billing rates in Call Log data and invoicing include a surcharge relating to the cost of applicable taxes, tariffs and other carrier fees. For more details please refer to Addendum C of the Five9 Customer License Agreement.

Type	Outbound	Inbound	Billing Increments (Seconds)
Interstate (US)	\$0.0160	\$0.01800	6
Intrastate (US)	\$0.0240	\$0.0300	6
Alaska	\$0.1170	\$0.1936	6
Hawaii	\$0.0816	\$0.0315	6
Canada	\$0.0160	\$0.0361	6
Other 10 digit calls	Market Rate	N/A	6
Directory Assistance	\$1.0000	N/A	60
Outbound to toll free	\$0.0396	N/A	6

Acceptance of Order:

Customer

Five9, Inc

Signature: Dave Modena *_es_sender_signature}}

Dave Modena (Nov 30, 2011)

Name: Dave Modena

Name: {{*_es_sender_fullname}}

Title: President

Title: {{*_es_sender_title}}

Date: Nov 30, 2011

Date: {{*_es_sender_date}}

FIVE9 CUSTOMER LICENSE AGREEMENT (Rev 0809)

This Five9 Customer License Agreement (“**Agreement**”), effective as of the last signature date below (“**Effective Date**”), is entered into by and between Five 9, Inc., a Delaware corporation (“**Five9**”), having offices at 7901 Stoneridge Drive, Pleasanton, CA 94588 and Aithr Dealer Inc (“**Customer**”), located at VA, United States.

INTRODUCTION

This Agreement provides the Customer with a license to access the Five9 Virtual Call Center system subject to the terms and limitations set forth in the Agreement. The Agreement includes the following Addendums:

Addendum A - Customer Information

Addendum B - Service Order Form

Addendum C - Local and Long Distance Rate Tables

Addendum D - VCC support services Agreement

Customer agrees that the Addendums, and any other documents executed by Five9 and the Customer in connection with this Agreement, whether in original form or as may be amended in writing from time to time, are hereby made an integral part of this Agreement.

AGREEMENT

1. DEFINITIONS

- a. “**Customer Information**” means Customer’s contact and other business information, as set forth on Addendum A.
- b. “**Customer Bill Date**” shall mean the date each month that the Customer is billed for the VCC Services. The Bill Date is determined by the Service Activation Date as described in Section 3(c).
- c. “**Seats**” or “**Seat Licenses**” means the maximum number of concurrent Customer users that may simultaneously access the VCC. The number of Seat Licenses is as set forth on the Service Order Form(s).
- d. “**Service Activation**” has the meaning set forth in Section 3(a).
- e. “**Service Activation Date**” is the date on which your account is activated and provisioned and has the meaning set forth in Section 3(a).
- f. “**Service Order**” means any written service order, including the initial service order, in the form set forth in Addendum B, signed by each party specifying the particular VCC Services being ordered by Customer.
- g. “**Term**” has the meaning set forth in Section 4(a).
- h. “**VCC**” means Five9’s proprietary hosted virtual call center software and system, hosted on servers owned and operated by Five9, that enables the user to process data and to deliver text, recorded messages and/or voice conversations by telephone to a list of recipients that have been created and input by the user.
- i. “**VCC Services**” means all services or products provided through the VCC including a fixed number of seat licenses, any specially ordered premium services, local and long distance telecommunication services, and implementation services. .

2. USE OF VCC SERVICE

a. Service Orders. The form of Service Order attached hereto as Addendum B provides a description of the VCC Service products ordered from Five9. Customer shall complete an initial Service Order prior to being provided access to any VCC Services. Thereafter, Customer shall complete a Service Order each time Customer wishes to order additional VCC Services. Each Service Order shall indicate: (i) the VCC Services selected by Customer, including any premium services; (ii) the implementation services to be provided by Five9 for such VCC Services; (iii) the term of such VCC Services; (iv) the applicable VCC Service seat license fee, implementation and activation fees; and (v) any other special terms or fees that may apply to the selected VCC Services. Service Orders are only valid once signed by Customer and Five9.

b. Customer Information. Customer shall provide accurate, current and complete registration Customer Information in Addendum A, including, without limitation, Customer's legal name, address, email address, telephone number and, where applicable, payment information. Customer agrees to promptly notify Five9 of any changes in Customer Information and to verify such information as Five9 may reasonably request. Customer acknowledges and agrees that Customer's failure to provide Five9 with accurate Customer Information may lead to Five9's suspension or termination of Customer's account and/or access to the VCC Service, which suspension or termination shall be at the sole discretion of Five9.

c. License. Subject to the terms and limitations of this Agreement, Five9 agrees to provide Customer access to the VCC and the VCC Services set forth on a Service Order, up to the number of Seats specified on such Service Order, during the Term on a non-exclusive, non-transferable, revocable basis, solely for Customer's internal business purposes.

d. Use Restrictions. Customer agrees not to (i) license, sublicense, sell, resell, transfer, assign, distribute or otherwise commercially exploit or make the VCC Service available to any third party in any way; (ii) modify or make derivative works based upon the VCC Service; (iii) create unauthorized Internet "links" to the VCC Service or "frame" or "mirror" any content on any other server or wireless or Internet-based device; or (iv) reverse engineer or access the VCC Service in order to (a) build a competitive product or service, (b) build a product using similar ideas, features, functions or graphics of the VCC Service, or (c) copy any ideas, features, functions or graphics of the VCC Service.

e. Technical Requirements for Use of the VCC. In order to utilize the VCC Service, Customer must adhere to certain technical specifications and acquire and maintain certain minimum hardware, software and Internet connectivity, as specified on Addendum C ("**Required Equipment**"). During the sales process and prior to VCC Service activation, Five9, with Customer's cooperation, will conduct an assessment of Customer's current Required Equipment. Based on this assessment, Five9 may recommend adjustments to the Required Equipment in order to meet the minimum technical requirements to utilize the VCC Service. Customer is ultimately responsible for implementing any recommendations made by Five9 with respect to Required Equipment and also for the ownership and ongoing maintenance of Required Equipment. Five9's recommendations with respect to Required Equipment do not constitute a guarantee or warranty as to the future suitability of the Required Equipment for operating the VCC Service. CUSTOMER ACKNOWLEDGES AND AGREES THAT IT IS SOLELY RESPONSIBLE FOR OBTAINING AND SUPPORTING REQUIRED EQUIPMENT AS NECESSARY TO UTILIZE THE VCC SERVICE, AND CUSTOMER MAY NOT TERMINATE THIS AGREEMENT OR REQUEST A REFUND BASED ON A FAILURE OF ITS HARDWARE, SOFTWARE OR INTERNET CONNECTIVITY TO PROPERLY FUNCTION WITH THE VCC SERVICE.

3. ACTIVATION, FEES AND BILLING

a. Initial Service Activation and Provisioning. Prior to the activation of the VCC Services set forth in Customer's initial Service Order, Customer shall pay Five9 the fees specified in the Service Order, including implementation and activation fees, as well as the Seat License fees and pre-paid long distance fees (collectively, the "**Activation Fee**"). Upon receipt of the Activation Fee, Five9 will activate Customer's account and commence the provisioning process for the VCC Service (the date of the initial Service Activation represents the "**Service Activation or Provisioning Date**"). The initial provisioning process creates the Customer's unique domain within the VCC, and enables the Customer to log-in and access the VCC, to upload and access data, and make and receive calls.

b. Subsequent Service Orders. For subsequent Service Orders, Five9 shall commence the provisioning process for

the additional VCC Service as required by such Service Orders upon receipt of the applicable Activation Fee.

c. Fees, Customer Bill Date and Billing Cycle. Customer shall pay Five9 the recurring fees for the VCC Services as set forth on an applicable Service Order ("**Service Fee**"). Unless otherwise indicated in a Service Order or in this Agreement, Customer shall pay all monthly Seat License Fees in advance and long distance usage in arrears.. The Customer's billing cycle begins on the Service Activation Date and that same day of the month shall become the day each month that the Customer shall be invoiced (the "**Customer Bill Date**"). The Customer Bill Date will be the bill date for all VCC Services ordered by Customer pursuant to this Agreement, and partial months shall be pro-rated to the Customer Bill Date. Each invoice will include all recurring monthly Service Fees for the applicable VCC Services in use by Customer and any additional recurring premium services for the next billing month, all long distance charges incurred during the prior billing month, as detailed on Addendum D, and, if applicable, any professional services or other one-time charges for services delivered during the billing period.

d. Prepaid Long Distance Minimum Balance. Five9 requires that, prior to activation, Customer deposit a certain amount of prepaid long distance service fees ("**Prepaid Long Distance**") as stated in the Service Order. As calls are made, the cost of each call is debited from the Prepaid Long Distance balance. The running balance of Prepaid Long Distance is viewable to the *Partition Administrator*, in the "Snapshot" field, "Accounts" link of the Customer login from www.five9.com. Customer is ultimately responsible for reviewing and maintaining a sufficient Prepaid Long Distance balance to ensure continued use of the VCC Service. In the event that Customer's Prepaid Long Distance balance runs out, Five9 will suspend access to the VCC Service and Customer will be unable to make or receive calls. However, prior to taking such action, Five9 shall provide Customer with reasonable notice of the level of the Prepaid Long Distance balance at regular intervals to allow Customer to replenish the account balance. Five9 may from time to time upon notice to Customer increase the Customer's required minimum Prepaid Long Distance balance to reflect Customer's actual usage patterns or other changes.

e. Payment Terms. Payment terms for Service Fees and other fees due on a given invoice are "Due upon Receipt", unless otherwise stated on the invoice. Payment of all fees (including any Service Fees and Activation Fees), whether in advance of service or for services incurred, may be made by cash, check or wire transfer of immediately available funds to Five9 or by credit card, if expressly authorized by Five9 in advance. Customers electing to use a credit card to pay for Five9 services shall complete a Credit Card Authorization Form, which expressly authorizes Five9 to charge directly the credit card account number provided by Customer to pay for any and all charges legitimately incurred and invoiced under this Agreement. Customer shall be responsible for all sales, value-added or similar taxes due under this Agreement. Past due balances, including past due balances resulting from returned checks or charge-backs, are subject to an interest charge of 1.5% per month or the maximum amount permitted by applicable law, whichever is less.

f. Refund Policy. All prepaid fees under this Agreement are non-refundable, except if Customer's account is closed in good standing, under the terms of this Agreement, with all balances paid in full, the unused balance of Prepaid Long Distance shall be refunded to Customer.

g. Disputed Charges and Resolution of Disputes. Customer agrees to pay all undisputed charges under this Agreement without counter-claim, set-off or deduction. In the event, Customer legitimately and reasonably disputes an invoiced amount, Customer will provide Five9 with written notice (via e-mail at billing@five9.com) of the amount in dispute and the basis for the dispute within seven (7) business days of receipt of the invoice. Five9 agrees that it will work with Customer to reasonably and expeditiously resolve the dispute. Customer agrees that any undisputed amounts shall remain due and payable in accordance with the normal seven (7) day payment terms.

h. No Waiver. Failure of Five9 to charge Customer's credit card or to invoice Customer in a timely manner for any amounts due under this Agreement shall not be deemed a waiver by Five9 of its rights to payment for such amounts, and all outstanding amounts shall remain due and payable by Customer.

4. TERM AND TERMINATION

a. Initial Term and Automatic Renewals. Unless earlier terminated as provided in this Agreement, this Agreement commences on the Service Activation Date and shall continue for one (1) month ("**Initial Term**") and shall automatically renew for consecutive monthly (1) periods (each a "**Renewal Period**" and all Renewal Periods together with the Initial

Term, the “**Term**”) thereafter, unless either party has provided notice of its intent not to renew this Agreement in accordance with Section 4(c).

b. Changes to Service Fees During Renewal Terms. Five9 reserves the right to modify its Service Fees and charges for premium services for future Renewal Periods but must provide Customer with at least thirty (30) days prior written notice in the case of month to month Agreements and at least sixty (60) days in the case of annual or extended Terms to allow Customer sufficient time to exercise its right to cancel service at the expiration of the then current term.

c. Cancellation Notice Requirement. Customer may completely cancel this Agreement or partially reduce its VCC Services under this Agreement by providing Five9 with written notice (via e-mail at billing@five9.com) as follows:

(i) If the Term extends beyond month to month (whether annual or otherwise extended), notice of cancellation of the Agreement or of reduction of certain VCC Services must be provided at least thirty (30) days prior to the expiration of the then current Term of such VCC Services, as applicable.

(ii) If the Term is month to month, any notice of cancellation of the Agreement or of reduction of certain VCC Services shall be deemed to be a thirty (30) day notice regardless of the time remaining in the then current Term.

d. Suspension or Termination by Five9. Five9 may suspend or cancel Customer’s access to a VCC Service or terminate this Agreement as follows:

(i) *For Cessation of VCC Service.* Five9 may suspend access to any portion or feature of the VCC Service by providing Customer with written notice at least thirty (30) days prior to the date it intends to cease providing such VCC Service; except, however, in the case of annual or extended Terms, cancellation without cause may not occur prior to the start of the next Renewal Period.

(ii) *For Delinquent Accounts.* Five9 may suspend or disable Customer’s access to the VCC Service for any accounts for which payment is delinquent, provided however that Five9 shall have provided Customer with adequate notice and sufficient time to cure the delinquency.

(iii) *For Actual or Potential Harm to Five9 or a Third Party.* Five9 may suspend or terminate Customer’s account if Five9 has reason to believe that Customer (x) is using the VCC Service in a manner that may cause immediate and ongoing harm to Five9 or to a third party, including but not limited to, actions that violate federal, state or local laws, rules or regulations, such as compliance with “Do Not Call Lists”; (y) is compromising the security of the VCC Service and the privacy of Five9’s other customers; or (z) is engaging in other activity not specifically identified herein that could reasonably be construed as causing or potentially causing harm to Five9 or a third party. Five9 agrees that in the event it becomes aware of such actions by the Customer it will immediately notify the Customer of the unauthorized activity and either allow the Customer reasonable time to cease the activity or, if warranted by the circumstances, immediately suspend Customer’s access to the VCC Service.

e. Termination by Either Party. Either party may terminate this Agreement upon thirty (30) days written notice to the other party in the event of a breach of any provision of this Agreement by the other party, provided that, during the thirty (30) day period the breaching party fails to cure such breach (except the 30 day notice period shall not apply to Customers with delinquent accounts or Customers engaged in unlawful activities).

f. Resumption of Service. Customer’s resumption of access to the VCC Service following a suspension by Five9 for the reasons cited above will not extend the then current Term, nor result in an extension of the period covered by the prepaid Service Fees. Resumption of Customer’s account following suspension or termination by Five9 is subject to the sole discretion of Five9. If Five9 allows Customer to resume using the VCC Services, Customer may be subject to a reconnection fee and applicable retraining fees, and must pay in full all outstanding account balances.

g. No Customer Initiated Suspensions of Service. Customer understands that it has entered into an Agreement with a specific term and that nothing contained in the Agreement conveys the right to the Customer to suspend service in whole or in part during the Initial Term or during subsequent Renewal Periods, nor is the Customer entitled to a refund of any prepaid VCC fees on the basis of requesting a suspension of service.

h. Effect of Termination. Upon termination of this Agreement, (i) all licenses and rights granted hereunder shall immediately terminate and Customer shall have no right to continue to access or use the VCC Service, (ii) each party shall return or, at the option of the other party, destroy all Confidential Information of the other party in its possession or

control and (iii) Customer shall promptly pay all outstanding fees and charges associated with Customer's account up through the date of termination, (including charges for services delivered by Five9 that have not yet been invoiced such as local and long-distance charges and any Termination Fee, if applicable), provided that Five9 reserves the right to apply any security deposit or pre-paid charges or other amounts delivered by Customer to Five9 to satisfy any amounts owed to Five9 under the terms of this Agreement. In the event that Five9 takes any action to collect payment or to enforce any provision of this Agreement, Customer agrees to pay all reasonable costs of such action or suit incurred by Five9 (including fees for bad checks or similar fees), including reasonable attorney's fees and any interest on any unpaid amount. All outstanding payment obligations and Sections 1, 2(e), 4(h), 6(a), 7, 8, 9, 10, 11, 12, and 13 shall survive any termination or expiration of this Agreement.

5. CUSTOMER ACCOUNTS AND SECURITY

Customer is responsible for all authorized and unauthorized access, activities and charges associated with the Customer's account and/or password(s) with Five9, except for unauthorized charges that can reasonably be determined to be the result of Five9's negligence in providing sufficient safeguards against unauthorized third party access to Customer's account. Customer is responsible for the confidentiality of its password(s), for all charges incurred from the use of the VCC Service with its password(s) and for any and all charges made through the Customer's account by Customer's employees, agents, principals, consultants, or other entities or individuals in the employ of or engaged by Customer regardless of the reason for such charges. If Customer, or someone to whom Customer has given access to the VCC Service, violates this Agreement, Customer's account may be terminated pursuant to Section 4, and Customer will be liable for all fees, charges, and damages of any kind related thereto.

6. DATA USE

a. Data Use. During the normal operation of the VCC Service, Five9 will collect and store on its systems certain information and data provided or collected by the Customer ("**Customer Data**"). During the Term, Customer authorizes Five9 to store Customer Data on its internal systems and to use and copy Customer Data for the purpose of providing the VCC Service to Customer in accordance with this Agreement. Additionally, Customer agrees that Five9 may use non-individually identifiable Customer Data for internal business purposes to test, analyze and improve the VCC Service both during and after the Term.

b. Data Retention. Due to the storage demands on the VCC Service, Five9 retains the right to periodically purge Customer data from Five9 owned servers, to maximize system performance for all customers. If this data is important to Customer, Customer should take action to download and maintain this information on its premises. Depending on the data type, additional storage by Five9 may be available for an additional fee. Customer should contact a Five9 sales representative for more information about data storage. Please refer to the following table for Five9's data retention policy:

Data Type	Retention Period	How can I download it for long term storage?
CRM Data	120 Days	Retrieve with LeadSheet Reports
CRM Session Data	120 Days	Retrieve with LeadSheet Reports within 60 days. The information is provided to agents for 120 days
Call Logs	60 Days	Retrieve with CallLog Reports
Campaign State	120 Days	Retrieve with ListStatus Reports
Dialing Lists	120 Days	Retrieve with Lists / Export
Recordings	Sooner of: 30 Days or successful offload	Via ftp
Callbacks	120 Days after "Complete By Date"	Export in Administrator
Disabled Domains	30 Days after Account Closure or Suspension	n/a

7. EMERGENCY SERVICE (911 CALLING) NOT PROVIDED

a. No Requirement to Offer Emergency Services. Customer understands and acknowledges that Five9 does not and is not required to provide Emergency Service, where "**Emergency Service**" is defined as services that connect a user to emergency services personnel or a public safety answering point ("**PSAP**"), pursuant to applicable regulatory requirements. In the United States, Emergency Service is provided by dialing the digits "911" on a wired or a wireless telephone. Services provided by Five9 do not permit the dialing of "911" or any other emergency telephone numbers.

Five9 Services are not telephone or telecommunications services that can provide a connection to emergency services personnel or a PSAP under any circumstances. Customer recognizes and agrees that Five9 is not required to offer Emergency Service, pursuant to any applicable laws, rules or regulations. Customer further recognizes and agrees that Five9 is not a replacement for Customer's primary telephone service. CUSTOMER ACKNOWLEDGES AND ACCEPTS THAT FIVE9'S SERVICES DO NOT INCLUDE EMERGENCY SERVICE. CUSTOMER UNDERSTANDS AND AGREES THAT ADDITIONAL ARRANGEMENTS WITH A THIRD PARTY MUST BE MADE BY CUSTOMER TO ACCESS EMERGENCY SERVICE.

b. Specific Disclaimer of Liability for Emergency Service. Five9 does not provide Emergency Service in conjunction with the VCC Service or any other services that may be used by Customer in connection with Five9's services. Five9, its officers, directors, employees, shareholders, affiliates nor agents will be liable for any claim, damage, or loss arising from, or relating to, Customer's use of Five 9's services or any other service provided hereunder to contact a PSAP or Emergency Services personnel. Customer specifically waives, to the maximum extent permitted by applicable law, any and all such claims or causes of action, arising from or relating to Five9's services or any other service provided hereunder to contact a PSAP or other Emergency Services personnel. Customer agrees to defend, indemnify, and hold harmless Five9, its officers, directors, employees, shareholders, affiliates and agents from any and all claims, losses, damages, fines, penalties, costs and expenses (including, without limitation, court costs and attorneys fees) arising out of the fact that Five 9 does not offer Emergency Service.

8. COMPLIANCE WITH LAWS; "DO NOT CALL" REGULATIONS

a. Customer agrees to comply with all federal, state and/or local law related to or connected with providing, selling, licensing and delivering information services and telecommunications services and products. Customer assumes all liability and responsibility for use of the VCC Service in compliance with any federal, state or local laws, rules or regulations pertaining to the use of telephones, email, fax, automated telephonic equipment (e.g. "Autodialer", "Predictive Dialer") and other telephony and telecommunications products and services. Customer's limitations on its use of the VCC Service may include but are not limited to: commercial solicitations; advertisements; delivering artificial or prerecorded telephonic messages to homes, businesses, hospitals, cellular phones or paging systems without the prior consent of the called party; and restrictions on the time of day in which such calls are permissible. A violation of any such laws may result in substantial penalties and other sanctions. Any person intending to use the VCC Service for solicitation purposes and/or for any other purpose regulated by federal, state or local laws should consult with his or her own legal counsel, prior to entering into this Agreement to determine the extent of permissible activities. Customer agrees that Five9 will not be responsible for Customer's illegal or fraudulent use of the VCC Service, and Customer indemnifies Five9 for any claims, liabilities or expenses (including attorneys' fees) incurred by Five9 based upon Customer's illegal or fraudulent use of the VCC Service.

b. Customer is solely responsible for obtaining the consent of or a release from those persons or entities, to whom or to which Customer intends to send communications using the VCC Service. Customer agrees to periodically review the list of recipients to be contacted, to contact only those persons who the Customer is legally permitted to contact from Customer's customer data, and only in the manner permitted, under federal, state and local law, and to delete those recipients that no longer wish to receive communications from Customer.

c. "Do Not Call" Compliance. If Customer is advised by any party that they do not wish to receive communications from Customer via the VCC Service, then Customer agrees to promptly add those parties to its internal company-specific Do Not Call List in the VCC Service account, and thereafter refrain from calling such parties. If Five9 determines, in its sole discretion, that the receipt of communications via the VCC Service is not consensual, or violates any federal, state and/or local rule and regulation, or is harassing to consumers or businesses, Five9 may add specific telephone numbers to Customer's internal company-specific Do Not Call List to prevent further calling of those numbers, or suspend service as per Section 4 above.

d. CUSTOMER SHOULD SEEK THE ADVICE OF AN ATTORNEY REGARDING USE OF AUTOMATED TELEPHONIC EQUIPMENT AND MARKETING LAWS, PRIOR TO USE OF THE VCC SERVICE. Additional reference material is available at: <http://www.fcc.gov/cgb/donotcall/> and <http://ftc.gov/bcp/menu-tmark.htm#bized> (see "Telemarketing Sales Rule").

9. WARRANTY; DISCLAIMER OF WARRANTY

a. Representations and Warranties. Each party represents and warrants to the other party that (i) it has the power and authority to enter into and perform all obligations under this Agreement and its various Addendums and (ii) it will comply with all applicable laws in its performance under this Agreement.

b. Warranty Disclaimer. FIVE9 IS PROVIDING THE VCC SERVICE AS A HOSTED SERVICE AND THE VCC SERVICE IS DELIVERED ON AN "AS IS" AND "AS AVAILABLE" BASIS. FIVE9 DOES NOT WARRANT THAT THE VCC SERVICE WILL BE UNINTERRUPTED OR THAT ALL COMMUNICATIONS WILL BE DELIVERED, NOR DOES FIVE9 MAKE ANY WARRANTY AS TO ANY RESULTS THAT MAY BE OBTAINED BY USE OF THE VCC SERVICE. FIVE9 MAKES NO WARRANTIES EXPRESSED OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN RELATION TO THE VCC SERVICE. Customer understands that the VCC Service may be inaccessible or inoperable due to scheduled periodic maintenance and upgrades or for reasons beyond Five9's reasonable control including but not limited to (i) Customer or Five9 equipment malfunctions; or (ii) service interruptions caused by independent telecommunications providers that provide voice and data connectivity to Five9's or the Customer's data centers.

10. LIMITATION OF LIABILITY

UNDER NO CIRCUMSTANCES SHALL FIVE9 BE LIABLE TO CUSTOMER OR ANY OTHER PERSON FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL OR PUNITIVE DAMAGES ARISING OUT OF OR RELATING TO THIS AGREEMENT, INCLUDING WITHOUT LIMITATION ANY LOSS, DAMAGE OR LIABILITY RELATING TO: (A) LOSS OR CORRUPTION OF DATA; (B) INABILITY TO ACCESS THE VCC SERVICE; (C) PERFORMANCE RELATED DELAYS; (D) COMPUTER VIRUSES; (E) LOSS OF BUSINESS DUE TO INOPERABILITY OR PERFORMANCE OF VCC SERVICE; (F) NON-DELIVERY OR MIS-DELIVERY OF COMMUNICATIONS; (G) THE NEGLIGENT ACTS OF OTHER FIVE9 SUBSCRIBERS; (H) ANY DEFECTS, FAILURES, ERRORS, OMISSIONS OR MISSTATEMENTS IN ANY AND ALL INFORMATION DELIVERED BY OR PROVIDED FOR DELIVERY BY THE VCC SERVICE; AND (I) LOSS OR LIABILITY RESULTING FROM ACTS BEYOND FIVE9'S CONTROL. IN NO EVENT SHALL FIVE9'S LIABILITY UNDER THIS AGREEMENT EXCEED ALL LICENSE FEES PAID BY CUSTOMER TO FIVE9 IN THE ONE (1) YEAR PERIOD PRIOR TO THE DATE OF THE EVENT THAT GAVE RISE TO THE LIABILITY.

11. INDEMNIFICATION

a. By Customer. Customer agrees to indemnify, hold harmless and defend Five9, its shareholders, directors, officers, employees and agents from and against any action, claim, or damage, including reasonable costs and attorney's fees, asserted by any person, arising out of or relating to: (i) personal injury or property damage to the extent such claims or liabilities arise out of negligent or willful acts or omissions of Customer and/or its employees or agents in connection with their duties and responsibilities under this Agreement; (ii) Customer's breach of this Agreement; (iii) Customer's unauthorized use of the VCC Service, including any information, communication, data or work that Customer provides in connection with Customer's use of the VCC Service; (iv) libelous, slanderous, indecent or other statement concerning any person made or republished by Customer; or (v) any violation of federal, state and/or local law related to, arising out of or connected with Customer's authorized use of the VCC Service.

b. By Five9. Five9 agrees to indemnify, hold harmless and defend Customer, its shareholders, directors, officers, employees and agents from and against any action, claim, or damage relating to: (i) personal injury or property damage to the extent such claims or liabilities arise out of negligent or willful acts or omissions of Five9 and/or its employees or agents in connection with their duties and responsibilities under this Agreement, (b) Five9's breach of this Agreement, or

(c) any alleged or actual infringement by the VCC Service of any patent, trademark, or copyright, or alleged or actual misappropriation of any trade secret, provided Customer is using the VCC Service as authorized under this Agreement.

c. Procedure. An indemnified party shall (i) permit the indemnifying party to defend or settle any such claim, provided, however that (x) the indemnifying party shall not enter into any settlement agreement that would result in any admission by the indemnified party or payment by the indemnified party without the indemnified party's prior written consent, and (y) the indemnified party may at its election participate in the defense of such claim, suit or the like through separate counsel at its own expense, and (ii) provide the indemnifying party all reasonable assistance (at the expense of the indemnifying party) in connection with the defense or settlement of any such claim, suit or the like. Notwithstanding the foregoing, Five9 has the right, but not the obligation, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to Customer's indemnification pursuant to Section 11(a).

12. OWNERSHIP OF MATERIALS AND RIGHTS

The VCC Service is proprietary to Five9 and is protected by intellectual property laws and international intellectual property treaties. Except for the revocable term license and right to use the VCC Service granted by Five9 to Customer in this Agreement, nothing in this Agreement shall convey, transfer or assign any right, title or interest in any party's Proprietary Materials to the other party. As such, each party retains exclusive ownership of its Proprietary Materials (as defined below) in existence as of the Effective Date or developed by it during the Term. For purposes of this Agreement, "**Proprietary Materials**" means all patents, copyrights, design rights, trademarks, service marks, trade secrets and other worldwide intellectual property or proprietary rights owned by a party during the Term, and the software, schematics, diagrams, information, and other tangible embodiments, if any, relating thereto. All rights not granted by Five9 herein are expressly reserved.

13. MISCELLANEOUS

a. Applicable Law. This Agreement shall be governed by the laws of the State of California and the United States without reference to conflicts of laws. Venue for any and all actions arising out of this Agreement shall be the County of Alameda, California.

b. Amendments. Other than pursuant to Sections 4(b) and 4(d)(i), no amendment of this Agreement will be binding unless it has been agreed to in writing by both parties.

c. Emails. Five9 reserves the right to distribute informative emails regarding the VCC Service to Customer on an ad hoc basis.

d. Force Majeure. Neither party shall be held liable or responsible to the other party nor be deemed to have defaulted under or breached this Agreement for failure or delay in fulfilling or performing any term of this Agreement (other than payment of fees) when such failure or delay is caused by or results from causes beyond the reasonable control of the affected party, including but not limited to fire, floods, embargoes, war, acts of war, insurrections, riots, civil commotion, strikes, lockouts or other labor disturbances, acts of God or acts, omissions or delays in acting by any governmental authority; provided, however, that the party so affected shall promptly notify the other party of the force majeure event and use reasonable commercial efforts to avoid or remove such causes of nonperformance, and shall continue performance hereunder with reasonable dispatch whenever such causes are removed.

e. Waiver and Severability. No failure, delay in exercising or enforcing any right or remedy hereunder by Five9 shall constitute a waiver of any other right or remedy, or future exercise thereof. If any provision of this Agreement is determined to be invalid under any applicable statute or rule of law, it is only to that extent to be deemed omitted, and the balance of the Agreement shall remain enforceable.

f. Assignment. Customer may not assign this Agreement or any of its rights and obligations hereunder without the prior written consent of Five9. Any attempted assignment without such prior written consent shall be void.

g. Attorneys' Fees. In the event of a dispute arising out of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees.

h. Notices. All notices, authorizations, and requests in connection with this Agreement shall be deemed given (i) three (3) days after they are deposited with the United States Postal Service, first-class postage prepaid; or (ii) one (1) business day after they are sent by air express courier, or (iii) upon receipt if sent by facsimile or electronic mail (with receipt-confirmation of successful delivery). All notices shall be delivered to Five9 via mail, facsimile, or email (currently billing@five9.com) at its then current corporate headquarters as listed on the Five9 website, and to Customer at its most current street, facsimile and email address(es) as provided by Customer to Five9 in connection with Customer's registration process (or as thereafter updated or revised in a writing delivered by Customer to Five9).

i. Entire Agreement. Customer agrees that this Agreement, including Addendums, comprise the entire understanding between Five9 and Customer, and supersede any prior agreements or correspondence between Customer and Five9 and/or any postings or other notices from Five9 with respect to the subject matter of this Agreement.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement by their respective duly authorized officer.

Customer

Five9, Inc

Signature: Dave Modena {*_es_sender_signature}}
Dave Modena (Nov 30, 2011)

Name: Dave Modena

Name: {*_es_sender_fullname}}

Title: President

Title: {*_es_sender_title}}

Date: Nov 30, 2011

Date: {*_es_sender_date}}

ADDENDUM A**CUSTOMER INFORMATION AND SECURITY QUESTION****Billing Contact (Accounts Payable):**

All invoices and business matters will be sent to the email address indicated here.

Name: Dave Modena
Title: President
Address: 1460 W. Canal Court
City: Littleton
State/Prov.: Colorado
Country: usa
Postal Code: 80120
Phone #: n/a
Fax #: 804-524-9889
Email Address: dave.modena@firststl (REQUIRED)

Primary Business Contact, if other than above:

If same as above, please signify "same as above". **Primary Business Contact must be the signer of the Customer License Agreement**, and is the only party authorized to place additional orders or make account changes.

Name: Dave Modena
Title: President
Address: same as above
City: same as above
State/Prov.: same as above
Country: same as above
Postal Code: same as above
Phone #: same as above
Fax #: same as above
Email Address: dave.modena@firststl (REQUIRED)

Primary Technical Contact

All newsletters, technical updates, product features, training notices, etc will be sent to this contact via email.

Name: Dave Modena
Title: President
Address: same as above

City: same as above
State/Prov.: same as above
Country: same as above
Postal Code: same as above
Phone #: same as above
Fax #: same as above
Email Address: dave.modena@firststt (REQUIRED)

Security Question

For Customer's security Five9 requires a security question asked and answered at account set up. Please choose a question below and type (or print legibly) the answer to the question. This question will be entered on Customer's account and will be needed to perform certain operations on the account such as: DNC related items, DNIS deletion, Change of Primary Contact or billing information, Account Closure, FTP server changes to recording, Password Resets. If Five9 does not have a question on file and Customer is in need any of the services outlined above, Customer's request could be delayed as Five9's finance department will need to contact Customer to obtain approval for these services.

Question (mark one with X):

<input checked="checked" type="checkbox"/>	What is your pet's name?
<input type="checkbox"/>	What is your favorite color?
<input type="checkbox"/>	What is your mother maiden name?
<input type="checkbox"/>	What is the password for this account?

3455mode

Security Answer:

Buddy

"I am responsible for the confidentiality of this security answer and all actions initiated by its use. I further agree to immediately contact Five9 to request a new Security Question/Answer if believe any person has gained access to it."

Primary Business Contact - Signature:Dave Modena

Dave Modena (Nov 30, 2011)

Name:

Dave Modena

Title:

President

Date:

Nov 30, 2011

For changes to this Security Question please contact billing@five9.com.

ADDENDUM C
LOCAL AND LONG DISTANCE RATE TABLE

Communication Charges: Local, long distance, and any related surcharges, taxes or fees shall be billed monthly and shall cover all call activity incurred by the customer since the previous Customer Bill Date. Local and long-distance charges accrue on a call-by-call basis. Customer is responsible for any call activity incurred through its account. Local and long distance charges are computed and billed based upon the automatic number identification (ANI) as the calling number and the Dialed Number Identification Service (DNIS) as the called number and Pacific Standard Time as the originating time for each call. Customer's billed usage includes any and all connected calls, whether outbound or inbound, as determined by Five9's billing system. All connections to the Five9 server via "PSTN" (analog telephone line) rather than VoIP (internet) are billed as an outbound call for the entire connection time, and can substantially increase the bill. All calls are billed based on carrier connection made, regardless of agent connection to the call. Reporting of detailed call records is available from several reports, such as "CallLog1", in the Administrator or Supervisor portion of the Five9 system.

Prior to activation, Customer must deposit a certain amount of Prepaid Long Distance (or Prepaid Autodialer Long Distance, as applicable), as shown in the applicable Service Order. The running balance of Prepaid Long Distance is viewable to the Partition Administrator role, in the *"Snapshot" field, "Accounts" link, of the Customer Login from www.five9.com*. As calls are made, the cost of each call is debited from the Snapshot amount. As the Snapshot amount approaches zero, Five9 will make reasonable efforts to notify Customer and request additional Prepaid Long Distance to replenish the amount available. However, Customer should periodically review the Snapshot, and contact Five9 Billing to ensure that adequate Prepaid Long Distance balance is maintained.

Type	Outbound	Inbound	Billing Increments (seconds)
Interstate (US)	0.0160	0.01800	6.0/6.0
Intrastate (US)	0.0240	0.0300	0.0/6.0
Alaska	0.1170	0.1936	6.0/6.0
Hawaii	0.0816	0.0315	6.0/6.0
Canada	0.0160	0.0361	30.0/6.0
Other 10 digit calls	Market Rate	N/A	6.0/6.0
Directory Assistance	1.0000	N/A	60.0/60.0
Outbound to toll free	0.0396	N/A	6.0/6.0

Notes: All rates quoted in US \$ per minute. Interstate calls are calls where the call originates and terminates in different states based upon the ANI and DNIS. Intrastate calls are calls where the call originates and terminates in the same state based upon the ANI and DNIS. Different rates may apply to interstate and intrastate calls. Rates subject to change on 30 day notice; reduction in rates may occur without notice. Calls using the "Autodialer" product may incur a per-minute Surcharge, in addition to the rates above. International Calls are subject to Market Rates and 30/6 billing increment. Directory Assistance: Any call (xxx)-555-xxxx is billed as Directory Assistance. Payphone: \$0.80 connection fee per call, plus prevailing call charges. All inbound calls, whether to 8XX 'toll free' numbers or area code specific DID's are subject to the rates shown. Detailed call reporting is available in Five9 Call Log reports. Rate lookup feature is available in Administrator role. **All rates shown above are for comparison to "pre-tax" rates quoted by telephone providers. Actual billing rates in Call Log data and invoicing include a surcharge relating to the cost of applicable taxes, tariffs, and other carrier fees.**

TIP: Five9 recommends that Customer 'scrub' its lists prior to use, to remove unwanted call numbers.

This VCC Support Services Agreement is referenced in and incorporated into the attached Five9 Customer License Agreement ("**Agreement**"). Upon reasonable notice, Five9 reserves the right to modify the terms of the Support Services Agreement to reflect current market conditions.

Five9 provides Support Services for subscribers to Five9's VCC service as part of the VCC license fee. Customer agrees to designate up to three (3) of your employees as designated support contacts (Named Contacts) who will be responsible to report problems or issues to Five9 Support. Five9 will classify and respond to these issues in accordance with the terms and procedures defined in Section 4 of this Addendum E.

Five9 regularly publishes its scheduled periodic maintenance windows and agrees to notify Customer sufficiently in advance of planned downtime. Other than for scheduled downtime, Five9 shall promptly notify Customer in the event the VCC becomes inaccessible and shall use its best efforts to resume performance of the VCC as soon as practicable.

Section 2. Named Contacts

Named Contacts are the only Five9 users who are authorized to log problems or make support inquiries directly to Five9. Named Contacts are the primary technical interface between your company and the Five9 Support Centers. All inquiries from non-qualified contacts will be referred back to their internal Named Contact. Changes in Named Contacts can be made at any time by contacting one of Five9's Customer Support Centers.

Section 3. Technical Support

Each problem will be assigned a priority depending upon the nature of the problem (see Definitions below). Five9 Customer Support will work with Named Contacts to isolate, identify, reproduce and resolve reported problems. The Five9 Customer Support team will work internally to drive the development of a workaround or fix if one is required. When a solution or workaround is identified, Five9 Customer Support will work directly with the Named Contact to communicate the resolution.

Section 4. Priority Definitions and Response Times

Priority	Description	Escalation to Tier 3	Escalation to Engineering
P1	Production system is down which precludes customer from successful operation of either the total system or component critical to operation and requires immediate attention.	0-.25 hours	0-.25 hours
P2	Critical component of production environment has significant outages and/or failures precluding its successful operation and for which there is no acceptable workaround. The issue affects a significant number of users.	0-3 hours	3 hours
P3	A problem exists with a major feature within the product but the majority of the functions are still usable and some circumvention may be required to provide service.	0-16 hours (two business days)	24 hours (3 business days)
P4	A minor problem exists or user has a question that does not significantly affect the application's function.	0-24 hours (three business days)	40 hours (5 business days)

Section 5. Exclusions

Five9 shall have no obligation to support:

- a. Errors caused by Licensee's negligence, hardware malfunction, or other causes beyond the reasonable control of Five9;
- b. Software installed in a hardware or operating environment not supported by Five9. The current technical requirements for connecting to the VCC Service are located in our customer portal or at the link: <http://www.five9.com/virtual-call-center-software/system-requirements.htm> . These requirements may change from time to time. In such event, Customer will be notified of the changes and of the specific Required Equipment needed to continue using the VCC Service.
- c. Third party software not licensed through Five9.
- d. Customer's internal network or Customer's ISP provider issues.

Credit Card Approval Form

Please process this Credit Card Charge for:

Customer Name (Five9 Account Name) AIHR Dealer Inc.

Customer Number (Five9 Account) _____

Order Form (Addendum B) dated _____

Amount authorized this transaction _____

Use of Card: ☐ This Order Only ☐ All Account Charges & Automatic RenewalsCredit Card Type: (check one) ☐ Visa ☐ Mastercard ☐ American Express ☐ DiscoverCard # check

Expiration Date _____

A billing specialist will call to verify the Verification Code (CVV) prior to authorization of this order. This is required for the charge to be processed.

CARDHOLDER ADDRESS

Address must be exactly as on shown current cardholder statement. You must have a matching AVS (Address Verification System) approval for this charge to be processed. Most bank cards outside of North America do not participate in AVS; we cannot accept orders without AVS match. Cardholder must be the signer of the Five9 Customer Agreement, and an Owner, Officer, Director, or Partner of Customer.

Cardholder Name XAddress XCity XState X Zip 111111Phone 11111

Fax _____

Email Address dave.modena@firststreetonline.com

I hereby authorize Five9 to charge this credit card as per my instructions above, the Five9 Customer License Agreement, and my cardholder's member agreement. Furthermore, I have read and agree to the Five9 policies regarding refunds (section 4.K. of the Customer License Agreement).

Dave Modena

Print Name

Dave Modena
Dave Modena (Nov 30, 2011)

Cardholder Signature

Nov 30, 2011

Date

Please fax complete form to (925) 369-7304 or email: billing@five9.com








Five9 Monthly Agreement

EchoSign Document History

November 30, 2011

Created: November 30, 2011
By: Daniel Donovan (ddonovan@five9.com)
Status: SIGNED
Transaction ID: JVGVN8482P4P3Y

“Five9 Monthly Agreement” History

-  Document created by Daniel Donovan (ddonovan@five9.com)
November 30, 2011 - 1:44 PM PST - 173.164.178.1
-  Document emailed to Dave Modena (dave.modena@firststreetonline.com) for signature
November 30, 2011 - 1:45 PM PST
-  Document viewed by Dave Modena (dave.modena@firststreetonline.com)
November 30, 2011 - 1:52 PM PST - 12.26.68.146
-  Document esigned by Dave Modena (dave.modena@firststreetonline.com)
November 30, 2011 - 2:11 PM PST - 12.26.68.146
-  Signed document emailed to all eligible parties
November 30, 2011 - 2:11 PM PST



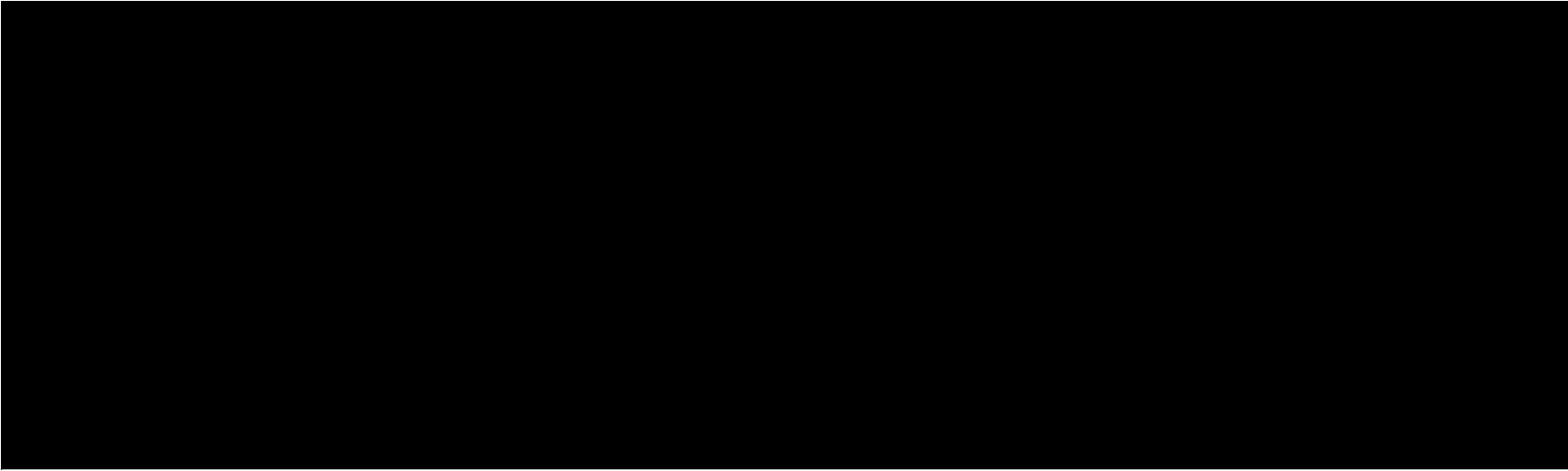
**THORNDAL
ARMSTRONG**
DELK BALKENBUSH & EISINGER

A PROFESSIONAL CORPORATION

ATTORNEYS

www.thorndal.com

EXHIBIT C



From: Larry Rathbone [mailto:larry.rathbone@aihremodelers.com]

Sent: Thursday, August 27, 2015 5:51 PM

To: DAVE MODENA

Subject: Re: Automatic call recording turned on

Your extension is 3401. This is an automated message that the entire company received. Ring Central rolled out a new automation feature. The recording feature that was in place required a *, 9 to record. The new feature will do it automatically so production people don't have to manually launch it. They can still retrieve their recording the same way. They use this for credit card payments, etc . . . Think "your call may be recorded for quality and training purposes."

Talk to you later.

Larry Rathbone,

Vice President, Operations



Aging in the Home Remodelers

• 303.222.3202 (Office Direct)

• 303.222.3200 (Main)

larry.rathbone@aihremodelers.com

From: "dave.modena@firststreetonline.com" <dave.modena@firststreetonline.com>

Date: Thursday, August 27, 2015 at 3:39 PM

To: Larry Rathbone <larry.rathbone@aihremodelers.com>

Subject: FW: Automatic call recording turned on

Sorry to bother you ... but what is my extension? thanks

Dave Modena

President - Aging In The Home Remodelers

804-451-2314

Sr. V.P. firstSTREET for Boomers & Beyond

www.firststreetonline.com

From: RingCentral [<mailto:service@ringcentral.com>]

Sent: Thursday, August 27, 2015 2:32 PM

To: DAVE MODENA

Subject: Automatic call recording turned on



RingCentral
YOUR PHONE SYSTEM, EVERYWHERE



Automatic Call Recording
settings




Dear Dave Modena,

An administrator of your RingCentral phone system has turned on automatic call recording on your extension and your calls are now being recorded. You can access your recorded calls in the call log at <http://service.ringcentral.com/>.

Please contact your system administrator with any questions.

Please note that certain state and federal laws apply to call recording, and some states require the consent of both parties before calls can be legally recorded. As a result, you may need to inform third-parties whom you call through the service that their calls are being recorded. Third parties will receive an automated announcement indicating that a call is being recorded only when they call you. You are responsible for obtaining any and all legally-required consents when you make a call with call recording enabled. If you do not provide notice of the recording at the beginning of each outbound call, or otherwise obtain consent, you may be subject to criminal prosecution and/or substantial fines under these laws. You may wish to consult with an attorney before recording any calls. This information does not constitute legal advice.



Copyright 2015 RingCentral, Inc. All rights reserved. RingCentral is a registered trademark of RingCentral, Inc.
1400 Fashion Island Blvd, San Mateo, CA 94404, USA.

[Legal](#)



**THORNDAL
ARMSTRONG**
DELK BALKENBUSH & EISINGER

A PROFESSIONAL CORPORATION

ATTORNEYS

www.thorndal.com

EXHIBIT 2

1 DISTRICT COURT
2 CLARK COUNTY, NEVADA
3 ROBERT ANSARA, as Special)
Administrator of the Estate of)
4 SHERRY LYNN CUNNISON, Deceased;)
ROBERT ANSARA, as Special)
5 Administrator of the Estate of))
MICHAEL SMITH, Deceased heir to the)
6 Estate of SHERRY LYNN CUNNISON,)
Deceased; and DEBORAH TAMANTINI)
7 individually, and heir to the)
Estate of SHERRY LYNN CUNNISON,)
8 Deceased,)
)
9 Plaintiffs,)
VS.) Case No.
10) A-16-731244-C
) Dept. No.: II
11 FIRST STREET FOR BOOMERS & BEYOND,)
INC.; AITHR DEALER, INC.; HALE)
12 BENTON individually; HOMECCLICK, LLC;))
JACUZZI, INC., doing business as)
13 JACUZZI LUXURY BATH; BESTWAY)
BUILDING & REMODELING, INC.; WILLIAM)
14 BUDD, individually and as BUDDS)
PLUMBING; DOES 1 through 20; ROE)
15 CORPORATIONS 1 through 20; DOE)
EMPLOYEES 1 through 20; DOE)
16 MANUFACTURERS 1 through 20; DOE 20)
INSTALLERS 1 through 20; DOE)
17 CONTRACTORS 1 through 20; and DOE)
21 SUBCONTRACTORS 1 through 20,)
18 inclusive,)
)
19 Defendants.)
)
20 _____
21 DEPOSITION OF: HALE BENTON
22 Phoenix, Arizona
23 November 27, 2017
24 1:09 p.m.
25 Job No.: 433815
26 Prepared by:
KRISTIN M. DECASAS, CSR, RPR
27 Certificate No. 50925

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1 DEPOSITION OF HALE BENTON

2 commenced at 1:09 p.m. on November 27, 2017, at One
3 Arizona Center, 400 East Van Buren - Suite 1900, Phoenix,
4 Arizona, before KRISTIN M. DECASAS, a Certified Reporter,
5 CR No. 50925, for the State of Arizona.

6

7 A P P E A R A N C E S

8 For the Plaintiffs:

9 RICHARD HARRIS LAW FIRM

10 BY: BENJAMIN P. CLOWARD, ESQ.

11 CHARLES ALLEN, ESQ. (via speakerphone)

12 801 South Fourth Street

13 Las Vegas, Nevada 89101

14 702-444-4444

15 benjamin@richardharrislaw.com

16

17

18 For the Defendant, Jacuzzi, Inc.:

19 SNELL & WILMER

20 BY: JOSHUA COOLS, ESQ.

21 3883 Howard Hughes Parkway - Suite 1100

22 Las Vegas, Nevada 89169

23 702-784-5200

24 jcools@swlaw.com

25

1 APPEARANCES CONT'D:

2 For the Defendant, Bestway Building:

3 ROPERS, MAJESKI, KOHN & BENTLEY

4 BY: ARTHUR N. BORTZ, ESQ.

5 3753 Howard Hughes Parkway

6 Las Vegas, Nevada 89169

7 702-954-8300

8 arthur.bortz@rmkb.com

9

10 For the Defendant, The Chicago Faucet Company:

11 KOLESAR & LEATHAM

12 BY: JENNIFER MICHELI, ESQ.

13 400 South Rampart Boulevard - Suite 400

14 Las Vegas, Nevada 89154

15 702-362-7800

16

17 For the Defendant, First Street for Boomers & Beyond,
18 Inc. and AITHR Dealer, Inc.:

19 THORNDAL, ARMSTRONG, DELK, BALKENBUSH & EISINGER

20 BY: MEGHAN M. GOODWIN, ESQ.

21 1100 East Bridger Avenue

22 Las Vegas, Nevada 89101

23 702-366-0622

24 mmg@thorndal.com

25

1 APPEARANCES CONT'D:

2

3 For the Defendant, Homeclick, LLC.:

4 OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI

5 BY: BRANDON SMITH, ESQ. (via speakerphone)

6 9950 West Cheyenne Avenue

7 Las Vegas, Nevada 89129

8 702-384-4012

9 bsmith@ocgas.com

10

11 For the Defendant, William Budd individually and as Budds
12 Plumbing:

13 LIPSON, NEILSON, COLE, SELTZER & GARIN

14 BY: ERIC TRAN, ESQ. (via speakerphone)

15 9900 Covington Cross Drive - Suite 120

16 Las Vegas, Nevada 89144

17 702-382-1500

18

19

20

21

22

23

24

25

1 November 27, 2017

2 1:09 p.m.

3 Phoenix, Arizona

4

5 HALE BENTON,

6 called as a witness herein, having been first duly sworn,

7 was examined and testified as follows:

8 EXAMINATION

9 BY MR. COOLS:

10 Q Mr. Benton, could you please state your full
11 name for the record?

12 A Hale Powers Benton.

13 Q You mentioned before we started the record that
14 this is your first time having a deposition taken, right?

15 A Yes.

16 Q So basically just to explain what's going on, we
17 have a court reporter here, who's recording everything or
18 typing down everything that we're saying. So this is the
19 attorneys' opportunity to ask you questions about this
20 case.

21 One of the things that is very common in
22 normal conversation is to speak at the same time as one
23 another or speak over each other. It's important that we
24 don't do that in this context so that we have a clean
25 record.

1 records. That was it.

2 THE WITNESS: That's the one. Yes. I'm
3 sorry.

4 MR. COOLS: Other than that, I haven't
5 spoken with him before today.

6 BY MR. CLOWARD:

7 Q Did you ever e-mail or text with anybody about
8 your deposition or what you know?

9 A No, Sir. No, Sir.

10 Q Okay. Fair enough.

11 And then you were -- you were asked some
12 questions about this being a tight fit. I think you
13 wrote down on the paperwork, "tight fit." And then you
14 said that -- in the paperwork it says, "recommended to
15 lose some weight."

16 Was that your recommendation that
17 Ms. Cunnison lose some weight?

18 A That's correct.

19 Q And she said that she was going to do that, she
20 was going to lose some weight?

21 A To my recollection, yes, because she -- yes.

22 Q Okay.

23 Now, you were asked specifically, I guess,
24 whether you had any concerns about her being a tight fit.
25 Mr. Cools said, you know, what were your concerns for her

1 And in the same documents, we discussed
2 earlier that you have some written notes that you did not
3 give Ms. Cunnison a lead pamphlet, correct?

4 A Lead paint pamphlet, yeah, because the house was
5 built in 2005.

6 Q In 2005?

7 A Yeah, we would only give them those if it was
8 back in the '70s.

9 Q Okay.

10 I just wanted to clear up the reason you
11 didn't give her a lead pamphlet was because it was
12 unnecessary?

13 A Yes, unnecessary.

14 Q Okay.

15 Do you recall looking at these documents --
16 let me rephrase that. Excuse me.

17 My understanding from looking at these
18 documents is that you sold Ms. Cunnison the Jacuzzi model
19 with ten jets; is that accurate?

20 A Yes.

21 Q Yes?

22 A Yes.

23 Q Okay.

24 When you visited Ms. Cunnison in her home,
25 were there any other individuals at the home?

1 A That's what I've been trying to remember. Um, I
2 believe, but I'm going to tell you, I just believe what
3 I'm going to tell you, I believe there was a son there.
4 A son.

5 Q Okay.

6 Did you have any conversations with the
7 son?

8 A No, but he kept on -- again, this is what I
9 think -- talking to his mother about not getting a tub.
10 It's too much money. That's what I recall.

11 Q Okay.

12 Do you remember if the son was present when
13 you discussed Ms. Cunnison maybe having a tight fit into
14 the tub?

15 A No, I don't, but I think he was there. I don't
16 recall it exactly.

17 Q And I'm a woman so bear with me. I know.

18 A I think he was there.

19 Q I'm sorry. Go ahead.

20 A Yeah. He had to have because he was there the
21 whole time. Yeah. Yes.

22 Q Okay.

23 So how did Ms. Cunnison's weight come up in
24 conversations because I know that can be kind of awkward
25 sometimes?

1 A She was just big, and I'm the one who brought it
2 up.

3 Q So you let her know, hey, your size --

4 A Size, it's going to be a tight fit. You got to
5 lose some weight to get the full benefits of it. I was
6 worried she wouldn't get the full benefits of the jets.

7 Q Okay.

8 Um, did she indicate to you that she was
9 intending to lose weight for other reasons than the
10 Jacuzzi tub?

11 A No. No.

12 Q So when she said that she was going to lose
13 weight, it was because she wanted to be able to utilize
14 the tub?

15 A I believe so. That's my -- that's my thought,
16 yes.

17 Q Did Ms. Cunnison ever tell you what type of
18 medical condition she was suffering from when she decided
19 to purchase the tub?

20 A No.

21 Q Aside from her weight, do you remember her
22 physical condition when you were at her home?

23 A No.

24 Q Did anything stand out to you aside from her
25 weight?

1 the parties.

2 MR. CLOWARD: I'm just going to -- I hate
3 to throw a wrench, I've never actually done this, but any
4 party can request that that be done, and I'm going to
5 request that that be done. So I'm requesting that you
6 read and review. Coordinate with the reporter. I've
7 never exercised that, that right, but I know that you've
8 had some memory -- you know, I want to give you a full
9 opportunity.

10 THE WITNESS: That's three hours of
11 testimony.

12 MR. CLOWARD: I know. It's important. I'm
13 sorry. I'm sorry to do that, but I'd like to you to
14 review and sign. That way if anything comes back to you
15 during review, you can fill that in for us. Okay?

16 THE WITNESS: Are we still on the record?

17 MR. CLOWARD: Yes.

18 THE WITNESS: Can we go off the record?

19 MR. CLOWARD: Sure.

20 MR. COOLS: Yeah.

21 MS. MICHELI: That's fine.

22 (RECESS: 4:13 P.M. TO 4:15 P.M.)

23 MR. COOLS: Sir, back on the record.

24 Mr. Hale (sic), just to confirm, you -- as
25 Mr. Cloward requested, you're going to receive and sign

1 your transcript from this deposition; is that correct?

2 THE WITNESS: Yes.

3 MR. COOLS: And you'll work with the court
4 reporter in terms of coordinating receiving a copy of it
5 and letting her know if there are any changes?

6 THE WITNESS: Yes.

7 MR. COOLS: Off the record. That concludes
8 the deposition.

9 (DEPOSITION CONCLUDED AT 4:16 P.M.)

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1 REPORTER'S CERTIFICATE

2 COUNTY OF MARICOPA)

3) SS.

4 STATE OF ARIZONA)

5 The deposition of HALE BENTON, noticed by Counsel
6 for the Defendant Jacuzzi, was taken on November 27, 2017
7 At One East Washington - Suite 500, Phoenix, Arizona,
8 before Kristin M. DeCasas, RPR, CSR, Arizona Certified
9 Reporter, No. 50925.


10 I, KRISTIN M. DECASAS, hereby certify:

11 That I am a RPR, CSR, and Arizona Certified Reporter,
12 No. 50925, representing Litigation Services, Registered
13 Firm R1023; that an oath or affirmation was administered
14 to the witness by me;

15 That the foregoing proceedings, Deposition of
16 HALE BENTON, was written by me in computerized machine
17 shorthand and thereafter transcribed and produced under
18 my direction; that the transcript constitutes a full,
19 true and accurate record of said proceedings taken on the
20 date and time indicated therein; that the witness has
21 elected to read and sign the transcript; that the
22 preparation, production and distribution of the
23 transcript and copies comply with the Arizona Revised
24 Statutes and Arizona Code of Judicial Administration
25 7-206(J)(1)(g)(1) and (2); that the billings and business

1 terms regarding the transcript and copies comply with the
2 Arizona Revised Statutes and Arizona Code of Judicial
3 Administration 7-206(J)(1)(g)(3) through (6); that I am a
4 disinterested person to this action with no relational,
5 financial, contractual, or business interest in said
6 action, and that I have not been retained to provide
7 court reporting services in the action by an individual
8 or entity other than a party, a party's attorney, or a
9 registered reporting firm.

10 IN WITNESS WHEREOF, I have hereunto subscribed my hand on
11 this day, December 4, 2017.

12 
13

14 KRISTIN M. DECASAS, CSR, RPR
15 Arizona Certified Reporter
16 No. 50925
17
18
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21
22
23
24
25

1 CERTIFICATE OF COMPLIANCE BY REPORTING FIRM

2 I CERTIFY that the foregoing deposition transcript
3 was prepared by the reporter designated herein; that a
4 digital copy of the reporter's transcript was submitted
5 by the reporter to Litigation Services, LLC, Registered
6 Firm R1023, for the purposes of preparing electronic
7 and/or paper copies for the parties; that the transcripts
8 have been prepared and distributed pursuant to the
9 request by counsel on the record or the order on file
10 with Litigation Services, LLC.

11 I FURTHER CERTIFY that the production and
12 distribution of the transcripts, as well as the billing
13 and business terms, comply with the ethical obligations
14 of a Registered Firm indicated in the Arizona Code of
15 Judicial Administration 7-206(J)(1)(g)(1) and (2) and
16 7-206(J)(1)(g)(3) through (6).

17 DATED this 4th day of December, 2017.

18

19

20


Designated Representative

21

Litigation Services, LLC

22

Firm Number R1023

23

24

25

DEPOSITION DECLARATION

Job Number: 433815
Case Caption: ANSARA, ET AL vs.
FIRST STREET FOR BOOMERS
Case Number: A-16-731244-C

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my Deposition taken in the captioned matter, or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on this day, _____.

HALE BENTON

1	DEPOSITION ERRATA SHEET
2	
3	Page No. _____ Line No. _____ Change to: _____
4	_____
5	Reason for change: _____
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7	Page No. _____ Line No. _____ Change to: _____
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**THORNDAL
ARMSTRONG**
DELK BALKENBUSH & EISINGER
A PROFESSIONAL CORPORATION
ATTORNEYS
www.thorndal.com

EXHIBIT 3



Corporate Office
1460 W Canal Court #102 Littleton, CO 80120
(303) 222-3200 - Office Phone (303) 953-7084 - Fax
Southeast Regional Office
Southeast Office 11555 Medlock Bridge Road,
Suite 100, Duluth, GA 30097
(678) 597-3026 - Office Phone

CUSTOMER AGREEMENT

Date: 10/19/2013

www.jacuzzi-walk-in-tubs.com

License #/ Registration #/ ROC #/ Cert #/ WI Dwelling Contractor Cert #:

CUSTOMER INFORMATION

CONTRACT TERMS

Customer Name (s): SHERRY L. CUNNINGHAM Sale Price: \$ 13,993.10 1/3 Down Payment: \$ 4664.00
Address: 3581 SEDGEWICK CT Due Day of Installation: \$ 9329.10
City: LAS VEGAS State: NV Is Financing Needed? Yes ☒ No ☐ Amount Financed: n/a
Card #: 6100 168 Check ☐ Visa ☐ Master Card ☐ Discover ☐
Zip Code: 89112 Phone #: 702-435-5990 CCV: - Expiration: -
(This card or check will be used for the balance unless otherwise noted)

JACUZZI WALK IN TUB AND ACCESSORIES

Drain Location <input checked="" type="checkbox"/> Right Hand <input type="checkbox"/> Left Hand	Tub Color <input checked="" type="checkbox"/> White <input type="checkbox"/> Almond	Accessories <input type="checkbox"/> Slide Bar <input checked="" type="checkbox"/> Grab Bar <small>Chrome Only</small>	Filler <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	End Panel <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Wall System (Max Acrylic width 60" and height 94") <input type="checkbox"/> White <input type="checkbox"/> Almond <input type="checkbox"/> Almond Swirl <input type="checkbox"/> Silver Swirl <input type="checkbox"/> Caramel Swirl <input checked="" type="checkbox"/> Paint ready wall board <small>Customer responsible for Tile or Paint</small>
---------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------	-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Hot Water Heater

Jacuzzi® recommends a 50 gallon hot water heater for optimum performance

(Initial) I consent to retain my current hot water heater

(Initial) I would like to wait until installation is complete and try my current hot water heater before making any decisions.

(Initial) I would like a new 50 gallon hot water heater included in the above agreed upon price.

-NOTICE OF CANCELLATION-

YOU, THE BUYER MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ACCOMPANYING NOTICE OF CANCELLATION FORM FOR EXPLANATION OF THIS RIGHT.

Installation Date

Estimated Start Date: 1/5/2014 Customer will call

Estimated Completion Date: 1/15/2014

The start and completion dates is only estimates and not definite.

Electrical

The electrical included under this contract is from the existing electrical service panel and does not include any type of service upgrades or repairs of previous electric issues unless otherwise noted.

slc (Initials)

ch (Initials)

Down Payment Authorization

Credit Card: I/We authorize AITHR Dealer, Inc. to charge my/our credit card in the amounts agreed upon above for the down payment upon the acceptance of this Agreement and for the installation of my Jacuzzi® Walk-In Tub.

Checking: I/We authorize AITHR Dealer, Inc. to initiate a debit, to my/our checking account at the depository financial institution (bank) identified by the accompanying check to such account, in the amounts agreed upon above for the down payment upon the acceptance of this Agreement and for the installation of my Jacuzzi® Walk-In Tub.

Customer (s) agrees and understands that this Agreement, and any accompanying specification sheet (s) constitute the entire understanding between the parties, and there are no verbal understandings changing any of the terms of this Agreement. No deviation from this Agreement will be valid without the signed, written consent of both AITHR DEALERS, Inc. and Customer (s). Customer (s) hereby acknowledges that Customer (s) has read the front and reverse of this Agreement, understands the terms of this Agreement, and has received a completed, signed, and dated copy of this Agreement, including the accompanying Notice of Cancellation, on the date first written above. Customer (s) acknowledges that Customer (s) was orally informed of Customer's right to cancel this Agreement.

(Texas Sales Only) IMPORTANT NOTICE: You and your contractor are responsible for meeting the terms and conditions of this contract. If you sign this contract, and you fail to meet the terms and conditions of this contract, you may lose your legal ownership rights in your home. KNOW YOUR RIGHTS AND DUTIES UNDER THE LAW.

(Illinois Sales Only) THE LAW REQUIRES THAT THE CONTRACTOR SHALL SUBMIT A SWORN STATEMENT OF PERSONS FURNISHING MATERIALS AND LABOR BEFORE ANY PAYMENTS ARE REQUIRED TO BE MADE TO THE CONTRACTOR.

Customer Signature: Sherry L. Cunningham Date: 10/19/2013

I hereby acknowledge that I own the property on which the improvements are to be made.

Customer Signature: slc Date: 10/19/2013

I hereby acknowledge that I own the property on which the improvements are to be made.

Sales Representative: Abel Date: 10/19/2013

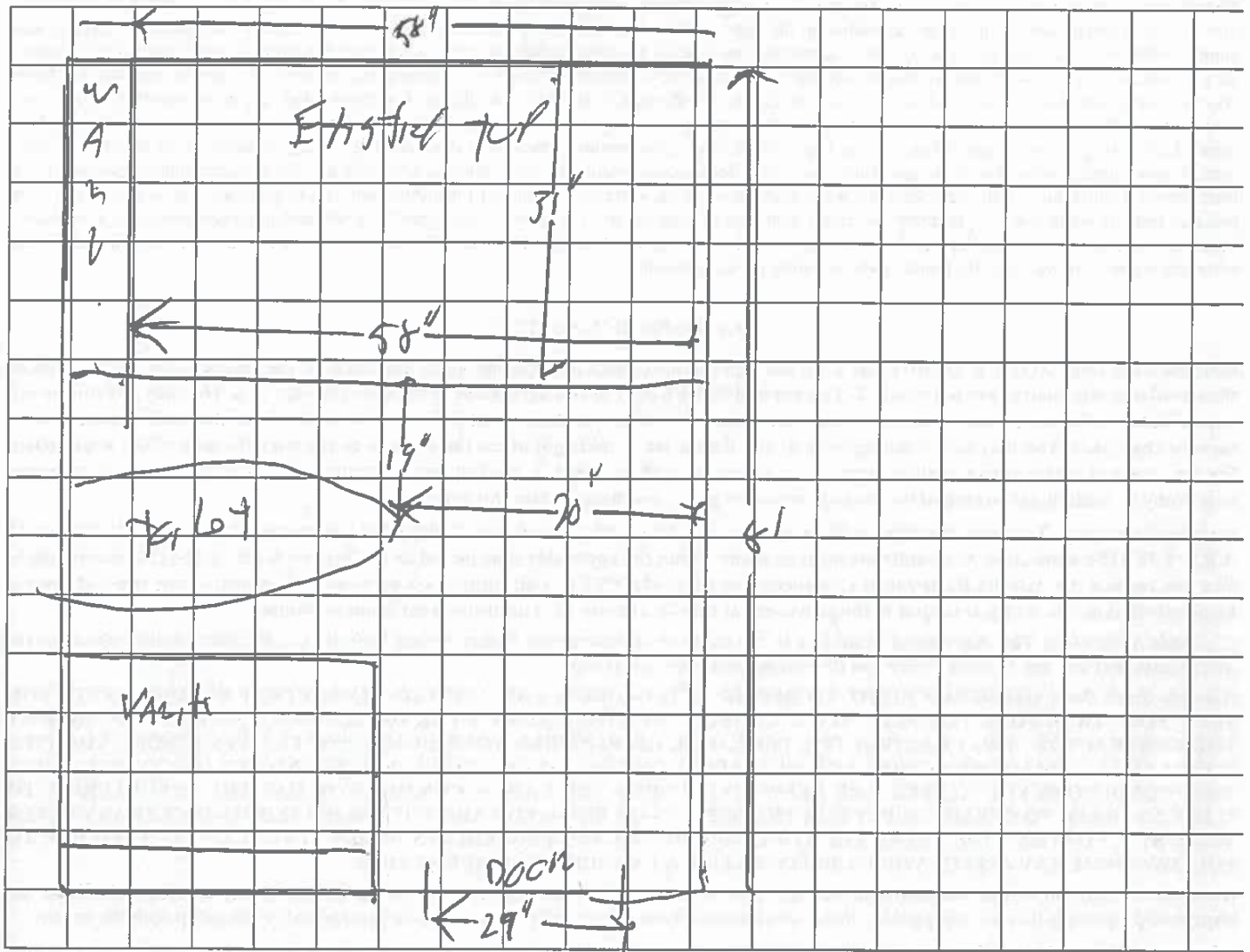
Acceptance of Contract

The conditions, specifications and prices stated herein are satisfactory and are herein accepted. AITHR DEALERS, Inc. is authorized to do work as specified. Payment will be made as outlined above. A Copy of this agreement will be furnished to Customer (s) upon signing.

I/we hereby acknowledge that a copy of this Agreement has been given to me/us and is subject to the terms and conditions on the back, which form part of this Agreement.

FIRST 000297

Bathroom Layout



If the NEW tub location is changing from the current, please use a dashed line (-----) to designate new location.

Notes

#1. Hold installation until approximately January 5, 2014. Customer will call, on we will call her.

#2. Texture and paint approx 3ft x 11ft or existing wall area where surround tub was removed

#3. Customer wants that she will fit very tightly in new tub, because weight loss - it will be 95 lbs

(Initial) plc (Initial) _____

Customer Checklist

<p><i>plc</i></p>	<p>1. Verbal Agreement: AITHR Dealers, Inc. will not honor any verbal agreements between the Sales Rep and the customer. All terms must be in writing and a part of this Agreement. Any change to this Agreement must be made in writing by both Customer (s) and Contractor.</p>
<p><i>plc</i></p>	<p>2. Unforeseen Damage: If in the event after removal of the existing old tub or shower a preexisting condition should arise such as rotting subfloors or mold, AITHR Dealers Inc. is not responsible for any existing unforeseen damage. AITHR Dealers Inc. will work with the customer to find the best possible resolution (<i>additional charges may apply</i>).</p>
<p><i>plc</i></p>	<p>3. Furniture and Personal items: While our installation team will be very careful, they cannot move or remove any furniture, pictures or other personal items. So please prepare your home by moving or removing all personal items and valuables prior to installation. If a clear path is not provided your installation could be delayed.</p>
<p><i>plc</i></p>	<p>4. Lead Time: 4-6 weeks is the average lead time to have your new Jacuzzi walk-in tub installed. Our production department will call you in 3-4 days after you have purchased your new Jacuzzi walk-in tub. If you have not heard from them in that time frame, please feel to call 303-222-3200.</p>
<p><i>plc</i></p>	<p>5. Children, Pets and Doorways: Our installers will be in and out of your home frequently and may have to sometimes prop the door open. To ensure everyone's safety, please keep children and pets away from the installation area, installer's tools and vehicles.</p>
<p><i>plc</i></p>	<p>6. Water and Electrical: AITHR Dealers Inc. will require use of your electrical outlets for tools as well as needing to turn the water off to the entire home at some time during the installation. Please let the installation team know of any specials requirements.</p>
<p><i>plc</i></p>	<p>7. Installation Day: Your installation will be scheduled by our Production Department. Our team will work with you and your schedule to determine the installation date. A typical install takes 1-2 days but sometimes can take longer.</p> <p style="margin-left: 20px;"><i>HOLE WAS BUILT 12 2005.</i></p>
<p><i>plc</i></p>	<p>8. Tub Damage: It is rare a unit to arrive damaged or incorrect. If this happens, we will call you immediately as well as order you a new tub and arrange for a new installation date. You will not be compensated for this or any other time delays.</p>
<p><i>plc</i></p>	<p>9. Warranty: Your new Jacuzzi walk-in tub comes with a lifetime manufacturing and a two year installation labor warranty. Should you require service, please call 303-222-3200. If for any reason you have an issue with the operation of your Jacuzzi walk-in tub, please call Jacuzzi at 1-(800) 288-4002.</p>

Customer Signature: *J Sherry & Larrison* Date: *10-19-2013*

Customer Signature: *N/A* Date: *N/A*

Customer did not receive Logo Paint Package

11/11/2013

Price Pages.....September 9, 2013..... 52 x 30 (10) Jet and 52 x 30 (6) Jet

Basic Install		UM	PRICE	
Standard Jacuzzi Walk-in Tub installation 29 x 52 (10) Jet	EA	EA	\$13,495.00	✓
Standard Jacuzzi Walk-in Tub installation 29 x 52 (6) Jet	EA	EA	\$9,995.00	✓
Install a back shelf for tubs up to 32 inches <i>(If the tub is over 32 inches wide you must sell a back shelf)</i>	EA	EA	Included	✓
8" filler panel	EA	EA	Included	✓
Remove and reinstall (1) existing door less than 28 inches.	EA	EA	Included	✓
Reverse plumb drain and supply's	EA	EA	Included	✓
Installation of a slide bar for hand held.	EA	EA	Included	✓
Installation of grab bar	EA	EA	Included	✓
Basic electrical installation	EA	EA	Included	✓
ACRYLIC WALLS - PAINT / READY WALLS - KNEE WALLS - BACK SHELF				
Installation of 3 piece acrylic wall standard size - Max height 96" Max Width 36"	EA	EA	\$2,255.00	✓
Installation of 3 piece FRP wall standard size - Max height 96" Max Width 36"	EA	EA	\$1,400.00	✓
Install Paint or Tile ready wallboard in tub area	EA	EA	\$375.00	✓
(Additional) 8" filler panel - 1 additional filler can be used to give a total length of 68"	EA	EA	\$350.00	✓
Back Shelf 5" to 10" wide Build a shelf on the back side of the tub to meet existing flooring	EA	EA	\$500.00	✓
Back Shelf 11"-18" wide Build a shelf on the back side of the tub to meet existing flooring	EA	EA	\$625.00	✓
Knee Wall - Wall up to 12" wide finished with drywall.	EA	EA	\$525.00	✓
Knee Wall - Wall 13" - 18" wide finished with drywall.	EA	EA	\$650.00	✓
DOORS AND ACCESS				
Enlarge passage way or Arch (Drywall) Less than 29 inches	UM	UM	PER	✓
Remove and reinstall additional door less than 29 inches.	EA	EA	\$250.00	✓
Permanently widen up to 30 inches - install new 6 panel Hollow core door, includes moving electric up to 8"	EA	EA	\$575.00	✓
Remove and reinstall HOCKET DOORS less than 29 inches.	EA	EA	\$925.00	✓
Create opening for accessibility in non-load bearing walls (closet). Price includes re-drywall, tape and texture to match existing.	EA	EA	\$975.00	✓
Bathroom less than 58" remove drywall, notch studs, repair drywall (removal of vanity or toilet not included)	EA	EA	\$900.00	✓
	EA	EA	\$375.00	✓
PLUMBING				
R & R Toilet - if less than 29" from the tub or wall must be removed.	UM	UM	PER	✓
R & R Vanity if less than 29" from the tub or wall must be removed.	EA	EA	\$250.00	✓
Modify and move Center Drain up to 3 feet (Shower or Garden tub NOT IN CONCRETE)	EA	EA	\$350.00	✓
Modify and move Center Drain up to 3 feet in Concrete (Slab on Grade)	EA	EA	\$275.00	✓
Demo Tile Tub surrounds for garden or drop in tub	EA	EA	\$650.00	✓
Demo Tile shower pan per square foot (length x width)	EA	EA	\$275.00	✓
Removal Plumbing or Wet Wall	EA	EA	\$50.00	✓
Rebuild Plumb Wall: Water supplies, drain, vent, framing and drywall.	EA	EA	\$600.00	✓
Change from Drum trap to P trap	EA	EA	\$325.00	✓
50 Gallon Hot water heater	EA	EA	\$1,200.00	✓
80 Gallon Hot water heater	EA	EA	\$1,800.00	✓
ELECTRICAL				
Panel without 2 vacant breaker spaces, 100 amp panel and Multi Panels	UM	UM	PER	✓
Zinsco, Federal Pacific, Pushmatic Bulldog, Screw in Fuses, Stab Lock	EA	EA	\$1,200.00	✓
Condo, Town home, Homes with Flat Roofs and any panel without a Main shutoff	EA	EA	\$1,750.00	✓
Extended run Level 1 (Electrical Panel is 50' - 70' from the bathroom) ** add 25 feet to total length for two-story homes.	EA	EA	\$650.00	✓
Extended run Level 2 (Electrical Panel is 71'-100' from the bathroom) ** add 25 feet to total length for two-story homes.	EA	EA	\$500.00	✓
Extended run Level 3 (Electrical Panel over 100' from the bathroom) ** add 25 feet to total length for two-story homes.	EA	EA	\$650.00	✓
	EA	EA	\$850.00	✓
WINDOWS				
Remove old window and install new same size tempered glass window (White vinyl double pane) Includes framing window for smaller window.	UM	UM	PER	✓
Replace window trim with PVC trim - existing or new	EA	EA	\$1,500.00	✓
	EA	EA	\$200.00	✓
MISC. LABOR				
Demo Shower tile walls (Tile, wall board and framing)	UM	UM	PER	✓
Texturing of the wall board	EA	EA	\$40.00	✓
Additional drywall installation	EA	EA	\$1.68	✓
One coat of customer provided paint on newly installed or existing wall board.	EA	EA	\$4.84	✓
	EA	EA	\$2.50	✓

13,996.76

5,127.96

13,996.76



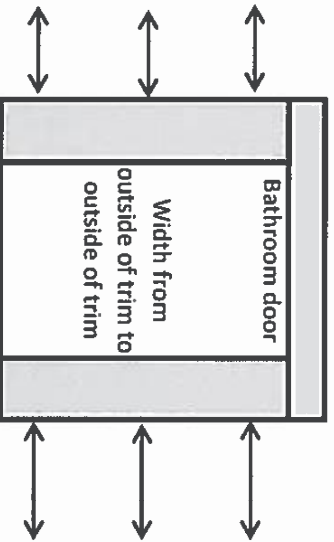
SHERY L. CURRISON

10/19/2013

Construction Measurements

1-Jan-13

Single Family Home		Plumbing Access			Stairs	
Ranch	✓	Crawl Space		Stair width		
2 story		Slab on Grade	✓	# of Landings		
Mobile or Manufactured Home		Basement		Landing #1	X	
Condominium Only		If basement is it finished	Yes	Landing #2	X	
Floor unit is on		Plumbing type	Yes	Landing #3	X	
Electrical panel in unit	Yes	Copper	Yes			
Water shut off in unit	Yes	Pex	Yes			
Does building have an elevator	Yes	Galvanized	Yes			
Is HOA approval needed	Yes	Lead	Yes			
Bathroom location		Electrical		The distance from the Electrical Panel to the bathroom is required and is measured from the Electrical Panel to the middle of the bathroom on the outside of the house		
1st level	✓✓	Electrical Panel Manufacturer	GE/AL			
2nd level		Electrical Panel Amps	200			
Basement		Electrical Panel Location				
Doors, Opening and Hallways		Outside	Basement	Crawl Space	Garage	
Number doors & openings	2	Electrical Panel - distance to bathroom	30'			
Entry door width	36"					
Hallway width	36"					
Bedroom door width	24"					
Bathroom door width	24"					
Door or Opening #3						
Door or Opening #4						
Door or Opening #5						
Bathroom						
Overall bathroom dimensions	8' x 5' 1/2"					
Bathtub length and width	58" x 31"					
Center line of toilet to tub	19"					
Front edge of toilet to wall	20"					
Window						
Tempered glass	Yes					
Window sill height from bottom of tub	1' 10"					



Sherry L. Currison
10/19/2013
BY X [Signature] 10/19/2013

1. How is the distance from the Electrical Panel to the bathroom measured? The distance is measured from the middle of the bathroom on the outside of the house.

2. The distance from the Electrical Panel to the bathroom is required and is measured from the middle of the bathroom on the outside of the house.

3. The distance from the Electrical Panel to the bathroom is required and is measured from the middle of the bathroom on the outside of the house.



www.jacuzzi-walk-in-tubs.com

Corporate Office
1460 W Canal Court #102 Littleton, CO 80120
(303) 222-3200 - Office Phone (303) 953-7084 - Fax
Southeast Regional Office
Southeast Office 11555 Medlock Bridge Road,
Suite 100, Duluth, GA 30097
(678) 597-3026 - Office Phone

RESIDENTIAL CONSTRUCTION RECOVERY FUND

Payment may be available from the recovery fund if you are damaged financially by a project performed on your residence pursuant to a contract, including construction, remodeling, repair or other improvements, and the damage resulted from certain specified violations of Nevada law by a contractor licensed in this state. To obtain information relating to the recovery fund and filing a claim for recovery from the recovery fund, you may contact the State Contractors' Board at the following locations:

State Contractors Board
9670 Gateway Drive, Suite 100
Reno, Nevada 89521-3953
Telephone number: (775) 688-1141; or

State Contractors Board
4220 South Maryland Parkway
Las Vegas, Nevada 89119
Telephone number: (702) 486-1100

ACKNOWLEDGMENT OF RECEIPT OF FORM

Each of the undersigned acknowledges receipt of a copy of this notice.

Sherry L. Anderson

Buyer Signature

10/19/2012

Must Be Dated

[Signature]

Co-Buyer Signature

[Signature]

Must Be Dated



AITHR
1460 W. Canal Court, Suite 102
Littleton, Colorado 80120
Phone: 303.953.6898
www.aihremodelers.com

STATE CONTRACTORS' BOARD

Contractors are required by law to be licensed and regulated by the State Contractors' Board. The State Contractors' Board has jurisdiction to investigate complaints that are filed against contractors. Any questions concerning a contractor may be referred to the State Contractors' Board at:

- (1) 9670 Gateway Drive
Suite 100
Reno, Nevada 89521
(775) 688-1141; or
- (2) 2310 Corporate Circle
Suite 200
Henderson, Nevada 89074
(702) 486-1100

The law of this State requires that a person or entity who enters into a contract to perform construction work be properly licensed by the State Contractors' Board for the category of work that the person or entity intends to perform. Laws regulating licensed contractors are designed to protect the public. If you contract with a person or entity who is not licensed to perform construction work, your remedies against that person or entity may be limited to a suit in civil court. You may be liable for damages arising out of any injuries to an unlicensed contractor or that contractor's employees, as well as withholding taxes, contributions pursuant to the Federal Insurance Contributions Act and contributions for industrial insurance and unemployment compensation. In addition, you must comply with other applicable state and federal laws regarding employment. Finally, you should be aware that construction performed on your property must comply with all applicable laws, ordinances, building codes and regulations.

A contractor is required to include his license number on all of his advertising, vehicles, bids and contracts. You may contact the State Contractors' Board to find out if a contractor has a valid license and, if so, the status of that license. The Board has complete information on the status of all licensed contractors in the State of Nevada. This information is available through the "voice response system" of the State Contractors' Board. However, if you wish to obtain specific information about complaints that have been filed against a contractor, such information must be requested from the Board in writing.

ACKNOWLEDGMENT OF RECEIPT OF FORM

Each of the undersigned acknowledges receipt of a copy of this notice.

Sherry L. Annison
Buyer Signature
[Signature]
Co-Buyer Signature

10/19/2018
Must Be Dated
[Signature]
Must Be Dated



AITHR
1460 W. Canal Court, Suite 102
Littleton, Colorado 80120
Phone: 303.953.6898
www.aihremodelers.com

NOTICE TO OWNER

Pursuant to NRS 108.221 to 108.246, inclusive, a contractor, subcontractor, laborer, supplier of materials or other person or entity who:

- (1) Performs work or furnishes materials of the value of \$ 500.00 or more to improve the value of your property; and
- (2) Is not paid for the work or materials, has a right to place a lien on your property on which the work was performed and to sue you in court to obtain payment.

This means that after a court hearing, your property could be sold by an officer of the court and the proceeds of the sale used to satisfy the amount you owe. If you did not ask for and receive releases of liens from the contractors' subcontractors, laborers or suppliers of materials, a lien may be placed on your property or you may be sued even if you have paid your contractor in full.

To preserve their right to file a claim or lien against your property, certain claimants, such as subcontractors, laborers and suppliers of materials, are each required to provide you with a document called a "preliminary or pre-lien notice." A preliminary or pre-lien notice is not a lien against your property. Its purpose is to notify you regarding persons or entities who may have a right to file a lien or claim against your property if they are not paid. To perfect their lien rights, contractors, subcontractors, laborers and suppliers of materials must file mechanics' liens with the county recorder, which then become recorded liens against your property. Generally, the maximum time allowed for filing a mechanics' lien against your property is 90 days after substantial completion of your project.


TO ENSURE EXTRA PROTECTION FOR YOURSELF AND YOUR PROPERTY, YOU MAY WISH TO TAKE ONE OR MORE OF THE FOLLOWING STEPS:


- (1) Request that your contractor supply you with a payment and performance bond, which guarantees completion of your project and payment of the subcontractors, laborers and suppliers of materials who work on the project. This payment and performance bond is different from the surety bond that a contractor must file for licensure pursuant to NRS 624.270. A payment and performance bond provides that if the contractor does not complete the project, the bonding company will pay damages up to the amount of the bond. This payment and performance bond, as well as a copy of the construction contract, should be filed with the county recorder for your further protection. There is a fee for a payment and performance bond. This fee is usually equal to between 1 and 6 percent of the amount of the contract, depending on the ability of the contractor to be bonded.
- (2) Require that payments be made directly to subcontractors, laborers and suppliers of materials through a mechanism that controls payment for construction. In the area in which you live, services to control the funding of your project may be available, for a fee, to control payment of your contractor by the use of vouchers or other means. These services may also provide you with waivers of liens and other forms of protection.
- (3) Issue joint checks for payment, made payable to both your contractor and the subcontractors, laborers and suppliers of materials who were involved in the project or portion of the project for which payment is due and who sent a preliminary or pre-lien notice to you. Those persons or entities have indicated that they may have the right to place a lien on your property, and therefore you need to protect yourself. Making checks jointly payable will help to ensure that all persons due payment are actually paid.
- (4) Require your contractor to provide you with unconditional "waiver and release" (lien release) forms so that when you make a payment on any completed phase of your project, each subcontractor, laborer and supplier of materials involved in that portion of the work for which the payment was made can sign the waiver and release forms. This protects you from liability to them for work for which they have already been paid.
 - Some stationery stores sell waiver and release forms if your contractor does not have them. The subcontractors, laborers and suppliers of materials from whom you obtain releases should be those persons or entities who have filed preliminary or pre-lien notices with you. If you are not certain which subcontractors, laborers and suppliers of materials are working on your project, you may obtain a list from your contractor. In regard to projects involving improvements to a single-family residence or a duplex owned by an individual, the persons signing these releases lose their right to file a mechanics' lien against your property. In regard to other types of projects, obtaining such releases may still be important, but may not provide complete protection.
 - To protect yourself by use of a waiver and release form, you must be certain that all subcontractors, laborers and suppliers of materials who work on your project sign a waiver and release form. If a mechanics' lien has already been filed against your property, in most cases the lien can only be released voluntarily by a recorded "release of mechanics' lien," which is signed by the person or entity that filed the mechanics' lien against your property. However, if the person or entity that filed the lien fails to bring an action to enforce the lien in a timely manner, the lien may be removed without voluntary action on the part of that person or entity. You should not make final payment on your project until all mechanics' liens that are filed against your property have been removed.

TO PROTECT YOURSELF FULLY, YOU SHOULD CONSULT AN ATTORNEY: (1) BEFORE YOU SIGN A CONSTRUCTION CONTRACT; OR (2) IF A LIEN IS FILED AGAINST YOUR PROPERTY.

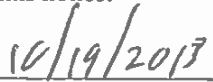
ACKNOWLEDGMENT OF RECEIPT OF FORM


Each of the undersigned acknowledges receipt of a copy of this notice.



Buyer Signature


Co-Buyer Signature



Must Be Dated


Must Be Dated

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FIRST PAGES



Aging In The Home Remodelers

www.jacuzzi-walk-in-tubs.com

Corporate Office
1460 W Canal Court #102 Littleton, CO 80120
(303) 222-3200 - Office Phone (303) 953-7084 - Fax
Southeast Regional Office
11555 Medlock Bridge Road,
Suite 100, Johns Creek, GA 30097
(678) 597-3026 - Office Phone

Date: 10/19/2011

Owner (s) Street Address, City, State and Zip Code :

3881 SEDGECROFT CT, LAS VEGAS, NV 89122

Home Telephone #:

702-485-5990 / cell 702 882 1980

OWNER(s) Acknowledgement of Receipt

Print Customer Name

SHERY L CURRISON

Print Customer Name

Signature

X Shery L Currison 10/19/2011

Date

Signature

u/k

Date

YOU, THE BUYER(S), MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD (3rd) BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

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NOTICE OF CANCELLATION

Date of Transaction: 10/19/2011 You may cancel this transaction without any penalty or obligation within three business days from the above date. If you cancel, any property traded in, any payments made by you under the Contract or Sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the Seller of your cancellation notice, following receipt by the Seller of your cancellation notice, and any security interest arising out of the transaction will be canceled. If you cancel you must make available to the Seller at your residence, in substantially as good condition as when received, any goods delivered to you under this Contract or Sale; or you may if you wish comply with the instructions of the Seller regarding the return shipment of the goods at the Sellers expense and risk. If you do make the goods available to the Seller and the Seller does not pick them up within 20 days of the date of your Notice of Cancellation you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the Seller, or if you agree to return the goods to the Seller and fail to do so, then you remain liable for the performance of all obligations under the Contract .To cancel this transaction mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to AITHR Dealers INC, 1460 W. Canal Court, unit 102, Littleton, Colorado 80120, NOT LATER THAN MIDNIGHT OF 10/23/2011
(Date) I HEREBY CANCEL THIS TRANSACTION.

Customer's Signature

Date

Customer's Signature

Date

NOTICE OF CANCELLATION

Date of Transaction: _____ You may cancel this transaction without any penalty or obligation within three business days from the above date. If you cancel, any property traded in, any payments made by you under the Contract or Sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the Seller of your cancellation notice, following receipt by the Seller of your cancellation notice, and any security interest arising out of the transaction will be canceled. If you cancel you must make available to the Seller at your residence, in substantially as good condition as when received, any goods delivered to you under this Contract or Sale; or you may if you wish comply with the instructions of the Seller regarding the return shipment of the goods at the Sellers expense and risk. If you do make the goods available to the Seller and the Seller does not pick them up within 20 days of the date of your Notice of Cancellation you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the Seller, or if you agree to return the goods to the Seller and fail to do so, then you remain liable for the performance of all obligations under the Contract .To cancel this transaction mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram to AITHR Dealers INC, 1460 W. Canal Court, unit 102, Littleton, Colorado 80120, NOT LATER THAN MIDNIGHT OF _____
(Date) I HEREBY CANCEL THIS TRANSACTION.

Customer's Signature

Date

Customer's Signature

Date



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

EXHIBIT 4

In the Matter Of:

Ansara, et al. vs. First Street For Boomers & Beyond, Inc., et al.

WILLIAM ARTHUR LEWIS

July 20, 2017

Job Number: 401221

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DISTRICT COURT

CLARK COUNTY, NEVADA

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., et al.,

Defendants.

DEPOSITION OF WILLIAM ARTHUR LEWIS

LAS VEGAS, NEVADA

THURSDAY, JULY 20, 2017

Reported By: Holly Larsen, CCR NO. 680, CA CSR 12170
Job No.: 401221

1 DEPOSITION OF WILLIAM ARTHUR LEWIS, taken at
2 3883 Howard Hughes Parkway, Suite 1100, Las Vegas,
3 Nevada, on Thursday, July 20, 2017, at 9:20 a.m.,
4 before Holly Larsen, Certified Court Reporter, in
5 and for the State of Nevada.

6

7 APPEARANCES:

8 For the Plaintiffs:

9 RICHARD HARRIS LAW
10 BY: BENJAMIN CLOWARD, ESQ.
801 South Fourth Street
Las Vegas, Nevada 89101
11 702.444.4444
benjamin@richardharrislaw.com
12

13 For Jacuzzi, Inc.:

14 SNELL & WILMER, LLP
15 BY: JOSHUA D. COOLS, ESQ.
3883 Howard Hughes Parkway
Suite 1100
16 Las Vegas, Nevada 89169
702.784.5200
17 jcools@swlaw.com

18

For Chicago Faucets:

19

20 KOLESAR & LEATHAM
BY: JENNIFER MICHELI, ESQ.
400 South Rampart Boulevard
21 Suite 400
Las Vegas, Nevada 89145
22 702.362.7800
jmicheli@klnevada.com
23

24

25

1 APPEARANCES (Continued):

2 For First Street For Boomers & Beyond, Inc., and
3 AITHR Dealer, Inc.:

4 THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER
5 BY: MEGHAN GOODWIN, ESQ.
6 1100 East Bridger Avenue
7 Las Vegas, Nevada 89101
8 702.366.0622
9 mgoodwin@gmail.com

10 For William Budd and Budds Plumbing:

11 LIPSON, NEILSON, COLE, SELTZER, GARIN, P.C.
12 BY: ERIC TRAN, ESQ.
13 9900 Covington Cross Drive
14 Suite 120
15 Las Vegas, Nevada 89144
16 702.382.1500
17 etran@lipsonneilson.com

18 For Bestway Building & Remodeling, Inc.:

19 ROPERS MAJESKI KOHN BENTLEY
20 BY: ARTHUR N. BORTZ, ESQ.
21 3753 Howard Hughes Parkway
22 Suite 200
23 Las Vegas, Nevada 89169
24 702.954.8300
25 arthur.bortz@rmkb.com

For Homeclick, LLC:

OLSON, CANNON, GORMLEY, ANGULO & STOBERSKI
BY: DANIELA LABOUNTY, ESQ.
9950 West Cheyenne Avenue
Las Vegas, Nevada 89129
702.384.14012
dlabounty@ocgas.com

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I N D E X

WITNESS: William Arthur Lewis

EXAMINATION	PAGE
By Mr. Cools	5, 44, 54
By Ms. Labounty	21, 46, 53
By Ms. Goodwin	29, 48
By Ms. Micheli	35

E X H I B I T S
(None)

1 LAS VEGAS, NEVADA; THURSDAY, JULY 20, 2017

2 9:20 a.m.

3 -oOo-

4

5 (In an off-the-record discussion held prior
6 to the commencement of the proceedings,
7 counsel agreed to waive the court reporter's
8 requirements under Rule 30(b)(4) of the
9 Nevada Rules of Civil Procedure.)

10

11 Whereupon,

12 WILLIAM ARTHUR LEWIS,
13 having been first duly sworn to testify to the
14 truth, was examined, and testified as follows:

15

16 EXAMINATION

17 BY MR. COOLS:

18 Q. Mr. Lewis, could you please state your full
19 name for the record?

20 A. William Arthur Lewis, pastor.

21 Q. Have you ever given a deposition before?

22 A. No.

23 Q. Let me explain some of the ground rules.

24 The oath that you were just given is the same oath
25 that you'd be given if you were testifying in a

1 because the water wasn't running when the fire
2 department got there.

3 Q. And you saw her, you believe, the day after
4 the incident?

5 A. Yeah. I was in the hospital.

6 Q. How long were you with her?

7 A. Not all that long because the nurse asked
8 me if I would please leave because they wanted to do
9 some tests on her. So I left. Then I went back the
10 next day and they told me she passed away. I'm
11 going, Whoa.

12 Q. Was anybody else there at the hospital when
13 you were there?

14 A. No. Just me.

15 Q. Do you know if any of her children had come
16 to see her?

17 A. I have no idea. I have no idea.

18 Q. You mentioned speaking with her son at some
19 point. When did you --

20 A. That would have been a week later. The
21 police gave me the keys to the house to take care of
22 the dog. They didn't want to take the dog away. So
23 I ended up taking care of the house for them, fed
24 the dog every day.

25 Q. Did anybody at the hospital tell you what

1 her medical condition was?

2 A. No. I didn't talk to any of the doctors or
3 nurses.

4 Q. Did Ms. Cunnison or anyone at the hospital
5 tell you what her kind of prognosis was for getting
6 out --

7 A. No.

8 Q. -- or when she expected to get out?

9 A. No, they did not.

10 Q. When you say you weren't there very long,
11 do you know an approximate time frame? 30 minutes?
12 An hour?

13 A. Probably 45, 50 minutes.

14 Q. Did Ms. Cunnison ever tell you about having
15 any problems with the tub before the incident?

16 A. No. Not before, no.

17 Q. She didn't express any issues with the door
18 to the tub?

19 A. No. She never said anything about it.

20 Q. Or the drain to the tub?

21 A. No.

22 Q. Did she indicate that it, you know, was
23 easy for her to use, to get in and out of?

24 A. Yes.

25 Q. When did she tell you that? When she

1 showed it to you?

2 A. Yeah. When she showed it to me first time
3 I seen it.

4 Q. Now, are you familiar with Ms. Cunnison
5 having any other falls or getting stuck prior to
6 this?

7 A. No, I'm not. No. Not that I know of, no.

8 Q. And you started seeing her regularly about
9 a month before her death; is that correct?

10 A. Yes.

11 Q. And what precipitated you and her renewing
12 your friendship or relationship?

13 A. It was a friendship, yeah.

14 Q. And how did that come about where you guys
15 started seeing each other regularly?

16 A. She called me and asked me how I was doing.
17 I said, "I'm doing fine." So we started talking
18 and, you know, we got back -- started going to see
19 each other.

20 Q. Did Ms. Cunnison ever discuss her financial
21 issues like her trust or will or anything like that?

22 A. No, no.

23 Q. When you saw the bathtub, did everything
24 appear to be working correctly?

25 A. Well, not when I seen it. It was all torn

1 up.

2 Q. I guess I'm talking about before the
3 incident. Did you see anything that looked like it
4 was not working correctly before the incident
5 occurred?

6 A. No, I didn't.

7 MR. COOLS: I might have some follow-up
8 questions, but I'm going to go ahead and let the
9 other attorneys ask you some questions now. Thank
10 you.

11

12 EXAMINATION

13 BY MS. LABOUNTY:

14 Q. My name is Daniela Labounty. I represent
15 one of the parties in this lawsuit, and I have just
16 a few follow-up questions for you.

17 You said that you had known Sherry for
18 about seven years?

19 A. Yes.

20 Q. And that you met her when you moved to
21 Las Vegas. I forget, that was about 11 years ago?

22 A. About that, yes.

23 Q. So there were a few years when you lived
24 here that you didn't know her?

25 A. Yes.

1 A. No. We didn't really talk about our
2 children. We were too much involved with just each
3 other.

4 Q. You mentioned that she talked a lot about
5 the church; is that right?

6 A. Yeah. We talked about church.

7 Q. Did she do any type of outside studying or
8 contemplation like with certain spiritual books or
9 guides or anything?

10 A. I know she read her bible, yes.

11 Q. Was that like a daily thing?

12 A. Yes.

13 Q. So my understanding is she got the walk-in
14 tub when you guys weren't really together; is that
15 right?

16 A. Yes.

17 Q. So before she got that, when you lived with
18 her, how often did she take a shower, take a bath,
19 or bathe?

20 A. She took a shower every day.

21 Q. Was that her choice? Like her number one
22 option, she'd rather take a shower than a bath?

23 A. Yes.

24 Q. Did you ever know her to take baths?

25 A. Really I can't stop to think about that



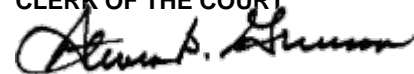
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EXHIBIT 5



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

- 6
- 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 b. That SHERRY was relying on Defendants' skill and judgment to provide a suitable
20 product.
21

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
26
27
28

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;

