

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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Dept. No. XIX

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

Real Parties in Interest.

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

APPENDIX VOLUME 6 TO PETITION FOR WRIT OF MANDAMUS

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Dealer, Inc.;*


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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 6 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.

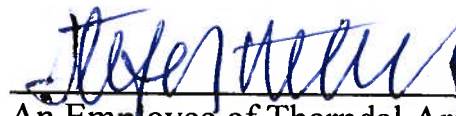
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An Employee of Thorndal Armstrong Delk
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of September, 2018, service of the above and foregoing DEFENDANT, FIRSTSTREET FOR BOOMERS AND BEYOND, INC.'S RESPONSE TO PLAINTIFF, ROBERT ANSARA'S FIRST SET OF REQUEST FOR PRODUCTION OF DOCUMENTS was made upon each of the parties via electronic service through the Eighth Judicial District Court's Odyssey E-File and Serve system.

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An employee of THORNDAL ARMSTRONG
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EXHIBIT 38

EXHIBIT 38

	A	B	C	D	F	G	H	P
			<p>The installer, Dave Morino, saved the deal. He was awesome. The salesman ordered the wrong tub, and Dave traveled maybe three hours total to get the right tub and bring it back to re-install it. When Dave came out he saw it was the wrong product, and he personally went to pick up the correct tub. If he hadn't saved the deal, we would have probably gone with another company. He was tremendous. He also did a nice job on the installation. He took our recommendations and complaints and did whatever we wanted. He did a first class job, and he was awesome. We liked the tub, and we are very happy with it. It is a good quality tub. This is our second Jacuzzi, but we didn't want the Home Alert part of the deal. We aren't old, and we don't need that product. When the salesman came out to sell us the tub, we told him we wanted the tub, and it was a done deal. He insisted, however, that we go through the whole presentation. We are in our 60's, and he was telling us about how we might fall. That may happen one day, but it isn't why we bought the tub. We purchased the tub because it fits in the space and we were planning ahead. Even so, he insisted on going through everything. Then we received a follow up call for another service, and that badgered me as well. I would tell the salesmen to sell products to</p>					
803	FirstSTREET All-Products	Additional Comment	<p>I would like to recognize our salesman that sold, and explained the tub, he was a believer in the product, and did a good job selling the product.</p>		12690 E Villanova Dr	Aurora	Colorado	Dave & Debbie Fischer
804	FirstSTREET All-Products	Recognize Excellence	<p>My suggestion would be for the project coordinator, to better communication with the electrician. He didn't adequately explain everything, pushing the project out.</p>		133 Crump Creek Rd	Blairsville	Georgia	Libby & Jack Stevens
805	FirstSTREET All-Products	Improvement Suggestion			133 Crump Creek Rd	Blairsville	Georgia	Libby & Jack Stevens

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	FirstSTREET All-Products	Representative Follow Up	I still need to call them and have them check the heater.		350 Diana St	Mitchell	Indiana	Ilene Hardman
963			No one should change the order without consulting the customer. I don't like that it went from a right side to a left side. The installer was in a ratty looking truck and uniform. It didn't seem like a good representation of the company. The second installer came in looking more clean cut.		350 Diana St	Mitchell	Indiana	Ilene Hardman
964	FirstSTREET All-Products	Improvement Suggestion			350 Diana St	Mitchell	Indiana	Ilene Hardman
965	FirstSTREET All-Products	Value Received	It was the best investment ever!	Yes	350 Diana St	Mitchell	Indiana	Ilene Hardman
966	FirstSTREET All-Products	Current Referrals	I would recommend them to all my friends.		350 Diana St	Mitchell	Indiana	Ilene Hardman
967	FirstSTREET All-Products	Area Of Satisfaction	The tub itself is wonderful! It has helped my arthritis so much!	Yes	350 Diana St	Mitchell	Indiana	Ilene Hardman
968	FirstSTREET All-Products	Overall Experience	There was some serious install issues so it hard to say.		350 Diana St	Mitchell	Indiana	Ilene Hardman
969	FirstSTREET All-Products	Additional Comment	Thanks for a great job and caring about my home and how they put it in. They did a wonderful job.		189 Art Gallery Rd	Bedford	Indiana	Doyle & Joanne Phipps
970	FirstSTREET All-Products	Recognize Excellence	They were all good.		189 Art Gallery Rd	Bedford	Indiana	Doyle & Joanne Phipps
971	FirstSTREET All-Products	Quality And Performance	My husband can't even use it because he is paralyzed on the left side and it took him 2 hours to get out. . My son loves it.		189 Art Gallery Rd	Bedford	Indiana	Doyle & Joanne Phipps
972	FirstSTREET All-Products	Representative Follow Up	Kathy never called me. I was told to call Nate and he was supposed to call me back and he never called me back. He told me that three times and he has never called me back.		189 Art Gallery Rd	Bedford	Indiana	Doyle & Joanne Phipps
973	FirstSTREET All-Products	Improvement Suggestion	I think that the sales person should ask if they are paralyzed. And they should let them know that they may not be able to get out of the tub if so. My husband got in just fine and then we couldn't get him out. I had to have my nephew to come out him out. It took us 2 hours to get him out. The whole idea was to help make him feel better and he can't use it.		189 Art Gallery Rd	Bedford	Indiana	Doyle & Joanne Phipps

	A	B	C	D	F	G	H	P
1501	FirstSTREET All-Products	Recognize Excellence	No, its nothing special		8301 Mooses Ct	Las Vegas Nevada		William Schanel
1502	FirstSTREET All-Products	Review	We are not happy and this is a big rip off and they don't care, even if you die. They just want their money. They're not cheap.	Yes	8301 Mooses Ct	Las Vegas Nevada		William Schanel
1503	FirstSTREET All-Products	Representative Follow Up	They don't return your call, the minute they get the money you dint hear from them at all, nothing		8301 Mooses Ct	Las Vegas Nevada		William Schanel
1504	FirstSTREET All-Products	Improvement Suggestion	Try to be more careful when install, when its too big try to find a way to get it and not to squeeze it in, they leave hole toilet		8301 Mooses Ct	Las Vegas Nevada		William Schanel
1505	FirstSTREET All-Products	Value Received	We paid high for the thing for my stroke, and i only used once, the 1st time I tried to use by myself, I fell. I slipped and I fell. I couldn't even walk for 1 1/2 months. it was so slippery		8301 Mooses Ct	Las Vegas Nevada		William Schanel
1506	FirstSTREET All-Products	Current Referrals	I have people that is interested but I don't want to be the bad person and didn't answer.		8301 Mooses Ct	Las Vegas Nevada		William Schanel
1507	FirstSTREET All-Products	Area Of Satisfaction	None		8301 Mooses Ct	Las Vegas Nevada		William Schanel
1508	FirstSTREET All-Products	Overall Experience	The delivered on time, but all my doors were scraped, kept quite and no body came to paint it back, they were suppose to come this Friday, they haven't showed up wot fix all the scrapes on the wall		8301 Mooses Ct	Las Vegas Nevada		William Schanel
1509	FirstSTREET All-Products	Additional Comment	No		925 Rockaway St	Las Vegas Nevada		Larry Drake
1510	FirstSTREET All-Products	Recognize Excellence	C.J.		925 Rockaway St	Las Vegas Nevada		Larry Drake
1511	FirstSTREET All-Products	Improvement Suggestion	The only thing I would say is the electricians did kind of a sloppy job and Aging in The Home Remodelers had to fix it for them.		925 Rockaway St	Las Vegas Nevada		Larry Drake
1512	FirstSTREET All-Products	Current Referrals	No		925 Rockaway St	Las Vegas Nevada		Larry Drake
1513	FirstSTREET All-Products	Area Of Satisfaction	Professionalism in putting the tub in, explaining everything, and answering all my questions.		925 Rockaway St	Las Vegas Nevada		Larry Drake

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	FirstSTREET All-Products	Recognize Excellence			13310 Sage Heights			
1549	FirstSTREET All-Products	Quality And Performance	My lead installer was wonderful.		Dr	San Anton	Texas	Richard Hain
1550	FirstSTREET All-Products	Representative Follow Up	The tub takes 10 minutes to fill up. My salesperson never told me about this.		Dr	San Anton	Texas	Richard Hain
1551	FirstSTREET All-Products	Salesperson Demonstration	I did not contact any representative.		Dr	San Anton	Texas	Richard Hain
1552	FirstSTREET All-Products	Improvement Suggestion	The tub takes 10 minutes to fill up. My salesperson never told me about this.		Dr	San Anton	Texas	Richard Hain
1553	FirstSTREET All-Products	Area Of Satisfaction	Aging In The Home Remodelers needs to research a way to fill up the tub faster. There needs to be a holding tank.		Dr	San Anton	Texas	Richard Hain
1554	FirstSTREET All-Products	Overall Experience	The installation went well. The installers were professional, knowledgeable, thorough, and they cleaned up well.		Dr	San Anton	Texas	Richard Hain
1555	FirstSTREET All-Products	Additional Comment	The tub takes 10 minutes to fill up. My salesperson never told me about this. I do not like sitting in the tub waiting for it to fill up. I have only used three times since the installation.		Dr	San Anton	Texas	Richard Hain
1556	FirstSTREET All-Products	Recognize Excellence	They sent a guardian button at not charge!		1025 US-259	Henderson	Texas	Elizabeth Dismukes
1557	FirstSTREET All-Products	Installation Crew	The installers are so wonderful! They were able to leave the shower working and so I can use both!		1025 US-259	Henderson	Texas	Elizabeth Dismukes
1558	FirstSTREET All-Products	Review	The installer is awesome!		1025 US-259	Henderson	Texas	Elizabeth Dismukes
1559	FirstSTREET All-Products	Quality And Performance	Excellent company! Excellent service! I will use them again!	Yes	1025 US-259	Henderson	Texas	Elizabeth Dismukes
1560	FirstSTREET All-Products	Improvement Suggestion	The floor is dangerously slippery. That is a little scary.		1025 US-259	Henderson	Texas	Elizabeth Dismukes
1561	FirstSTREET All-Products	Area Of Satisfaction	Improving the non slip. The water in the hand held shower head has very little pressure. I wish I could change the pressure of the settings. I think they need to work on the salesman. He knew his stuff but he should have suggest the bigger tub. The installer caught the details and made the adjustment.		1025 US-259	Henderson	Texas	Elizabeth Dismukes
1562	FirstSTREET All-Products		The install new was one of the nicest people I've worked with.		1025 US-259	Henderson	Texas	Elizabeth Dismukes

	A	B	C	D	F	G	H	P
1573	FirstSTREET All-Products	Additional Comment	I think that a good product. It was very high priced, our children were not very thrilled. I believe the hydrotherapy is a good thing. I just do not want to be trapped in the water again. There was no way I could climb out. Also, I will also have a phone with me when I take a shower.		4114 Gorman Ave	Waco	Texas	Isaac Shiftlet
1574	FirstSTREET All-Products	Recognize Excellence	I would like to recognize the installation crew for their exceptional service. They were knowledgeable and professional.		4114 Gorman Ave	Waco	Texas	Isaac Shiftlet
1575	FirstSTREET All-Products	Quality And Performance	I called back in January because that was the first chance we had to use it and it was wonderful. But when I pulled the release to let the water out, it would not release. I know that it worked for the installers, but I could not get it to work. I left a message and they told me it was probably the weight of the water that was holding it in. They were going to get us a pump. I called they day we got it and they said they would schedule someone to come put it on. No one has showed up since. Also, I would like to return the life alert that was sent, I do not need it.		4114 Gorman Ave	Waco	Texas	Isaac Shiftlet
1576	FirstSTREET All-Products	Improvement Suggestion	One thing they can do better would be an immediate installation.		4114 Gorman Ave	Waco	Texas	Isaac Shiftlet
1577	FirstSTREET All-Products	Salesperson Professionalism	He was on time, but it was a lot of pressure.		4114 Gorman Ave	Waco	Texas	Isaac Shiftlet
1578	FirstSTREET All-Products	Area Of Satisfaction	I was most satisfied with the Hydrotherapy. The one time I got to use it it was wonderful, and I am really looking forward to using it again.		4114 Gorman Ave	Waco	Texas	Isaac Shiftlet

	A	B	C	D	F	G	H	P
1650	FirstSTREET All-Products	Area Of Satisfaction	The entire process was great. Due to weather the install was fowled up but that was no ones fault. They had not called me they were suppose to be here and were late but they were caught in a storm.		181 N Klein Rd	Steelville	Missouri	Rose Mary & Paula Lea Moorefield
1651	FirstSTREET All-Products	Improvement Suggestion	We were not given all of the information that needed to be given for financing.		2705 Station Ave	Sedalia	Missouri	Dwayne & Mildred Duncan
1652	FirstSTREET All-Products	Area Of Satisfaction	The job was competed quickly.		2705 Station Ave	Sedalia	Missouri	Dwayne & Mildred Duncan
1653	FirstSTREET All-Products	Additional Comment	I would like to speak with someone about fixing my water heater.		414 Highland Dr	Gretna	Nebraska	Gary & Nancy Zessin
1654	FirstSTREET All-Products	Recognize Excellence	Alan did a great job with the installation. He came back and fixed a small problem. Jared was a great sales person as well.		414 Highland Dr	Gretna	Nebraska	Gary & Nancy Zessin
1655	FirstSTREET All-Products	Quality And Performance	The water heater is not good because it goes cold fast.		414 Highland Dr	Gretna	Nebraska	Gary & Nancy Zessin
1656	FirstSTREET All-Products	Representative Follow Up	My wife tried to call them this morning and last week. We have still not heard back.		414 Highland Dr	Gretna	Nebraska	Gary & Nancy Zessin
1657	FirstSTREET All-Products	Improvement Suggestion	They can make sure they have the right size water heater for the tub.		414 Highland Dr	Gretna	Nebraska	Gary & Nancy Zessin
1658	FirstSTREET All-Products	Current Referrals	We have told some friends about them.		414 Highland Dr	Gretna	Nebraska	Gary & Nancy Zessin
1659	FirstSTREET All-Products	Area Of Satisfaction	The explanation by Alan was great.		414 Highland Dr	Gretna	Nebraska	Gary & Nancy Zessin
1660	FirstSTREET All-Products	Additional Comment	They sent me some kind of Guardian machine in the mail and I don't really understand it.		718 Sunrise Dr	Ripon	Wisconsin	Bonnie & Victor Luther
1661	FirstSTREET All-Products	Recognize Excellence	Both of the installers were good.		718 Sunrise Dr	Ripon	Wisconsin	Bonnie & Victor Luther

	A	B	C	D	F	G	H	P
			Well the faucet when you go to shower sometimes we get operate it we get no water. I've called Sebastian and he hasn't returned my call. When the switch is on we put it on shower but it can't go back to tub. We need to use pliers to get it to work. The gasket came off 2-3 days later but I glued it back. Anything that I can do I don't mind doing but this is out of my hands. I'm waiting on a call from Sebastian to send somebody out. Not very happy right now with the equipment. I don't know where it's made if in Mexico or China since you can't get anything build in America anymore.					
1743	FirstSTREET All-Products	Quality And Performance			1470 Fellowship Ln	Madisonville	Texas	Margaret & Mike Woycheshin
1744	FirstSTREET All-Products	Representative Follow Up	Waiting on Sebastian to call me back on problem with faucet and shower.		1470 Fellowship Ln	Madisonville	Texas	Margaret & Mike Woycheshin
1745	FirstSTREET All-Products	Value Received	Depends on the factor. Yes it's very expensive but it keeps you from falling in and out of the tub. I say a 3 for the reason nobody said it would take about 80 gallons of water to fill up the tub.		1470 Fellowship Ln	Madisonville	Texas	Margaret & Mike Woycheshin
1746	FirstSTREET All-Products	Area Of Satisfaction	Probably would be the storage place around the tub has space to put shampoo and stuff and that way it doesn't fall off.		1470 Fellowship Ln	Madisonville	Texas	Margaret & Mike Woycheshin
1747	FirstSTREET All-Products	Recognize Excellence	The installers.		4622 Karime Ave	Harlingen	Texas	Luas & Effie Cantu
1748	FirstSTREET All-Products	Quality And Performance	My wife fell twice in the tub because it is too slippery. She is afraid to get in there. They need to address this problem.		4622 Karime Ave	Harlingen	Texas	Luas & Effie Cantu
1749	FirstSTREET All-Products	Improvement Suggestion	Non slippery floor tub and seat.		4622 Karime Ave	Harlingen	Texas	Luas & Effie Cantu
1750	FirstSTREET All-Products	Area Of Satisfaction	The air jets.		4622 Karime Ave	Harlingen	Texas	Luas & Effie Cantu

	A	B	C	D	F	G	H	P
			When the salesperson comes to make the sale he should explain if there is going to be any remodeling. They couldn't even get it into the bathroom and had to tear down the door frame and cut into the walls. They put it back together in the end but I wasn't aware that was going to happen.					
1775	FirstSTREET All-Products	Improvement Suggestion			4826 W Beverly Ln	Glendale	Arizona	Stanley Rebmann
1776	FirstSTREET All-Products	Recognize Excellence	I would like to recognize Jessica with Aging in the home Remodelers.		3006 E Harwell Rd	Phoenix	Arizona	Jan Lee
			I feel that they fell short with the installers of the company that they contracted for the install. The process should have taken 2 days rather than 1 full day. It was quite a tense process for me. They were on time and did minimal damage. The work that they did to fix back up was just okay. I also never did get my free gift of a year subscription to an alert system.		3006 E Harwell Rd	Phoenix	Arizona	Jan Lee
1777	FirstSTREET All-Products	Improvement Suggestion	I was most satisfied with the original salesman and Jessica, who was from the Aging In The Home Remodelers company.					
1778	FirstSTREET All-Products	Area Of Satisfaction			3006 E Harwell Rd	Phoenix	Arizona	Jan Lee
1779	FirstSTREET All-Products	Additional Comment	It has helped my arthritis. It's a wonderful thing. We use it regularly.		5735 Wildwood Dr	Marysville	California	Rick and Connie Fagan
			Chris. He was exceptional. He was over quickly to resolve a problem and we worked through it together and he explained what was happening. He was great.					
1780	FirstSTREET All-Products	Recognize Excellence			5735 Wildwood Dr	Marysville	California	Rick and Connie Fagan
1781	FirstSTREET All-Products	Improvement Suggestion	They did a wonderful job.		5735 Wildwood Dr	Marysville	California	Rick and Connie Fagan
1782	FirstSTREET All-Products	Current Referrals	No.		5735 Wildwood Dr	Marysville	California	Rick and Connie Fagan
1783	FirstSTREET All-Products	Area Of Satisfaction	The installer was excellent. The tub looks like it was made for the house.		5735 Wildwood Dr	Marysville	California	Rick and Connie Fagan
1784	FirstSTREET All-Products	Recognize Excellence	My crew was great.		410 E Parmenter St	Lamar	Colorado	Pat & Howard Hobbs

	A	B	C	D	F	G	H	P
2033	FirstSTREET All-Products	Likely To Recommend	I am, but with the idea that they need to look at what trouble we had with the water pressure.		1564 Covered Bridge Rd	Beavertow	Pennsylvania	Paul & Sylvia Brosious
2034	FirstSTREET All-Products	Installation Crew	They were very good.		1564 Covered Bridge Rd	Beavertow	Pennsylvania	Paul & Sylvia Brosious
2035	FirstSTREET All-Products	Quality And Performance	We don't have enough water pressure to make it operate the way it should. We can't use it the way it's suppose to be used.		1564 Covered Bridge Rd	Beavertow	Pennsylvania	Paul & Sylvia Brosious
2036	FirstSTREET All-Products	Salesperson Demonstration	He did, except for the fact about the water pressure. We have a well and I think those tubs are meant for towns or cities. I don't know if he mentioned that at all, but he might have.		1564 Covered Bridge Rd	Beavertow	Pennsylvania	Paul & Sylvia Brosious
2037	FirstSTREET All-Products	Improvement Suggestion	Tell people in the country just what trouble we had (see previous comments about the water pressure).		1564 Covered Bridge Rd	Beavertow	Pennsylvania	Paul & Sylvia Brosious
2038	FirstSTREET All-Products	Value Received	I have no problems with the tub itself, just with the fact that we can't use it. It cost \$18,000 and we can't use it the way it's suppose to be used. We were very disappointed in that aspect. I had high hopes we were going to be able to use it well.		1564 Covered Bridge Rd	Beavertow	Pennsylvania	Paul & Sylvia Brosious
2039	FirstSTREET All-Products	Area Of Satisfaction	It's low, so we have no trouble getting in and out of it, and that's wonderful.		1564 Covered Bridge Rd	Beavertow	Pennsylvania	Paul & Sylvia Brosious
2040	FirstSTREET All-Products	Recognize Excellence	I would like to recognize the installer for his exceptional service.		3515 Missouri Ave	Richmond	Virginia	Evelyn Smith
2041	FirstSTREET All-Products	Area Of Satisfaction	I was most satisfied after they put it in, and I did not have to fall into the tub anymore.		3515 Missouri Ave	Richmond	Virginia	Evelyn Smith
2042	FirstSTREET All-Products	Recognize Excellence	I want to recognize everyone. They all did a great job.		23549 VA-47	South Hill	Virginia	Catherine Crowe
2043	FirstSTREET All-Products	Review	I am glad about the lifetime warranty.	Yes	23549 VA-47	South Hill	Virginia	Catherine Crowe
2044	FirstSTREET All-Products	Area Of Satisfaction	I was satisfied by their promptness.		23549 VA-47	South Hill	Virginia	Catherine Crowe
2045	FirstSTREET All-Products	Likely To Recommend	The salesperson said we would get a LifeAlert Guardian. We have not heard from him about it and we would like to receive the LifeAlert.		5974 Alum Ridge Rd NW	Floyd	Virginia	Leslie and Joyce Pugh

	A	B	C	D	F	G	H	P
	FirstSTREET All-Products	Installer Knowledge	He showed me how to operate it but did not answer all of my questions.		5639 S Pershing St	Derby	Kansas	Cindy Wood
2476	FirstSTREET All-Products	Installation Completed On Time	The job was supposed to take two days but instead they stuck around until 11 PM that night to finish it.		5639 S Pershing St	Derby	Kansas	Cindy Wood
2477	FirstSTREET All-Products	Representative Follow Up	I tried to call them about it. I sent Marcus pictures of it and never heard anything back.		5639 S Pershing St	Derby	Kansas	Cindy Wood
2478	FirstSTREET All-Products	Salesperson Demonstration	It took over a year for us to get it, so don't really recall the sales experience. The installers explained how to use the tub when I got it.		5639 S Pershing St	Derby	Kansas	Cindy Wood
2479	FirstSTREET All-Products	Improvement Suggestion	The insulation should have been better.		5639 S Pershing St	Derby	Kansas	Cindy Wood
2480	FirstSTREET All-Products	Area Of Satisfaction	I was satisfied most that the tub works great. It does what it needs to. The jets work. That's about it.		5639 S Pershing St	Derby	Kansas	Cindy Wood
2481	FirstSTREET All-Products	Installation Schedule	They should have come sooner but they never called.		340 Meek Ave	Arkansas	Kansas	Nancy & Bill Greenwood
2482	FirstSTREET All-Products	Quality And Performance	They have slipped and fell in the tub. They can't open the door to the tub. They are afraid to go back in there now.		340 Meek Ave	Arkansas	Kansas	Nancy & Bill Greenwood
2483	FirstSTREET All-Products	Installation Procedure	We did so much work and were not getting much out of it. I would not recommend it for anyone. It was really a bad idea.		340 Meek Ave	Arkansas	Kansas	Nancy & Bill Greenwood
2484	FirstSTREET All-Products	Salesperson Demonstration	I don't think he explained the door very well. He did pretty good at explaining almost everything else but the door. Did not rate this one.		340 Meek Ave	Arkansas	Kansas	Nancy & Bill Greenwood
2485	FirstSTREET All-Products	Improvement Suggestion	I would suggest they fix the door and the slipperiness in the seat and the floor. The door runs into their legs. He said it would not do that and it does.		340 Meek Ave	Arkansas	Kansas	Nancy & Bill Greenwood
2486	FirstSTREET All-Products	Value Received	It's only a fair value if it actually works for someone. The commercial shows it is for handicap people and it is no help to them at all.		340 Meek Ave	Arkansas	Kansas	Nancy & Bill Greenwood
2487	FirstSTREET All-Products	Current Referrals	I would not recommend them at all.		340 Meek Ave	Arkansas	Kansas	Nancy & Bill Greenwood
2488	FirstSTREET All-Products							

	A	B	C	D	F	G	H	P
2566	FirstSTREET All-Products	Improvement Suggestion	I think they should make the door opening wider.		1815 Rosebud Ct	College St	Texas	Floyd & Annabelle Thurman
2567	FirstSTREET All-Products	Value Received	I guess.		1815 Rosebud Ct	College St	Texas	Floyd & Annabelle Thurman
2568	FirstSTREET All-Products	Area Of Satisfaction	I was pleased with everything.		1815 Rosebud Ct	College St	Texas	Floyd & Annabelle Thurman
2569	FirstSTREET All-Products	Additional Comment	I was supposed to get a Home Alert for around my neck, but I have yet to receive it.		112 Hanback Rd	Gordonsvi	Virginia	Roberta Bennett
2570	FirstSTREET All-Products	Recognize Excellence	The installers were really good.		112 Hanback Rd	Gordonsvi	Virginia	Roberta Bennett
2571	FirstSTREET All-Products	Review	It was very quick and they were very professional. They were ahead of time.	Yes	112 Hanback Rd	Gordonsvi	Virginia	Roberta Bennett
2572	FirstSTREET All-Products	Area Of Satisfaction	It is good for soaking. I like the whirlpool jets.		112 Hanback Rd	Gordonsvi	Virginia	Roberta Bennett
2573	FirstSTREET All-Products	Additional Comment	I do appreciate everyone following up. It is a sign of good customer service.		309 Doe Trl	Wincheste	Virginia	Barbara Fletcher
2574	FirstSTREET All-Products	Recognize Excellence	The project manager told me about the electrical panel and said they would take care of the cost. But then they didn't even do what they had to do. The plumber went above and beyond. I guess I should have asked questions about these things. They said here is the price today and here is the price in 45 days. I should have thought about it more.		309 Doe Trl	Wincheste	Virginia	Barbara Fletcher
2575	FirstSTREET All-Products	Installation Procedure	I do not remember it being explained in the detail it ended up being what I really needed. My box was full but he said I needed 2 breakers. He was quoting me \$500 plus to put in a sub panel. He said they would have to take out all the wires and it was to much money for me. They ended up doing what I said I would do. He did not even go and look at the panel. I do not know if they were trying to get me t pay more money or what. They were clean and professional.		309 Doe Trl	Wincheste	Virginia	Barbara Fletcher

	A	B	C	D	F	G	H	P
	FirstSTREET All-Products	Current Referrals	no		2721 Lakeview Cir	Plattsmouth	Nebraska	Judith & Christopher Darrell
3193			The second contractor was very efficient and courteous. Justin did very nice work, but some finishing work still needs to be done.					
3194	FirstSTREET All-Products	Area Of Satisfaction	I thought they were the best of the brand and that's why we went with them, but we are totally shocked with how they treated us and especially because of our age. They were very snarky, and had terrible communication with us. I can't tell you how awful it was.		2721 Lakeview Cir	Plattsmouth	Nebraska	Judith & Christopher Darrell
3195	FirstSTREET All-Products	Additional Comment	They were supposed to be done within two days and it took them two and a half weeks. The project is still not 100% complete.		7006 Clubhouse Dr	New Bern	North Carolina	Donna & Daniel Addario
3196	FirstSTREET All-Products	Installation Schedule			7006 Clubhouse Dr	New Bern	North Carolina	Donna & Daniel Addario
3197	FirstSTREET All-Products	Quality And Performance	I am talking to a lawyer about the tub itself, it doesn't have any traction on the bottom, because both my husband and I have fallen down in the tub. This whole thing with the company has been an ongoing struggle, from the day we called them to now.		7006 Clubhouse Dr	New Bern	North Carolina	Donna & Daniel Addario
3198	FirstSTREET All-Products	Installation Procedure	This has been the worst part, we are going to do a legal procedure against them but absolutely no communication. The entire marketing aspect was absolutely ridiculous. The tub is not safe for anyone over the age of 50.					Donna & Daniel Addario
3199	FirstSTREET All-Products	Installer Knowledge	They weren't really good at demonstrating everything.		7006 Clubhouse Dr	New Bern	North Carolina	Donna & Daniel Addario
3200	FirstSTREET All-Products	Installation Completed On Time	The installer was having a child so they should have known it wasn't going to be completed in two days. We didn't have any water for 5-6 days.					Donna & Daniel Addario
3201	FirstSTREET All-Products	Representative Follow Up	I'm still waiting for someone to call me back and at least tell me what happened		7006 Clubhouse Dr	New Bern	North Carolina	Donna & Daniel Addario

EXHIBIT 39

EXHIBIT 39

BENJAMIN P. CLOWARD, ESQ.

Nevada Bar No. 11087

RICHARD HARRIS LAW FIRM

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Attorneys for Plaintiff

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,

Plaintiff,

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,

Defendants.

AND ALL RELATED MATTERS

CASE NO.: A-16-731244-C

DEPT NO.: II

**PLAINTIFFS' MOTION TO
COMPEL DEFENDANT
FIRSTSTREET TO PRODUCE
DOCUMENTS ON ORDER
SHORTENING TIME**

Date of Hearing:

Time of Hearing:

**PLAINTIFFS' MOTION TO COMPEL DEFENDANT FIRSTSTREET TO PRODUCE
DOCUMENTS ON ORDER SHORTENING TIME**

Plaintiffs, by and through their attorney of records, Benjamin P. Cloward, Esq. of the Richard Harris Law Firm, submits this Motion to Compel Defendant FirstStreet. This Motion is made and based on the papers and pleadings on file herein, the following Memorandum of Points and Authorities, and the oral argument of counsel at the hearing on this Motion.

DATED this 27th day of October, 2018.

RICHARD HARRIS LAW FIRM

 #12 575

BENJAMIN P. CLOWARD, ESQ.

Nevada Bar No. 11087

801 South Fourth Street

Las Vegas, Nevada 89101

Attorneys for Plaintiffs

ORDER SHORTENING TIME

TO: ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD

This matter having been brought on **PLAINTIFFS' MOTION TO COMPEL DEFENDANT FIRSTSTREET TO PRODUCE DOCUMENTS ON ORDER SHORTENING TIME**, the Court having examined the pleadings and papers on file herein, the affidavit in support of motion, and the points and authorities submitted herewith, and good causing appearing, IT IS HEREBY ORDERED that the time of the hearing on the motion is shortened to the ____ day of _____, 2018 at the hour of _____ a.m./p.m., in front of Discovery Commissioner Bulla, at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155.

DATED this ____ day of _____, 2018.

DISCOVERY COMMISSIONER

Submitted by:

RICHARD HARRIS LAW FIRM


BENJAMIN P. CLOWARD, ESQ.

Nevada Bar No. 11087
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiffs

DECLARATION OF BENJAMIN P. CLOWARD

STATE OF NEVADA)
)
COUNTY OF CLARK)

I, BENJAMIN P. CLOWARD, being first duly sworn, depose and say:

1. I am qualified to testify regarding the foregoing.

2. Approximately 2-3 days *before* the *continued* deposition of Rule 30(b)(6) designee Michael Dominguez, counsel for Defendant FirstStreet contacted me by phone to discuss several issues.

3. FirstStreet indicated it became very upset after the Rule 30(b)(6) deposition, wherein Jacuzzi testified that Jacuzzi had no involvement in the marketing or advertising of the walk-in tubs.

4. FirstStreet explained that all advertising had to be first approved by Jacuzzi and there were thousands of emails from FirstStreet to Jacuzzi asking for approval of certain ads.

5. FirstStreet's counsel indicated that an effort was being made to produce the emails prior to the continued deposition, but that due to the sheer volume of the emails it was not possible to produce them prior to the deposition.

6. I told FirstStreet's counsel that as long as the emails were turned over very shortly after the deposition that would be fine.

7. At the continued deposition of Rule 30(b)(6) designee, Michael Dominguez, Jacuzzi again claimed it was not involved in the marketing aspects of the tub.

8. At the first of October, I contacted FirstStreet's counsel and asked for the emails and for the discovery responses which were overdue.

9. FirstStreet's counsel indicated that several lawyers at her firm had been assigned to go through the emails and that they would be forthcoming.

10. FirstStreet's counsel indicated the discovery responses would be served "the next week" and that the emails would be forthcoming hopefully near the end of the next week or the week after for sure.

1 11. The following week, FirstStreet answered the outstanding discovery, but did not
2 produce any emails.

3 12. On Friday, October 12, 2018, I contacted FirstStreet's counsel via email and
5 indicated if the emails were not forthcoming, I would need to file a motion to compel.

6 13. The following week, I contacted FirstStreet's counsel via text, email and by
7 phone in an attempt to obtain the emails and was informed that Phil Goodhart was handling the
8 emails and I should follow-up with him.

9 14. At the deposition of Rhonda Bonecutter, on October 19, 2018, I asked Mr.
10 Goodhart whether the emails were going to be produced or whether I needed to file a motion to
11 compel.

12 15. Mr. Goodhart indicated that until Plaintiffs' recent Request for Production
13 [served on September 25, 2018], the emails were not responsive to any outstanding request and
14 that they were not relevant because there were no cross-claims between the parties.

15 16. I asked Mr. Goodhart to review the allegations in the complaint and indicated that
16 they were relevant for Plaintiffs' to prove Plaintiffs' case-in-chief and that they needed to be
17 turned over via NRCP 16.1.

18 17. Mr. Goodhart indicated I should call him on Monday (October 22, 2018).

19 18. I contacted Mr. Goodhart on Monday October 22, 2018 via email and called his
20 office leaving a message trying to resolve this matter without court intervention.

21 19. At no point did FirstStreet's counsel agree to produce the emails in lieu of
22 Plaintiffs filing a motion to compel despite repeated requests to have them produced.

23 20. The emails and documents are necessary for Plaintiffs' to prepare for the
24 upcoming FirstStreet and AITHR Rule 30(b)(6) depositions currently scheduled for mid-
25 November.

26 21. Plaintiff therefore requests that this motion be heard on order shortening time in
27 order to allow time for the requested documents to be produced and reviewed prior to the Rule
28 30(b)(6) depositions.

22. The foregoing is true and accurate.

FURTHER, AFFIANT SAYETH NAUGHT

Dated this 24th day of October, 2018.

BENJAMIN P. CLOWARD

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a product liability case arising out of a February 19, 2014 incident which resulted in the tragic and prolonged death of Sherry Cunnison (“Sherry”). Like many elderly Americans, Sherry had difficulty getting in and out of traditional bath tubs. Sherry purchased a Jacuzzi Walk-In Tub to assist her with bathing based on the promises made by Jacuzzi regarding the safety features associated with its Walk-in Tubs.

On February 19, 2014, just the second or third time using her newly purchased Jacuzzi Walk-in Tub, Sherry began taking a bath. Due to the defective design of the Tub, Sherry slipped off the front of the seat while reaching for the poorly placed tub controls and drain-lever, located out of reach at the front of the tub. As her bottom slipped off from the front of the tub seat, she became wedged in the footwell of the tub such that she was unable to stand back up. She ultimately became trapped in a living hell remaining in that awful position for nearly 3 days.

After not hearing from Sherry, her family and friends became concerned. The local police were contacted to perform a wellness check. Sherry was discovered trapped in the Jacuzzi walk-in tub. Due to the terrible design features of the tub (having an inward opening door) even four trained Firefighters/Paramedics could not initially extricate Sherry from the tub. The Firefighters/Paramedics tried desperately to remove her from the tub ultimately snapping her arm as they tried to pull her from the bottom of the tub. After snapping her arm, the Firefighters/Paramedics finally resorted to cutting the door completely off the tub to free Sherry. She was rushed to the hospital where she died a few days later of severe dehydration and rhabdomyolysis.

II. LEGAL ARGUMENT

The advertising claims are a central part of Plaintiffs’ complaint in this case. Plaintiff’s Fourth Amended Complaint sets forth the following relevant allegations¹:

¹ See, Plfs. 4th Amended Complaint, attached hereto as **Exhibit 1** (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

5 4 88. Defendants knew of the heightened risk of having users like SHERRY fall down inside
6 5 the Jacuzzi walk-in bathtub, and have difficulties getting back up or out of the bathtub, but did nothing
7 6 to mitigate that risk.

8 7 89. Defendants knew of the heightened risk of having users like SHERRY fall down inside
9 8 the Jacuzzi walk-in bathtub, and have difficulties getting back up or out of the bathtub, but did nothing
10 9 to reduce that risk.

11 10 90. In fact, Defendants knew of alternative designs for a walk-in bathtub that were much
12 11 safer to users like SHERRY who were at a substantial risk of falling down inside the Jacuzzi walk-in
13 12 bathtub and were unable to get back up or out of the bathtub but chose against implementing
14 13 alternative designs for increased profitability.

15 14 91. Because of Defendants conscious choices to put profits before safety, the Jacuzzi walk-
16 15 in bathtub is a deathtrap for nearly any elderly person who happens to fall down inside the bathtub
17 16 because there are no grab bars positioned in a way that someone can get back up if they fall down and
18 17 because the door opens inward and traps the elderly person inside the bathtub.

19 18
20 19
21 20 The allegations Plaintiffs set forth were based in part on the advertising Sherry Cunnison
22 21 was shown to induce her to purchase a tub.

23 22 The advertising she was shown suggested the Jacuzzi walk-in Tub marketed and sold by
24 23 FirstStreet had clear health and safety benefits compared to a regular bathtub. The advertising
25 24 also used fear as a primary motivating factor to induce the elderly and their children to purchase
26 25 a tub.

27 26 Specifically, the advertising made the following claims²:

28 27
29 28 ² See, Jacuzzi Brochure, attached hereto as **Exhibit 2**.



Features & Benefits

Jacuzzi® Walk-In Hot Tubs not only provide a safe and enjoyable way to take a bath, but also provide health benefits that can greatly improve your quality of life. The air and water jets may help to improve circulation and ease the symptoms of arthritis, back problems, muscle cramps, osteoarthritis, and other various injuries. Plus, you'll have the independence and worry-free ability to enjoy bathing again safely.

In the next 17 seconds, an older adult will be treated in a hospital emergency department for injuries related to a fall. In the next 30 minutes, an older adult will die from injuries sustained in a fall. Most falls occur in the bathroom, getting in and out of the tub.

Falls account for 65% of all home injury deaths for adults age 65-84.1 in 3 seniors will fall this year. Adults age 65 and older experience an average of 2.3 million nonfatal home injuries annually.

**Cost of Assisted
Living Facility:**
\$900 per week
\$46,800 per year

**Cost of Private
Nursing Home:**
\$1,300 per week
\$82,000 per year

During discovery, the Plaintiffs learned that there was a manufacturing agreement which clearly laid out the responsibilities of each party.³

A. Advertising and Marketing in this case

The Manufacturing Agreement ("MA") set out that FirstStreet was the "exclusive marketing" partner for Jacuzzi's walk-in bathtubs.⁴

...

³ See generally, Manufacturing Agreement (hereinafter referred to as MA) at pg. 5 (FIRST000006), attached hereto as **Exhibit 3**.

⁴ See, MA at pg. 5 (FIRST000006), attached hereto as **Exhibit 3**.

1 In the MA, Jacuzzi promised to provide FirstStreet with the “existing approved
2 advertising claims and claims support documentation . . . for use in FirstStreet’s advertisements
3 and marketing materials.”⁵

5 Jacuzzi promised that the information provided to FirstStreet supporting Jacuzzi’s
6 advertising claims would be “truthful, accurate, non-misleading, and adequately substantiated
7 (meaning claims based on tests, analyses, research, studies, or other evidence based on the
8 expertise of professionals in the relevant area . . .” Specifically, the MA set forth⁶:

9
10 Product will be similar and consistent with the pricing that is extended by JI to
11 other dealers or entities that sell the Finestra Product. JI will also sell FS all its
12 other JACUZZI-branded bath products (not subject to an exclusive supply or a
13 license agreement), including but not limited to all other walk-in tubs, whirlpool
14 tubs and jetted tubs (collectively, including the Finestra Product, the “Additional
15 Products”).

16 FirstStreet was required to submit all proposed marketing and advertising materials to
17 Jacuzzi prior to dissemination to the public. The agreement stated⁷:

18 . . .

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27 ⁵ See, MA at pg. 2 (FIRST000006), attached hereto as **Exhibit 3**.

28 ⁶ See, MA at pg. 2 (FIRST000006), attached hereto as **Exhibit 3**.

⁷ See, MA at pg. 4 (FIRST000006), attached hereto as **Exhibit 3**.

1 E. FS will use the materials and standards provided by JI as specified in Section 1.F.
2 of this Agreement to develop its advertisements and marketing material for the
3 ~~Products, and FS agrees that its advertisements and marketing materials for the~~
4 ~~Products will be consistent with those materials and standards. FS will submit its~~
5 ~~national advertising and marketing materials to JI to allow JI to confirm that the~~
6 ~~claims are accurate and that the advertisements and marketing materials comply~~
7 ~~with the Guidelines. JI agrees to respond to such submissions not later than three~~
8 ~~(3) business days after receipt of each such submission, and may require FS to~~
9 ~~change the advertising and marketing materials if such materials do not comply~~
10 ~~with the materials and standards provided by JI as specified in Section 1.F. of this~~
11 ~~Agreement and the Guidelines. JI cannot require FS to change the advertising and~~
12 ~~marketing materials based on the style and concept of the advertisements and~~
13 ~~marketing materials, including television advertising. Subject to the foregoing, for~~
14 ~~television advertising, JI can review the story board for factual and brand~~
15 ~~inconsistencies within the reasonable time frame specified by FS, and request~~
16 ~~changes to the story board based on any factual or brand inconsistencies only. JI~~
17 ~~does not have input into the creative concepts or style of the commercial or~~
18 ~~advertisement. Once a television commercial or advertisement is made, as long as~~
19 ~~it is consistent with the story board, JI cannot request any changes.~~

20 As shown above, the MA required FirstStreet to submit the advertising to confirm that
21 "the claims are accurate and that the advertisements and marketing materials comply with the
22 Guidelines [and that Jacuzzi] can review the story board for factual and brand inconsistencies."⁸

23 To assist FirstStreet with its marketing efforts, Jacuzzi promised to provide FirstStreet
24 with the "existing approved advertising claims and claims support documentation . . . [and that]
25 the claims and claims support provided to FS from JI, if any, will be truthful, accurate, non-
26 misleading, and adequately substantiated..."⁹

27 . . .

28 . . .

. . .

⁸ See, MA at pg. 4 (FIRST000006), attached hereto as **Exhibit 3**.

⁹ See, MA at pg. 2 (FIRST000006), attached hereto as **Exhibit 3**.

Product will be similar and consistent with the pricing that is extended by JI to other dealers or entities that sell the Finestra Product. JI will also sell FS all its other JACUZZI-branded bath products (not subject to an exclusive supply or a license agreement), including but not limited to all other walk-in tubs, whirlpool tubs and jetted tubs (collectively, including the Finestra Product, the "Additional Products").

Plaintiffs sought to have Defendants Jacuzzi and FirstStreet identify and produce the marketing materials used to induce the elderly, including Sherry, to purchase its walk-in bathtub.

One of the first things Plaintiffs did was to send requests for production to Jacuzzi asking for the marketing and advertising materials used to promote the Jacuzzi Walk-in Tub.

Despite the MA clearly stating that:

- 1) Jacuzzi would provide FirstStreet with "existing approved advertising claims"; and
- 2) FirstStreet "will submit its national advertising and marketing claims to Jacuzzi . . . to confirm that the claims are accurate. . . ."¹⁰

Jacuzzi claimed in written discovery that it was unaware of any sales materials used to market the walk-in bathtubs.¹¹

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¹⁰ See, MA at pg. 4 (FIRST000006), attached hereto as **Exhibit 3**.

¹¹ See, Jacuzzi Resp. to Pltf Req. for Prod. No. 27, attached hereto as **Exhibit 4**; Jacuzzi was also asked in Nos. 28-32 for sales and marketing materials provided to overweight patients or patients with mobility issues. The response was the same, "*Defendant is unaware of any specific sales materials . . . Jacuzzi did not produce marketing materials related to this tub.*"

REQUEST FOR PRODUCTION NO. 27:

Any sales material provided to elderly folks (over the age of 55) concerning the safety features of the Jacuzzi Walk In Tub. (These should be documents that were used prior to the date of loss of February 27, 2014).

RESPONSE:

Defendant is unaware of any specific sales materials provided to "elderly folks." Jacuzzi did not produce marketing materials related to this tub.

Defendant objects to the use of the phrase "sales material provided to elderly folks (over the age of 55)" because it implies that Jacuzzi knows the age or identity of individual people or population groups that received specific materials. Therefore, Defendant's Response is limited to sales material concerning the safety features of the Jacuzzi® Walk-In Bathtub.

Finding it hard to believe that despite the clear language in the MA setting forth the obligations of each party, Plaintiffs sought to confirm with Jacuzzi that it was not involved in the marketing and set forth the following Rule 30(b)(6) topics¹²:

...

...

...

¹² See, Plfs. Rule 30(b)(6) deposition notice, attached hereto as **Exhibit 5**.

SALES AND MARKETING TESTIMONY GENERAL

21. Testimony regarding the policies and procedures used by Jacuzzi to advertise and sell Jacuzzi walk in tubs.
22. Jacuzzi, Inc.'s, sales department, generally, concerning the advertising, marketing, sale and post-sale matters concerning the identification of the consumers that would likely use Jacuzzi's walk in tubs.
23. Jacuzzi, Inc.'s, sales department, generally, concerning the advertising, marketing, sale and post-sale matters concerning the subject Jacuzzi design of walk in tubs.
24. Identification of all persons known to Defendant who trained, directed or supervised to advise end users of the safety of Jacuzzi tubs.
25. Identification of all persons known to Defendant who trained, directed or supervised individuals to design walk in tubs that could cause or contribute to user being trapped in tub resulting in injury or death.

At the deposition, Jacuzzi "doubled-down" that it was not involved in any way with the marketing and that it was solely FirstStreet's obligation to produce any and all advertisement. The following testimony is important¹³:

...
...
...

¹³ See, Deposition of Rule 30(b)(6) designee Michael Dominguez, at 117-118, attached hereto as **Exhibit 6** (emphasis added).

Q. Okay.

"FS will submit its national
advertising and marketing materials
to JI to allow Jacuzzi to confirm that
the claims are accurate and that the
advertisements and marketing materials
comply with the guidelines."

Did I read that correct?

A. That's correct.

Q. Have they done that, have they submitted -- did
they submit those?

A. Not to my knowledge.

Q. And if not you, then who would have that
knowledge, Mr. Torres?

A. Yes.

Q. Okay. And he left how long ago?

A. Four years ago.

Q. Four years ago.

And so the last four years they haven't come
to you and asked you to approve any of their

Michael A. Dominguez, Volume I Robert Ansara, et al. v. First Street for Boomers & Beyond, Inc., et al.

1 advertisements --

2 A. No.

3 Q. -- is that correct?

4 A. That's correct.

After the *first* deposition of Mr. Dominguez, and several days before the continued *second* deposition, counsel for FirstStreet contacted counsel for the Plaintiffs and indicated that there were thousands of emails that contradicted what was said at the deposition.¹⁴ Specifically, FirstStreet indicated that FirstStreet was not allowed to do any advertising *without first* getting Jacuzzi's approval and that any and all claims ever made by FirstStreet were first submitted to Jacuzzi for approval.¹⁵

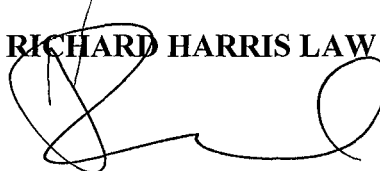
Both Jacuzzi and FirstStreet have an obligation pursuant to NRCP 16.1 to produce documents that are relevant regardless of whether any party has requested them pursuant to Rule 34. Specifically, the *mandatory language of NRCP 16.1 states, "a party must, without awaiting a discovery request, provide to the other parties: . . . (B) A copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and which are discoverable under Rule 26(b)."* See, NRCP 16.1 (a)(1) (emphasis added).

IV. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Compel Defendant FirstStreet to produce the e-mails and documents requested.

DATED this 24th day of October, 2018.

RICHARD HARRIS LAW FIRM

 #12575
BENJAMIN P. CLOWARD, ESQ.
Nevada Bar No. 11087
801 South Fourth Street
Las Vegas, Nevada 89101
Attorneys for Plaintiff

¹⁴ See, Declaration of Benjamin Cloward.

¹⁵ See, Id.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of RICHARD HARRIS LAW FIRM and that on this _____ day of October, 2018, I served a copy of the foregoing, **PLAINTIFFS' MOTION TO COMPEL DEFENDANT FIRSTSTREET TO PRODUCE DOCUMENTS ON ORDER SHORTENING TIME**, in Ansara, Robert, et al. v. First Street for Boomers & Beyond, Inc., et al., Clark County District Court Case No. A-16-731244-C, as follows:

- ☐ Electronic Service – in accordance with Administrative Order 14-2 and Rule 9 of the Nevada Electronic Filing and Conversion Rules (N.E.F.C.R.).
- ☐ U.S. Mail—By depositing a true copy thereof in the U.S. mail, first class postage prepaid and addressed as listed below; and/or
- ☐ Facsimile—By facsimile transmission pursuant to EDCR 7.26 to the facsimile number(s) shown below and in the confirmation sheet filed herewith. Consent to service under NRCP 5(b)(2)(D) shall be assumed unless an objection to service by facsimile transmission is made in writing and sent to the sender via facsimile within 24 hours of receipt of this Certificate of Service; and/or
- ☐ Hand Delivery—By hand-delivery to the addresses listed below.

SEE ATTACHED SERVICE LIST

**

An employee of RICHARD HARRIS LAW FIRM

SERVICE LIST

Ansara, Robert, et al. v. First Street for Boomers & Beyond, Inc., et al.
Clark County District Court Case No. A-16-731244-C

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Jacuzzi Brands, LLC*

EXHIBIT 40

EXHIBIT 40

9

Nicole Griffin

From: Cools, Joshua <jcools@swlaw.com>
Sent: Thursday, February 15, 2018 9:09 AM
To: Benjamin Cloward
Cc: Nicole Griffin
Subject: RE: Cunnison

Ben – Please give me a call today to discuss these terms. I would like to clarify that you are proposing these terms for the “other incident” search, not internal communications about Ms. Cunnison’s claim. Thanks. – Josh

From: Cools, Joshua
Sent: Wednesday, February 14, 2018 9:18 AM
To: 'Benjamin Cloward'
Cc: Nicole Griffin
Subject: RE: Cunnison

Ben – In addition to giving me a call about these terms, please let me know asap if March 21 or 22 are going to work for you for the 30b6 deposition. I need to let my client know if they need to continue holding that or look for new dates. – Josh

From: Benjamin Cloward [<mailto:Benjamin@richardharrislaw.com>]
Sent: Monday, February 12, 2018 7:23 PM
To: Cools, Joshua
Cc: Nicole Griffin
Subject: Cunnison

Hi Josh,

We would like for your client to add the following search terms:

1. Fall
2. Slip
3. Elderly
4. Overweight
5. Entering
6. Exiting
7. Door
8. Stability
9. Stable body position
10. Water controls
11. Seat
12. Hand holds
13. Hand grips
14. Grab rails
15. Grab bars
16. Grip bar
17. Design
18. Incident

19. Testing

20. Audit

Please let me know if you have questions.

Thank you,

Benjamin P. Cloward, Esq.

-Nevada Trial Lawyer of the Year (Nevada Justice Association) – 2016

-Board Certified Personal Injury Specialist (State Bar of Nevada) – Since 2016

-ABOTA Member Since 2016, Graduate of Gerry Spence Trial Lawyer College 2013



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EXHIBIT 41

EXHIBIT 41

9

Timeline for Reply in Support with respect to Discovery cutoff deadline (& also trial date)

DATE	DESCRIPTION
11/2/18	Minute Order: Disco cutoff extended to 1/25/19 (1/18/19 date rescinded); Trial reset from March 2019 to 4/22/19 trial stack
1/9/19	Jacuzzi filed Mot. to Stay Proceedings due to Pet. for Writ of Prohibition filed 12/7/18
1/10/19	Pls. filed Mot. to Strike Jacuzzi's Answer on OST
1/16/19	Pls. filed Mot. to Strike FS' & AITHR's Answer on OST
2/4/19	<p>Hr'g on both Motions to Strike at 98:18-20, 99:10-15, 99:21-23 Court stayed "all other activity"</p> <p>THE COURT: All right. So, I'm going to -- we're just going to have a temporary stay of all other activity through the 13th, Wednesday, February 13th. All right?</p> <p>THE COURT: So, on the [Feb] 13th, if not before, I will issue my order in this matter also indicating whether we need to have an evidentiary hearing on any issues and also indicating whether the trial is going to go forward or get moved. And if I need any advice or consent from the parties, we'll have a conference call.</p> <p>THE COURT: But right now, you stand at the current trial date, pretrial conference date, calendar call date, stay until the 13th except for this deposition.</p>
3/4/19	Minute Order issued: Evidentiary hearing set for 3/28/19
3/7/19 @ 4:38	Def Jacuzzi filed supplemental brief, mentioned Oct. 2018 death; needs 2 nd depo of Bonecutter after completion of additional fact discovery; still coordinating forensic search
3/7/19 @ 6:25	<p>Pls. filed supplemental brief; will need discovery on Oct. 2018 death (new development); Pls. also identified extensive, additional discovery needed if court does not strike answer (11 bullet points)</p> <p>Discovery conducted in Case since February 4, 2019: The only discovery conducted since 2/4/19 has been the deposition of Jacuzzi's expert, Nathan Dorris. No other discovery was performed because the case was stayed and no order or minutes issued until 3/4/19.</p>
3/12/19	Jacuzzi filed motion to continue 4/22/19 trial date on OST to Jul, Aug or Oct. 2019 trial stack
4/2/19	<p>SAO filed extending discovery cutoff to 8/2/19.</p> <ol style="list-style-type: none"> 1. The Discovery Cutoff Deadline shall be reset for 8/2/19. 2. The Pre-Trial Motion Deadline is set for 9/2/19. 3. The Pre-Trial Conference scheduled for April 3, 2019, is hereby vacated. 4. The Pre-Trial Conference is scheduled for 9/25/19. 5. The Calendar Call is scheduled for 10/9/19. 6. A FIRM trial date is scheduled for 10/28/19.
7/1/19	<p>Hr'g at 24:11-24, 25:10-26:5, see also pp. 27-31</p> <p>THE COURT: What -- so aside from that, whether we're going to have an evidentiary hearing or not, what discovery do you need going forward to sufficiently prepare your case for trial?</p> <p>MR. CLOWARD: The two things that we believe that we need is the evidentiary hearing to procure the record for appellate review and then the order on the forensic examination from 2008 to the present, so that it's not limited to the date of filing suit and for an order that they produce.</p> <p>And if it's under seal, that's fine. If it's under confidentiality, that's fine, but we need a list of information assets that is not redacted. The version that they</p>

DATE	DESCRIPTION
	<p>gave to us had things that were removed off of the list, so that we can intelligently determine what it is that we want to search and then narrow the scope accordingly.</p> <p>THE COURT: Well, what discovery, if any, do you need about that [Pullen] incident?</p> <p>THE COURT: It sounds like you were requesting things beyond the forensic review in your papers. I need to know.</p> <p>MR. CLOWARD: Sure, well, we think that we want to take the deposition of those folks, but I think right now, we have an open period of discovery. We're allowed to do that. The only objection that I could see is they may say, hey, you've reached your 10 deposition limit.</p> <p>And so, I would just need an order from the Court saying, you know, Mr. Cloward, you can -- there's good cause. You could go outside the 10 deposition limit, which went into --</p> <p>THE COURT: What's the deadline of discovery right now?</p> <p>MR. CLOWARD: I believe it is I want to say August...</p> <p>MR. CLOWARD: Okay, looks like August 2nd.</p> <p>MR. ROBERTS: Now Plaintiff has taken the position that discovery has been completely re-opened. They can do any discovery they want to.</p> <p>THE COURT: If I did refer to some specific discovery, then that statement by itself doesn't -- shouldn't lead someone to believe that it's wide open, but let's look at what I actually said.</p>
8/2/19	Last ordered DISCOVERY CUTOFF DATE (per 4/2/19 SAO)
8/12/19	Jacuzzi's 19 th Supplemental NRCP 16.1 disclosure
8/19/19	Jacuzzi's 20 th Supplemental NRCP 16.1 disclosure
8/21/19	Jacuzzi's 21 st Supplemental NRCP 16.1 disclosure
8/23/19	Jacuzzi's 22 nd Supplemental NRCP 16.1 disclosure
8/27/19	Jacuzzi's 23 rd Supplemental NRCP 16.1 disclosure
9/16/19	Evidentiary Hr'g (Day 1)
9/17/19	Evidentiary Hr'g (Day 2)
9/18/19	<p>Evidentiary Hr'g (Day 3) at 144:16-145:11</p> <p>THE COURT: Given the protraction of pretrial proceedings in this case, perhaps we do need to push trial into June. Thoughts on that, counsel?</p> <p>MR. GOODHART: Your Honor, actually we were talking a little bit about that before. I talked to Mr. Cloward about it and he was thinking in Octo -- you know, year, 12 months. And initially I thought well, you know, really, but the reality is we still don't have the ESI search completed yet and that's going to take a little bit of time. We need a ruling from this Court. We don't want to put you under any undue pressure to come up with the right decision. Then we have Christmas holidays. And I know my clients, First Street, and AITHR typically take a lot of time off during the summers to do family vacations and things like that, so the more</p>

DATE	DESCRIPTION
	<p>that I'm thinking about it, I don't think Mr. Cloward's recommendation for an October trial date is completely unrealistic.</p> <p>THE COURT: Tell you what, let's discuss this when we meet again. I will grant you this. We'll do it after June.</p> <p>MR. GOODHART: Okay.</p> <p>THE COURT: And we'll come -- I'll come up with some other dates, all right?</p> <p>MR. GOODHART: Thank you.</p> <p>THE COURT: Maybe October. All right counsel?</p>
9/30/19	Jacuzzi's 24 th Supplemental NRCP 16.1 disclosure
10/1/19	<p>Evidentiary Hr'g (Day 4) at 5:12-20:</p> <p>THE COURT: All right. The second thing, counsel, I had indicated we need to come up with a new trial date. And I think <u>that was dependent upon my ultimate ruling in this case, because that will affect how much discovery, if any, the Court is going to allow, and whether there's a need for any discovery</u>. But in talking with my JEA, it looks like I could give you a block of three or four weeks almost any time after July 1 of next year. All right. And so you guys talk amongst yourselves and find out which four weeks you'd like me to block off. I would appreciate that.</p>
10/10/19	Jacuzzi's 25 th Supplemental NRCP 16.1 disclosure
10/28/19	6 th Amended Order Setting Civil Jury Trial issued, setting trial on 5-week stack commencing 9/8/20 with a FIRM trial date of 10/12/20
1/9/20	Jacuzzi's 26 th Supplemental NRCP 16.1 disclosure
3/5/20	Minute Order issued re: Motion to Strike Jacuzzi's Answer as to Liability Only
3/17/20	COVID-19 hit: Sisolak ordered the closure of non-essential businesses in the state
3/19/20	Jacuzzi's 27 th Supplemental NRCP 16.1 disclosure
3/20/20	Administrative Order 20-09 re: civil matters issued
3/25/20	Administrative Order 20-11 re: civil matters issued
3/30/20	Administrative Order 20-10 re: court operations issued
4/17/20	Administrative Order 20-13 re: court operations issued
5/19/20	Pls. submitted proposed Order Striking Jacuzzi's Answer (draft started 4/14)
5/22/20	Jacuzzi filed Objections and submitted competing Order Striking Jacuzzi's Answer
5/22/20	<p>Jacuzzi filed Motion to Clarify Parameters of Waiver of Attorney-Client Privilege Required to Present Evidence that it was Acting on Advice of Counsel</p> <p>Jacuzzi asked for hearing for court to consider "advice of counsel" defense</p>
6/1/20	Administrative Order 20-17 re: court operations issued
6/29/20	<p>Hr'g</p> <p>Court reopens the evidentiary hearing to allow Jacuzzi time to present evidence regarding the advice of counsel issue, if it elects to do so. Trial date moved from 10/12/20 to 11/16/20 (firm setting for 3 weeks). The Court reserves 8/3/20-8/5/20 for the continued evidentiary hearing to allow Jacuzzi to present evidence regarding advice of counsel. (Ben's e-mail from 6/29/20);</p> <p>Court stayed minute order sanctioning Jacuzzi and reopened Evidentiary Hr'g to allow Jacuzzi to present evidence of "advice of counsel" defense</p>
7/14/20	Court sent new, proposed dates for Evidentiary Hr'g

DATE	DESCRIPTION
7/22/20	Court reset Evidentiary Hr'g for 9/22/20-9/24/20
9/18/20	Def Jacuzzi filed Notice of Waiver of Phase 2; Request to Vacate Evidentiary Hr'g (set for 9/22-9/24) – Jacuzzi advised it no longer wished to proceed w/ Evidentiary Hr'g to present advice of counsel defense and was no longer presenting that as a defense
9/21/20	Pls. filed Response to Def Jacuzzi's Notice of Waiver of Phase 2 & Request to Vacate Evidentiary Hr'g
9/22/20	Hr'g Arguments re: extending 5-year rule (beyond 2/23/21), setting a hearing re: resolution of Competing Orders (for 10/5/20); Court ordered briefing schedule: 10/20 for Jacuzzi & FS; 11/10 for Pls.' Resp.; Hr'g set for 11/23; MILs set for 11/19; new trial to be scheduled on 10/5/20; Evidentiary Hr'g for 9/23-9/24 vacated; Ruling on request for Mandatory Settlement Conference deferred until 10/5/20
10/5/20	Hr'g Parties appeared for Resolution of competing Orders Striking Jacuzzi's Answer; Court requested that Pls. resubmit proposed Order Striking Jacuzzi's Answer; FIRM Jury Trial date set for 3/1/21 (<i>1/11/21 trial date vacated</i>)
10/___/20	TBD – Pls. submitted (revised) proposed Order Striking Jacuzzi's Answer (revised from version submitted on ~5/19/20)
11/19/20	Hr'g on MILs & Pls.' Request for Jury Instructions
11/23/20	Hr'g
1/25/21	Pre-Trial Conference
1/11/21	FIRM jury trial setting vacated
2/8/21	Calendar Call
3/1/21	FIRM Jury Trial

EXHIBIT 42

EXHIBIT 42

9



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,

Defendants.

AND ALL RELATED MATTERS

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

DECLARATION OF
BENJAMIN CLOWARD

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, BENJAMIN CLOWARD, declare the following:

1. After receiving the *first*STREET Opposition I contacted Nick Fawkes for information
pertaining to David Modena's affidavit.

1 2. I was informed by Mr. Fawkes that he was the person who recorded the telephone call of
2 Sherry Cunnison.

3 3. I was informed by Mr. Fawkes that he transferred the voicemail to his computer and
4 provided the telephone call of Sherry Cunnison to Dave Modena via a thumb-drive.

5 4. I was informed by Mr. Fawkes that it is absolutely false that you cannot modify, change
6 or delete Lead Perfection notes as claimed by Mr. Modena.

7 5. Specifically, I was informed by Mr. Fawkes that for his current company, (of which he
8 is the owner), he still utilizes the Lead Perfection software program.

9 6. That while on the phone with Mr. Fawkes he got onto his Lead Perfection system and
10 created a "Test" note with a few words.

11 7. That while on the phone with Mr. Fawkes, he saved the note and then went back into the
12 note and modified the entry.

13 8. That while on the phone with Mr. Fawkes, he was able to delete the note that he had
14 created.

15 9. With respect to Mr. Modena's testimony that a change of a Lead Perfection note would
16 violate policies of AITHR, Mr. Fawkes indicated specifically that AITHR did not have any
17 written policies.

18 10. That as the lawyer in this case, AITHR has not produced any such written
19 policies in this case.

20 11. That Mr. Fawkes indicated that he would be willing to testify regarding the
21 above information.

22 12. Prior to June of 2020, neither myself, nor anyone from my office had ever
23 spoken with or communicated with Mr. Fawkes.

24 13. Prior to June of 2020, no one on behalf of Plaintiffs had been directed to contact,
25 communicate or speak with Mr. Fawkes.

26 14. That the first time either myself or anyone on behalf of Plaintiffs had any contact
27 with Mr. Fawkes was in mid-June of 2020 when I met with my team for several hours to work
28 on this case.

1 15. That this declaration was made in lieu of obtaining an affidavit directly from Mr.
2 Fawkes due to time constraints in obtaining an affidavit from Mr. Fawkes which involves
3 arranging a mobile notary, etc.
4

5 I declare under penalty of perjury that the foregoing is true and correct.
6

7
8 Executed on 11/12/20
9


Ben Cloward



EXHIBIT 43

Guild Survey Report 2015
Excel Spreadsheet
Submitted to Court via thumb-drive

EXHIBIT 43

9



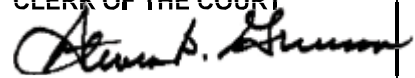
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A PROFESSIONAL CORPORATION

ATTORNEYS

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PETITIONERS' APPENDIX TAB 8



TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

ROBERT ANSARA, DEBORAH)
TAMANTINI, ESTATE OF SHERRY)
LYNN CUNNISON,)

CASE NO. A-16-731244-C

DEPT. NO. II

Plaintiffs,

vs.

Transcript of Proceedings

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

Defendants.

BEFORE THE HONORABLE RICHARD F. SCOTTI, DISTRICT COURT JUDGE

MOTION TO STRIKE

THURSDAY, NOVEMBER 19, 2020

SEE APPEARANCES ON PAGE 2

RECORDED BY:

BRITTANY AMOROSO, DISTRICT COURT

TRANSCRIBED BY:

KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording; transcript
produced by transcription service.

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APPEARANCES:

[ALL VIA VIDEO/TELEPHONE CONFERENCE]

For the Plaintiffs: IAN C. ESTRADA, ESQ.
BENJAMIN P. CLOWARD, ESQ.
CHARLES H. ALLEN, ESQ.

For the Defendants: D. LEE ROBERTS, JR., ESQ.
BRITTANY M. LLEWELLYN, ESQ.
JOHNATHAN T. KRAWCHECK, ESQ.
JOEL D. HENRIOD, ESQ.
PHILIP GOODHART, ESQ.

1 THURSDAY, NOVEMBER 19, 2020 AT 9:06 A.M.

2

3 THE COURT: Case number A731244. Let's find out
4 who's here for the parties. Who is here for the plaintiff?

5 MR. CLOWARD: Good morning, Your Honor. Ben
6 Cloward for the plaintiff. Also on the call is my
7 paralegal, Cat Barnhill. Additionally, Charles Allen, co-
8 counsel, as well as Ian Estrada. And, if you want, they
9 can make their appearances, as well.

10 THE COURT: No. That's fine. Who do we have for
11 defendant, Jacuzzi?

12 MR. ROBERTS: Good morning, Your Honor. Lee
13 Roberts is here for defendant Jacuzzi. Also on the line is
14 my partner, Johnny Krawcheck, Joel Henriod, and Brittany
15 Llewellyn. I think I got everyone.

16 THE COURT: Great. Great. Thank you. Do we have
17 anyone from Mr. Polsenberg's firm on the line?

18 MR. ROBERTS: Joel's here, Your Honor.

19 THE COURT: Oh, wait. You're here from -- that's
20 right. Thank you. And, then, what about defendant First
21 Street? Who do we have on the line?

22 MR. GOODHART: Good morning, Your Honor. Philip
23 Goodhart for defendants, First Street and Aithr. I
24 apologize for not having the video up, Your Honor, because
25 for some reason it wasn't working this morning.

1 THE COURT: That's okay. Not a problem.

2 All right. What other attorneys do we have on the
3 line? Anybody? Okay. That might be it. Good.

4 Are there any preliminary, procedural, or
5 logistical issues that anybody wants to discuss before I
6 ask a few questions?

7 MR. GOODHART: Your Honor, this is Philip Goodhart
8 on behalf of First Street and Aithr. I think I have a
9 procedural issue that I do need to discuss.

10 THE COURT: Please.

11 MR. GOODHART: On Friday, in addition to
12 Plaintiffs' Reply in Support of their Motion to Strike
13 First Street and Aithr's Answers, there was also a Motion
14 for Leave to Exceed the Page Limit in their Plaintiffs'
15 Reply from I think it was either 20 or 30 pages to what it
16 is now, which is in excess of 50 pages.

17 THE COURT: Right.

18 MR. GOODHART: That same day, I received a Notice
19 of Hearing for that Motion dated December 21, 2020. The
20 Motion did not appear to be on an order shortening time. I
21 did not file any Opposition to it because I received the
22 Notice that it was December 21, 2020, per the due course,
23 but, then, a few minutes later, on November the 18th, about
24 an hour later, I received a signed Order granting
25 Plaintiffs' Motion for Leave to File to Exceed the Page

1 Limit.

2 I'm a little confused how that could have
3 happened. I'm not sure if that had any impact, but I just
4 thought I needed to bring that to the Court's attention
5 because Plaintiffs' Reply did end up being in excess of 44
6 pages.

7 THE COURT: Right. Sometimes these things get
8 automatically set for the future, and then it came to my
9 attention, and I thought about it, and just decided, after
10 looking at it, that I would grant it. I didn't have any
11 communication with any of the parties about this and, as
12 far as I know, my staff didn't either. And I looked at the
13 request and I was thinking that, you know, the facts have
14 been so carefully addressed by the parties in the past and
15 I didn't think that the actual legal issues were that
16 complex. And, although I wasn't too excited about the idea
17 of reading an extra 20 pages, I decided that it would be
18 okay and that I would let the parties let me know if there
19 was anything, you know, significantly new in there that
20 they would need maybe some more time to address. That was
21 my thinking on that.

22 MR. GOODHART: Well, there are -- there's a
23 significant argument that are contained in this Reply that
24 I think should have been contained within the original
25 Motion. And, since I don't get a Sur-Reply and was not

1 advised that a Sur-Reply would be possible, I'm kind of,
2 you know, behind the eight ball a little bit in trying to
3 respond to each and every single allegation contained in
4 this 46-page brief.

5 THE COURT: Right. No, I understand. Is there a
6 particular section that you think you would need more time
7 to address or are you saying that there's facts that are
8 interspersed and --

9 MR. GOODHART: Well, there's really --

10 THE COURT: And would you be able to identify
11 those so we can see if it's something significant enough
12 that you would need more time or if we could just give you
13 a chance to deal with those today?

14 MR. GOODHART: Well, Your Honor, I feel
15 comfortable enough being able to deal with that today, but
16 my concern is that, you know, as part of the record, and
17 things like that, that I know after these hearings you take
18 your time to review all the pleadings and the papers and
19 take a look at everything closely, which is precisely what
20 you did at the time of the first Motion to Strike my
21 client's Answers. Originally, you issued a minute order
22 indicating that there was sufficient evidence and that an
23 evidentiary hearing would be required. And, then, about a
24 week or so later, you issued an updated minute order saying
25 that you primly had a time to review all the documents and

1 found --

2 THE COURT: Right.

3 MR. GOODHART: -- that there were no claims that
4 were valid against my client or even Jacuzzi at that point
5 in time.

6 THE COURT: At that point. Right.

7 MR. GOODHART: Right. And I'm just a little
8 concerned that, you know, I can certainly address many of
9 the things that are in here through the oral argument, but
10 to the extent that, you know, notes are taken and things
11 like that, I don't really know if -- I know you review the
12 papers very, very closely. So, you know, I am prepared to
13 go forward with the oral argument this morning, as we've
14 indicated. It's just if the Court would like a Sur-Reply
15 before it renders a decision, I would like the opportunity
16 to do so so that, in paperwork, if necessary. After I've
17 answered your questions and things like that, I could
18 possibly prepare one.

19 THE COURT: I understand that. So, I didn't want
20 to delay this anymore, but why don't we use this approach?
21 We'll have the parties answer my questions to make sure I
22 can organize all of the relevant facts in a way that helps
23 me to resolve this. And, if during the argument you
24 believe that there is some particular argument or fact that
25 you believe should have been in the Motion but it was in

1 the Reply and you want more time to address that or handle
2 it differently, let me know. Now, to the extent you can
3 identify that. All right?

4 MR. GOODHART: I would -- yeah. I would
5 appreciate that, Your Honor. Like I said, I'm not sure I
6 will need to, depending upon your questions and the
7 argument, however, I will try to indicate that if at all
8 possible. And I appreciate it. Thank you.

9 THE COURT: Sure. Mr. Cloward, did you want to
10 say anything about that?

11 MR. CLOWARD: Yes, Your Honor. I would. I
12 appreciate the opportunity.

13 You know, I -- we're somewhat befuddled because we
14 followed the exact format that was contained in the
15 Opposition and replied exactly to the sections that were in
16 the Opposition. So, for instance, you know, their first
17 thing that they set out was the Fox allegations and then
18 the Guild Surveys, and the front row seat, and our format
19 was the same. We didn't create new arguments. We just
20 addressed that -- the arguments that they set forth, number
21 one.

22 And, number two, we were very critical of First
23 Street for not addressing in full all of the important
24 aspects that we set forth in the Motion. On two or three
25 separate occasions, throughout our Reply, we pointed out:

1 Look, Judge, this was a real big deal. They only devoted
2 two paragraphs to it. They've glossed over it and I think
3 that their current request is a way to get another bite at
4 that apple to flesh that out. That -- and that wouldn't be
5 fair to us. We spent the time to do this. I have a lot of
6 personal issues going on last week with just real serious
7 things and, you know, I asked for one extra day to address
8 these issues. I didn't ask to kick this out and, you know,
9 -- so, we feel like it's been adequately briefed. We feel
10 that any other attempt would be to just continue to delay
11 the issue, Judge.

12 THE COURT: Okay. Thank you. Let's proceed then.

13 Counsel, it would be helpful to me if I prepared
14 my notes while we're going through this with particular
15 facts identified to me in short statements that I can put
16 into like one page sheets that I am working on.

17 Well, let me explain it this way. What I would
18 like to do is for the top five pieces of evidence, Mr.
19 Cloward, for you to identify what the piece of evidence at
20 issue is, --

21 MR. CLOWARD: Okay.

22 THE COURT: -- and, then, the next point would be:
23 When did the relevance of that issue or that piece of
24 evidence become known? Next would be: When did First
25 Street obtain that evidence? Perhaps they always had it.

1 The fourth piece of information I would need is: Was the
2 production excused? And there's arguments that things
3 might have been excused because of a discovery order, or a
4 meet and confer, or the language used by the plaintiff in a
5 particular document request. So, that's the fourth point.
6 And then the last point was: When was the evidence
7 actually produced?

8 Now, a lot of this, Mr. Cloward, is in your brief
9 and in First Street's brief and in the Reply brief, but it
10 wasn't always clear to me. Since we're dealing with
11 allegations of discovery violations, in particular relevant
12 things weren't produced on time, I need to know, you know,
13 these five points one more time: What's the piece of
14 evidence? When did relevance become known? When did First
15 Street have the evidence? Was their production excused?
16 And when was it ultimately produced?

17 And let's just take -- one, for example, let's
18 just begin this with Guild Survey, so you can follow my
19 analysis. And this isn't the full extent of my analysis.
20 This is just me trying to prepare a grid that has some of
21 the critical facts to help me go forward in understanding
22 your argument and doing my analysis after the hearing.

23 So, Guild Surveys, I think, is the first one you
24 addressed, Mr. Cloward, and, specifically, Guild Surveys
25 relating to slips, slips and falls. So that would be the

1 first piece of evidence that you think is critical that was
2 either not disclosed or not disclosed on time.

3 So, then the next issue for you to identify in one
4 or two sentences would be: When did that relevance become
5 known? And, so, we're dealing with: When should First
6 Street have known that evidence of slip and falls was
7 relevant in this case? And, of course, there's been some
8 argument among the parties on whether that was the First,
9 Second, Third, or Fourth Amended Complaint.

10 So, why don't we take it from there, Mr. Cloward?
11 The first piece of evidence is Guild Surveys versus slips.
12 Let's deal with that one. Okay?

13 MR. CLOWARD: You got it, Judge.

14 THE COURT: So, when did -- what's your position
15 on when that -- when the relevance of those Guild Surveys
16 regarding slips became known?

17 MR. CLOWARD: I would think that during the
18 deposition of Bradley Vanpamel [phonetic], which was in --
19 approximately, if memory serves me right -- and if the
20 Court wants, you know, very specifics, I can take a moment
21 to get that, but I believe late 2017 or early 2018.

22 THE COURT: All right.

23 MR. CLOWARD: It was early in the litigation.

24 THE COURT: And -- right. And I don't need
25 specifics unless it's -- unless the timing is critical.

1 And, after I get these pieces of information, I will give
2 you, Mr. Cloward, and opportunity to present whatever
3 argument you've prepared to present today.

4 All right. So, what's your position on when First
5 Street obtained this evidence? I assume your information
6 would be they always had it.

7 MR. CLOWARD: Correct.

8 THE COURT: All right. And I'm assuming your
9 position would be that production of such evidence was
10 never excused. Right?

11 MR. CLOWARD: Correct.

12 THE COURT: And then the -- then, we get to the
13 issue is: When was it produced? And you had a statement
14 in your brief on page 3 that they've only turned over one
15 year of Guild Surveys and that was just from 2015. And,
16 then, there's some discussion of it, of the surveys being
17 produced in August 2019. So, I'm assuming from this, your
18 position would be that they produced the Guild Surveys in
19 August 2019, but it was only for 2015?

20 MR. CLOWARD: Correct. And I was mistaken. As I
21 set forth in the Reply, that was the one issue --

22 THE COURT: Right.

23 MR. CLOWARD: -- that I was mistaken. It was
24 named 2015, so I assumed, and I apologize to the Court for
25 making that assumption. It does appear as though there

1 were surveys that were produced up to, I believe, 2017.

2 THE COURT: And then we had the statement from
3 First Street, I believe, in there that said they produced
4 all surveys.

5 But, anyway, so, see, that's kind of the initial
6 analysis that I wanted to do, Mr. Cloward. So, we have
7 Guild Surveys regarding slips with a piece of evidence at
8 issue. Relevance became known late 2017. They always had
9 it. They -- production was not excused. And they didn't
10 produce it until August 2019, perhaps almost two years
11 later. That would be your position on the Guild Surveys.

12 So what's the next most critical piece of evidence
13 that you have an issue with, Mr. Cloward?

14 MR. CLOWARD: I would think e-mails, internal e-
15 mails from team members of First Street within the First
16 Street organization, as well as the Aithr organization, as
17 well as e-mails back and forth from Jacuzzi regarding not
18 only slips but any incidents really, any safety incidents.
19 You know, incidents with the door, or incidents with people
20 not being able to get back out of the tub, you know, any
21 incident.

22 THE COURT: All right. So the -- kind of lumping
23 all of that together, it obviously makes it difficult to
24 prepare a one-page data sheet because we're dealing with e-
25 mails on different topics, prepared at different points in

1 time. And, of course, different dates of production. So,
2 let's deal with e-mails differently.

3 What about -- what's the next piece of evidence
4 that you believe is critical in this case that you didn't
5 receive or didn't timely receive?

6 MR. CLOWARD: Information pertaining to the
7 slipperiness -- I guess, preventative measures that were
8 taken. So, for instance, there were products that were
9 utilized by the parties, and if you want to break these
10 down into subcategories or one broad category, there was a
11 product called LiquiGuard, StepCote LiquiGuard. And,
12 apparently, it was a product that could be applied somehow
13 by one of the dealers or one of the installers. I don't
14 really know the details about exactly how the product is
15 even applied, or if it's a gel, or if it's a sticker. I
16 don't really know, you know, what they do to apply that.

17 But that would be something that I think would
18 have been relevant during Bradley Vanpamel's deposition in
19 2017, early -- or late 2017, early 2018, because the way
20 that he described this incident is that she was, you know,
21 reaching for the controls and slipped off of the seat and
22 kind of into that footwell position.

23 And what we find in a subsequent discovery that
24 Mr. Lee Roberts produced is that -- and the e-mail -- the
25 most important -- one of the most important e-mails was one

1 that Nick Fox authored all the way back in I believe it's
2 December of 2013, potentially, or -- I think that's when it
3 was. Maybe 2013. But, you know, he actually said to
4 Jacuzzi, and keep in mind, Judge, you know, Nick Fox is an
5 employee of First Street and Aithr, and he's telling
6 Jacuzzi: Hey, look, with respect to this slipperiness
7 issue, we ought to put it on the seat and the floor because
8 we're having some issues with folks.

9 So, it's clearly an issue of the tub. They had
10 information about it. Bradley Vanpamel's description of
11 how she got into the footwell, that's when --

12 THE COURT: Okay. No, I got that one.

13 MR. CLOWARD: -- it would seem --

14 THE COURT: So, what was the other preventative
15 measure that would come in this category?

16 MR. CLOWARD: The -- I would say the bath mat
17 issue, the bath mats.

18 THE COURT: Oh, by the way, back up for a second.
19 The LiquiGuard, when was that evidence produced? For my
20 chart here.

21 MR. CLOWARD: So, I've been -- and I would just
22 ask the Court, give me a little bit of allowance to be
23 precise. I like to be precise and I know the Court likes
24 the precision, and, so, if I'm a little wrong on some of
25 these dates, I apologize. But I think that they were

1 produced anywhere between July and August of 2019. So, at
2 the very end of discovery or after discovery, and they were
3 never produced by First Street to my knowledge. I double-
4 checked the disclosures to make sure that I could make that
5 representation to the Court. I had a paralegal that -- Ms.
6 Barnhill helped me with that. And I don't believe that
7 First Street ever produced any of the information with
8 respect to the LiquiGuard, or the StepCote, or the bath
9 mats. And, so, that was produced by Jacuzzi.

10 THE COURT: All right. Very good. So,
11 LiquiGuard, bath mat, what other preventative measure was,
12 in your opinion, not disclosed?

13 MR. CLOWARD: I think that the information with
14 respect to the Kahuna Grip could have more timely disclosed
15 so that we could have had more thoughtful discovery and
16 thoughtful participation with the depositions of the
17 30(b)(6) witnesses with our experts, with, you know, really
18 all of the folks who have participated in this case, with
19 their experts, with the 30(b)(6) witnesses for both
20 parties. But, quite frankly, we didn't get that
21 information -- any of the documents relative to that
22 produced until 2019.

23 Mr. Modena did testify to that. You know, he said
24 that there was a product, you know, called Kahuna something
25 or -- he wasn't -- I can't remember the testimony off the

1 top of my head, but that was in, I believe, December 2018.
2 You know, so well into this litigation, years into the
3 litigation, well after Bradley Vanpamel's deposition where
4 slipperiness was an issue and should have been produced in
5 a timely manner such that we could have utilized that for
6 our experts and for the depositions.

7 THE COURT: I got -- what's your position on when
8 First Street obtained evidence of these preventative
9 measures, the LiquiGuard, bath mat, and Kahuna Grip?

10 MR. CLOWARD: Well, the documents that have been
11 produced, they've had this information -- we could prove to
12 the Court that they've had this the entire time and they've
13 been involved with the development of these products.

14 You know, one of the things that is befuddling to
15 the plaintiffs is they -- First Street says: Well, you
16 know, we don't have some of these documents. Or: Hey, we
17 weren't copied on these documents. You know, things of
18 that nature. One of the documents in particular was a
19 dealer bulletin that specifically said that they had tested
20 the Aithr Aging in the Home, A-I-T-H-R, had tested a
21 product and that they were pleased to announce that both
22 Jacuzzi and Aithr had tested it, and that right there is an
23 example of -- you know, well, what did they do to test it?
24 How did they test it? What measures were taken to test it?
25 Where are the other documents pertaining to that testing?

1 Who else was present --

2 THE COURT: No. I got that. I got that.

3 All right. So, what's the next most critical
4 piece of evidence in your mind, other than we have, you
5 know, the Guild Surveys, the e-mails, and the preventative
6 measures. What would be next in your mind?

7 MR. CLOWARD: I think that the Alert 911 is -- was
8 a big deal. And, you know, Ruth Cranute [phonetic] was a -
9 - an individual who filled out a formal request with
10 Consumer Products Safety Commission and they have a website
11 that you can go to if you're a consumer. You fill out the
12 form and if it's -- if they are going to put it on their
13 website, they send you some more information. You have to
14 authorize for them to do that. It's a formal process. It
15 takes some time. It takes some doing and effort by an
16 individual to actually go through with that process,
17 because there's back and forth communication with the
18 individual and the Consumer Product Safety Commission.

19 And, so, she went to that extent, filled that out,
20 and, in there, she said: You know, the Guardian Alert or
21 the Alert 911, I can't remember the exact terminology she
22 used, but, you know, it would have been useless to me that
23 they provided. So, early on, and that was -- we obtained
24 that in at least early -- I would say, you know,
25 April/May-ish of 2018, before the deposition of Bill

1 Demeritt, the Jacuzzi 30(b)(6).

2 So, we had that document in our possession. We
3 used that to cross-examine Bill Demeritt when he said:
4 Hey, look, Jacuzzi only knows of two incidents, both of
5 them are being litigated by you, Mr. Cloward. Those are
6 the only ones we know about. Well, gave him every chance
7 and pulled that document out and said: Well, what about
8 this? You know, this Guardian Alert. And, I think, at the
9 time, we didn't know it -- you know, anything other than
10 what was on the document as to what that product was.

11 And, so, I guess, when was it known to be
12 relevant? I would say during Bill Demeritt's deposition
13 when we cross-examined Bill Demeritt on that. That's when
14 it first came out that that would be an issue.

15 And as far as: When did First Street have the
16 evidence? Well, they've always had it. They were -- you
17 know, they, apparently, were more involved with the product
18 than Jacuzzi.

19 Was it excused? Their argument is going to be:
20 Well, you know, during the hearing, during the August 2018
21 hearing, Commissioner Bulla said: Well, you know, send
22 some written discovery, I guess, if you want on that
23 product. And my response to that would be: Well, Judge, I
24 had had several conversations with counsel involved and it
25 was always represented that they didn't know anything about

1 it, they didn't have anything to do with it. And, so,
2 that's why we didn't send the discovery. And, you know,
3 that's part of my complaint is that, you know, we should --
4 I should be able to trust what counsel says to me and
5 that's what's been disheartening about this case, you know,
6 first with Josh Cools having eye-to-eye, you know,
7 conversations of like: Well, this just doesn't make sense.
8 It doesn't feel right in my gut. I mean, are you sure?

9 And the same thing applies with this product with
10 Mr. Goodhart. I had multiple conversations with him. And
11 it was always represented: No, we don't -- we didn't -- we
12 don't know what it is. We don't have anything to do with
13 it. And, then, we find out, during the deposition of Ms.
14 Cranute, -- and, fortunately, she kept the paperwork. You
15 know, if she hadn't kept the paperwork, this might still be
16 an issue that we're chasing around and we're trying to find
17 information and answers to.

18 But I would think that if the company is giving an
19 Alert 911 system and part of the evidence that we have in
20 the Guild Survey is that folks were told not to use it
21 without -- not to use the tub without having this nearby,
22 now that's a pretty big deal. That's a big issue. And we
23 haven't been able to just do any discovery with respect to
24 that. So, that would be the next on the list.

25 THE COURT: All right. Give me one more.

1 MR. CLOWARD: Okay. Could I give you two more?

2 THE COURT: Sure. All right.

3 MR. CLOWARD: Okay. So, the -- I guess the
4 Cunnison recording. You know, this is one that is a huge
5 thing and, you know, for First Street to say, you know, we
6 didn't keep certain documents or we didn't keep certain
7 recordings, we didn't offload certain recordings, you know,
8 Dave Modena's testimony -- or his affidavit belies that
9 position. His affidavit says, and I'm quoting for the
10 Court, quote:

11 Mr. Fox was told by counsel to retain anything and
12 everything related to Sherry Cunnison in Aithr's files,
13 including all recorded calls, end quote.

14 So, if you don't have these recordings, why are
15 you telling your individual to save these recorded calls?
16 You know, but then they come years later and say: Well,
17 Judge, we didn't save these because we had the Lead
18 Perfection and, so, you know, we would only save them into
19 the -- or we would just type the notes of what it meant.
20 Well, your affidavit from Mr. Modena belies that argument
21 because he's instructing Mr. Fox to save all of the
22 recorded calls.

23 So, -- and, obviously, there is an issue as to
24 this other call where she dove -- had to dive under the
25 water. First off, the documents -- their own Lead

1 Perfection notes and the note from the Allstate adjuster
2 indicates that at some point there was confusion about that
3 issue and that the drain was what caused her to be stuck.
4 And, you know, what does Nick Fox have to lose? What does
5 Annie Duback [phonetic] have to lose? They don't want to
6 get tied up into litigation. They don't want to be
7 deposed. They don't want to be involved, yet they said
8 that she called and she told them that she got stuck. She
9 had to dive underneath the water.

10 Yet, the thing that's disheartening, again, Judge,
11 is when we find additional information from the 911
12 responders, and so we file the Motion and focus on that
13 information, they crucify me and try to make it look like
14 my whole claim, my case is changing, and ever-changing, and
15 I can't tell you how many times they've criticized, and
16 been critical of me for that, and it's just not fair
17 because the evidence shows that -- now we know that there
18 were two calls and that there were two issues.

19 THE COURT: All right.

20 MR. CLOWARD: So, in answering the Court's
21 questions, I guess the calls -- so, we're talking Ring
22 Central, we're talking the -- RingCentral and Five9, those
23 calls would -- that would be a piece of evidence. When it
24 was known to be relevant, I would say back in 2017 during
25 Bradley Vanpamel's deposition -- or, actually, those

1 particular -- so, you would want to break those down into
2 two components. Number one, the calls with respect to
3 Sherry Cunnison. Those would have been relevant from day
4 one, but the broader calls of other claimants calling in to
5 complain about the tub and document safety issues, those
6 would have been known to have been relevant as early as
7 2017, during Bradley Vanpamel's deposition when he
8 described what took place and how she became stuck.
9 Because you may have folks -- or we know that folks called
10 in saying: Hey, look I was -- you know, my husband was
11 stuck in the tub for two hours. We had to call the fire
12 department, or I had to call my cousin to help him out, or
13 I had to call -- you know, we had to cut the door off. You
14 know, so there -- those other issues would have been
15 relevant early on, Your Honor.

16 When did First Street --

17 THE COURT: Okay.

18 MR. CLOWARD: -- have the evidence? When did
19 First Street have the evidence? Well, we know for a fact
20 that First Street had the evidence with respect to the call
21 of Sherry Cunnison around, I believe, 2014. I believe
22 that's when the -- it was set out in the Motion, when Mr.
23 Goodhart, in the Motion, indicated that there was an e-mail
24 to Nick Fox saying: Hey, save everything. They had the
25 information at that point. Nick Fox was able to obtain it.

1 According to his affidavit, he provided it by a thumb drive
2 to Dave Modena. So they had it early, early on.

3 Was it excused? Absolutely not. There's no
4 excuse to not disclose those documents.

5 And when was it actually produced? It was
6 actually produced in 2020, upon plaintiff's -- so, it's
7 never been produced by First Street. Plaintiff's efforts,
8 we were able to obtain it. And those are the calls with
9 respect to Sherry.

10 With respect to the other individuals, First
11 Street -- I guess it depends on if you believe First
12 Street's affidavit as to when they had the evidence. They
13 had the evidence when folks would call in, but they claimed
14 that they downloaded or input the information obtained in
15 the call into their Lead Perfection System, but that's, you
16 know, -- who knows if that's actually accurate. I mean,
17 maybe it is, maybe it isn't. We don't know.

18 Was it excused? We don't believe that it's ever
19 been excused. We believe that the Court has been pretty
20 clear on what's relevant information and the rules are very
21 clear on what's relevant information. It's claims and
22 defenses. Evidence pertaining to claims and defenses,
23 you've got to produce it. And, so, we don't believe that
24 it's ever been excused.

25 When was it actually ever produced? It never has

1 been produced.

2 THE COURT: Okay. You said you have one more.

3 MR. CLOWARD: Yeah, one more.

4 THE COURT: Well, [indiscernible] one more.

5 MR. CLOWARD: I appreciate that, Judge.

6 You know, the dealers were still an issue. You
7 know, this was the basis of the first Motion.

8 THE COURT: Right.

9 MR. CLOWARD: And the -- I guess the -- I just
10 wanted to highlight the prejudice that has been caused.
11 You know, the Court gave leave to take those depositions
12 and we attempted to take depositions, and what we found are
13 that most of these companies are out of business. The
14 attempts that we did make, people just didn't show up and,
15 you know, you can see the prejudice when you see Dave
16 Modena's affidavit and Dave Modena says: Look, a lot of
17 these claims came in completely and solely through the
18 dealers. We had no access to their information. We had no
19 access to their computer systems. And, so, you know, we
20 don't know what they're told.

21 Well, so, that's a whole bucket of evidence and
22 Dave Modena even testifies that the dealers are the folks
23 most likely to have the information. So, that's a huge
24 bucket of evidence that's out there that nobody knows
25 anything about. And because of the delay of First Street

1 not producing that information when we requested in an
2 interrogatory, you know, that's information that will
3 likely never be found because those folks are out of
4 business or they're no longer doing those -- selling those
5 products and it's just gone.

6 And, so, with respect to the dealer network, we
7 believe that they had that as early as 2011 or 2012 when
8 the Manufacturing Agreement was signed by the parties and
9 there was specific language in the Manufacturing Agreement.

10 As the Court may recall, our interrogatory cited
11 the Manufacturing Agreement and said: Hey, on page, you
12 know, 5, and that's not the correct page, I just don't
13 remember the page, but, hey, on page 5, paragraph 6, the
14 manufacturing agreement says X, Y, Z, the, quote, network
15 of dealers. Please provide the name of the network of
16 dealers. And they said: Well, Aithr is the only dealer.
17 And we found that that was not true.

18 And, so, you know, those should have been
19 affirmatively produced by 16.1. Had they been produced by
20 16.1 back in 2016/2017, we would have had a better
21 opportunity to hopefully gather the information from those
22 dealers, but we were not afforded that opportunity due to
23 the delay in time.

24 We don't think that it was ever excused and it was
25 produced in 20 -- I think 2018/2019. The map, but, again,

1 by then, it was too late.

2 THE COURT: All right. And, so, what you're
3 adding to your prior Motion on this issue is the prejudice
4 is what's new then.

5 MR. CLOWARD: Correct.

6 THE COURT: All right. Very good. So, thank you.
7 That's a good start for my chart. Let's go ahead then and
8 whatever argument you had prepared to present today, you
9 may do that now.

10 MR. CLOWARD: Okay. And I don't want to rehash
11 everything. You know, we're fortunate that Your Honor
12 carefully evaluates and reads everything, so I don't want
13 to waste the Court's time and just rehash --

14 THE COURT: Well, it's -- there's a lot of
15 material here and I am committed to being motivated to get
16 this done right, so let's proceed.

17 MR. CLOWARD: Understood.

18 Well, I think, you know, one of the fundamental
19 notions of the civil -- really of the justice system is the
20 right to a speedy matter, a speedy adjudication of your
21 issue, and we agree with the defendants that cases should
22 be heard on the merits. And that's all that we've ever
23 wanted. We wanted to just proceed. We wanted to be able
24 to present our case. We've wanted to be able to know the
25 information relative to proving our case. And one of the

1 things that's important to our case is that we have to show
2 that the product was dangerous, number one. And, number
3 two, we have to show that they knew about the dangerousness
4 of the product.

5 And, so, that's what we've attempted to do
6 throughout this process, from as early as 2017 when we sent
7 discovery and began fighting with Jacuzzi about these
8 issues. And First Street has been sitting there, front
9 seat, they've watched the slugfest. They watched all of
10 this happen, all of these arguments about: Well, what is
11 an incident? Well, what is prior versus subsequent? And
12 time and time again, Jacuzzi lost and Commissioner Bulla at
13 those hearings said -- then Commissioner Bulla at those
14 hearings said: You know, ordinary course. And she
15 understood what plaintiffs had to prove. They understood
16 at that point what plaintiffs had to prove.

17 They know that as a -- as being in the stream of
18 commerce, that they have the same defenses and that the
19 plaintiff has to prove the same things against First Street
20 that plaintiff would have to against Jacuzzi. So, at that
21 point, they have an affirmative obligation to turn those
22 things over.

23 And throughout this process, there has been a
24 number of discovery responses -- or, excuse me, discovery
25 requests that are directly on point, that ask for -- I

1 mean, you know, for instance, this interrogatory, it's the
2 first set of interrogatory, it's Number 11, and it's:

3 Please state whether the defendant, First Street,
4 has ever received notice either verbal or written from
5 or on behalf of any person claiming injury or damage
6 from his use of Jacuzzi walk-in tub, which is the
7 subject of this litigation.

8 Like, it's directly on point. And their response
9 is: We only know of, you know, Leonard Baize and Max
10 Smith. Conveniently, plaintiffs are prosecuting Max Smith
11 and, conveniently, Leonard Baize was one that plaintiffs
12 found.

13 So, there's been no good faith participation by
14 First Street and their whole position, Judge, has been:
15 Hey, there's never been an order compelling. And, so, if
16 there's not an order compelling, then we don't have to
17 produce it. And that's their position boiled down to its
18 essence. And that's not what the caselaw says. That's not
19 what the statute says. That's not what NRS 16.1 subpart 3,
20 I believe (c), says. They have an affirmative obligation.
21 Twenty-six -- Rule 26, NRCP 26 says that there's an
22 affirmative obligation to seasonably supplement your
23 disclosures and your responses.

24 This discovery response was back in 2018. It's
25 never been supplemented. And we know, from the document

1 dump that took place at the end of 2019, or at the latter
2 part of 2019, the summer and latter part of 2019. I mean,
3 Judge, you've seen now, at this point, the problems that
4 this tub had and the number of issues that were documented,
5 clearly documented, yet plaintiff was -- has lost the
6 opportunity to do further discovery on those, to depose the
7 relevant individuals.

8 And, most important, plaintiff has lost the
9 opportunity to depose the 30(b)(6). I can't compel Dave
10 Modena to come and testify at trial as the 30(b)(6). You
11 know, you have to be prepared during a 30(b)(6) deposition.
12 You have to get the information. You have to get whatever
13 concessions you're going to get. You have to authenticate
14 the documents. You have to be very prepared to do all of
15 those foundational requirements, so that when you find
16 yourself in trial, and it's an out of state corporation,
17 you don't find that you are, you know, out of luck and not
18 able to prove your case. And we've been denied those
19 fundamental opportunities.

20 You know, it goes -- and it's from all of these
21 relevant issues. I mean, you look at the advertising
22 issues, you look at the Alert 911 issue, you look at the
23 dealer issue, you look at, you know, all of these issues,
24 it's been a fight, fight, fight. There's been no good
25 faith disclosure. And, so, we haven't been able to have

1 the documents to use during -- to effectively use during
2 the depositions, and to give to our experts, and to cross-
3 examine their experts, and to use potentially with other
4 lay witnesses who might have knowledge, like Audrey
5 Martinez, for instance, or Kurt Bachmeyer.

6 So, there are just -- there are a lot of issues
7 that plaintiffs believe First Street and Aithr created due
8 to their obstructionist behavior and, you know, it's -- as
9 I mentioned before, it's disheartening when before a
10 deposition I reach out to opposing counsel and say, hey,
11 are you sure about this, and the response is: Yeah, we
12 didn't have anything to do with it. And, then, during the
13 deposition, again, give them an opportunity. And, then, I
14 pulled the document out and say -- or after Ms. Cranute
15 talks about it, hey, Mr. Goodhart, here's the document,
16 it's got First Street written all over it, now all of a
17 sudden the story changes. You know, so, I think that we've
18 been significantly prejudiced.

19 I mean, think of getting ready for trial, Judge,
20 what would be involved in this case? To get ready for
21 trial, we'd have to redepose pretty much all of the
22 witnesses in the case now that we have the documents, now
23 that we are actually in possession of, hopefully, the
24 majority of the documents. First Street still has not
25 produced documents. A lot of these internal documents that

1 they claim, well, we looked for them, and we don't have
2 them, and we don't know where they're at, yet Jacuzzi was
3 able to produce them. That just doesn't make sense. How
4 is it that Jacuzzi can produce these documents but, First
5 Street, you can't?

6 So, but, let's just say that we have the bucket of
7 information that we have and we would have to redepose the
8 30(b)(6)s for all of the companies, to talk to them, to
9 authenticate documents, to have further discussion about
10 the documents, to find out about what happened, when it
11 happened, who was involved. I mean, you know, as -- I use
12 the StepCote as an example earlier and, in that dealer
13 bulletin, the dealer bulletin says that Aithr performed its
14 own tests. That's a big issue, you know? You're claiming
15 -- First Street is claiming: Hey, we didn't manufacture
16 the product. That was solely due to -- that was solely
17 Jacuzzi's responsibility. All we did was we just
18 advertised it. Well, the dealer bulletin belies that
19 argument in that you are at least involved in solutions
20 and, if you are involved in solutions to the slippery issue
21 or the issue of folks falling, then clearly you knew about
22 it. And what is the extent that you knew about it?

23 And, so, those are additional things that the
24 plaintiff has lost the opportunity to discover and, Your
25 Honor, if the Court has anything else that it wants us to

1 address in particular, but I think that our pleadings are
2 sufficient and adequate.

3 We attempted to -- and I know -- and I apologize,
4 they're long. We just wanted to make sure that the Court
5 had all of the relevant information, all of the relevant
6 citations, all of the relevant documents so the Court
7 doesn't have to take anyone's word for it but can look at
8 the documents itself and make the determination.

9 THE COURT: Thank you. I appreciate that. Thank
10 you very much.

11 All right. So, Mr. Goodhart, I'll let you proceed
12 however you would prefer. You can deal with the six
13 different pieces of evidence that I asked Mr. Cloward about
14 initially, if you want to do that, or simply incorporate
15 that into your argument. But I wanted him to identify
16 those pieces of evidence and those particular facts.
17 That's just for my benefit, but yours as well. Well, I
18 will let you proceed however you deem it most effective for
19 you.

20 MR. GOODHART: All right, Your Honor. I
21 appreciate that.

22 Just real quickly, going through these, and then
23 I'll proceed. With respect to the Guild Surveys, it wasn't
24 until July of 2019 that plaintiff sent out a Request for
25 Production of Documents to my client and asked me to

1 produce any and all surveys, regardless of what it was that
2 was being reported by the consumer.

3 And, again, these are customer surveys where First
4 Street and Aithr are trying to find out: How did we do
5 with the installation process? Are you happy with the
6 product? What's going on? These aren't surveys designed
7 for any type of complaint.

8 And, as Mr. Cloward certainly knows from a
9 document production that was probably back in April 2019
10 and also again in August of 2019, in response to this
11 Request for Production of Documents, several hundreds of
12 pages of [indiscernible] surveys were produced for the 2013
13 and 2014 time frame. And these surveys would only have
14 written information on them if there was a complaint about
15 slipperiness or anything like that. So, it would be a
16 virtual impossibility to search any of these documents,
17 even if they were scanned into the system, to determine
18 whether somebody said: Well, the tub seems kind of
19 slippery.

20 But it's note that -- it would have been, those --
21 each and every survey, regardless of whether there was a
22 complaint, was produced in response to the Request for
23 Production of Documents. It was that simple. In addition
24 to that, the Guild Survey, we produced a searchable Excel
25 spreadsheet.

1 One of the biggest issues that plaintiffs has had
2 with Jacuzzi over the years is Jacuzzi would handpick which
3 documents to produce. As I recall, one of the biggest
4 issues and perhaps one of the main issues why the Court
5 granted the Motion to Strike Jacuzzi's Answer, appeared to
6 be that when Mr. Cloward's experts did some searches of the
7 sales [indiscernible] records, that documents that Jacuzzi
8 had originally set had been searched for, words and phrases
9 had been searched for and turned up nothing. Actually
10 turned up numerous complaints. And this is Jacuzzi.

11 So, we didn't hide any of that. We didn't try to
12 hide any of that. We produced everything, as far as the
13 surveys, when we were asked to produce them in their
14 Request for Production of Documents. These surveys were,
15 in fact, identified back in December of 2018 when we
16 deposited a whole bunch of e-mails that predated Ms.
17 Cunnison's death and that's kind of what started all of
18 this going.

19 So, plaintiff was fully aware that there were
20 surveys because we produced a couple of them that we had
21 sent to Jacuzzi over some customers' concerns, yet they
22 wait until July of 2019 to do a Request for Production of
23 Documents and we produced those documents within a month.

24 With respect to the internal e-mails, I can
25 represent to the Court that all e-mails have been produced

1 that we are in possession of. In fact, my client, First
2 Street and Aithr, were unable to search the e-mails in
3 their systems because of various reasons over antiquity of
4 the e-mail systems, and switching e-mails, and things like
5 that. And they provided my office with all the e-mails and
6 I had a paralegal and an associate go through the e-mails.
7 Again, they had problems searching the e-mails and,
8 therefore, we had to read -- they had to read well over
9 120,000 e-, trying to identify which ones needed to be
10 produced. And they were identified.

11 So, if the e-mails become the issue, well, then,
12 under one of the *Young* factors, the e-mails were viewed by
13 counsel. So that cannot be used as a guide or as a sword
14 or a hammer on my clients, First Street or Aithr.

15 With respect to the preventative measures that Mr.
16 Cloward has identified, First Street has never, ever denied
17 that they had conversations with Jacuzzi about some
18 customer saying the tub appears to be slippery, is there
19 anything we can do about that? And we produced e-mails to
20 and from Jacuzzi indicating that those concerns were
21 expressed to Jacuzzi. And, in response, Jacuzzi advised --
22 and, again, these e-mails have been produced. Jacuzzi
23 advised First Street that the tub floor -- and, again,
24 we're talking about the tub floor here. Met all the IAMPO
25 standard resistance requirements, that it was not slippery,

1 that perhaps customers could use an oil that are increasing
2 the slipperiness. And because the -- but because of that,
3 Jacuzzi then took a look to see whether or not there may be
4 some type of substance they can put on the floor of the
5 footwell. That was Jacuzzi that was doing that. Jacuzzi
6 was analyzing it because it's their product. The last
7 thing First Street would want to do is have a customer put
8 something on the floor of the product or to do it
9 themselves through Aithr or through subcontractor which
10 would void a warranty. So, this had to be something that
11 was directed and controlled by Jacuzzi, which the documents
12 clearly reveal was.

13 I understand Mr. Cloward doesn't like it. I
14 understand Mr. Cloward wants to read things into documents
15 and issues that certainly aren't there. He has every right
16 to do so. We have had Mr. Modena here for trial and he can
17 cross-examine Mr. Modena at trial all he wants on these
18 issues. But the fact of the matter is we never tried to
19 hide anything. We have never destroyed anything.

20 The 911 Alert, again, as indicated in Mr. Modena's
21 affidavit and in our Opposition, this was an add-on. This
22 was an add that was in magazines where, if you purchased
23 the tub, First Street would provide or the dealer would
24 provide you with a \$200 gift for free. It wasn't designed
25 because we knew people were slipping and falling or being

1 injured. No, some of the gifts were \$200 dinners to a
2 restaurant. Some of the gifts were magazine subscriptions.
3 It was a simple: Hey, thank you for buying this tub.
4 Here's a gift for you. And, oh, if you even allow us just
5 to come into your home to give you the presentation, we'll
6 give you the gift as well. There wasn't any nebulous
7 reason behind this. Mr. Cloward wants to read conspiracies
8 into this by saying: Well, we must have known that this
9 tub was slippery and dangerous otherwise we would have
10 never given people 911 Alert bracelets. That is simply not
11 true and that's what Mr. Modena testified to about. Again,
12 we haven't hid anything.

13 With respect to the Cunnison recording and the
14 Five9 and RingCentral, I'll deal with those in a second.
15 As far as the dealers go, again, this issue was addressed
16 in the very first Motion to Strike and the Court read our
17 response and said: You know what? Maybe it could have
18 been a little bit clearer, but you certainly, plaintiffs,
19 could have raised that issue in a Motion to Compel. But
20 you didn't. You accepted the answer. And the answer was
21 restricted to who would have been selling these kind of
22 products.

23 When plaintiff asked for the dealer information,
24 again, through -- it wasn't even through formal discovery.
25 It was during a deposition. We complied and within a week

1 or two, we provided plaintiffs with all of that
2 information. And, again, what we're dealing with is
3 information from dealers who are not related to First
4 Street or Aithr.

5 And just to give the Court some -- a little bit of
6 a background with this as well, to make sure that it truly
7 understands what's going on here and what the ramifications
8 may be of striking First Street and Aithr's Answer is the
9 Court needs to clearly understand that Aithr is not
10 Jacuzzi.

11 THE COURT: Okay.

12 MR. GOODHART: First Street is not Jacuzzi. They
13 are completely separate and apart organizations from each
14 other. Jacuzzi and First Street entered into an agreement
15 where First Street would market and advertise Jacuzzi's
16 walk-in tub. That's it.

17 In that same agreement, Jacuzzi said they would
18 design and manufacture the tub. So, with this agreement in
19 place, First Street utilized Aithr as a dealer. Aithr was
20 not the only dealer because there were dealers across the
21 country. There was a geographical area. I attached that
22 to the affidavit of Mr. Modena, which is Exhibit 1 in the
23 Opposition. That's the information we immediately provided
24 to the plaintiffs when we discovered through a 2.34
25 conference, during a deposition of our 30(b)(6) witness,

1 that that was what they were looking for. Up until that
2 point in time, we didn't know because it had never been
3 asked of us. As soon as it was asked of us, we immediately
4 produced it.

5 This Ms. Cranute that plaintiffs have been talking
6 about with respect to 911 issues, well, what he didn't tell
7 you, Your Honor, is that Ms. Cranute lives in Florida.
8 Florida is not Aithr's territory. Florida is Fairbanks
9 Construction's territory. Whatever information Fairbanks
10 Construction received as indicated in Mr. Modena's
11 affidavit, First Street doesn't find out about it unless it
12 is voluntarily provided to them. Fairbanks Construction
13 did have communications with Jacuzzi about some concerns
14 customers were having, but First Street was never involved
15 in those communications. We know that because Jacuzzi has
16 produced documents with communications with Fairbanks
17 Construction. We didn't produce those documents because we
18 do not have those documents.

19 We were not included in e-mail change or exchange
20 with those documents. And, quite honestly, it's not
21 surprising. Again, First Street does advertising and
22 marketing. While they're doing the advertising and
23 marketing, they obtained customer leads. Customers call in
24 and say: I'm interested in that product. First Street
25 will then find out where this customer lives and go to one

1 of the dealers and say: Hey, can you send a salesperson
2 out to their home to do an in-home sales presentation?

3 In Las Vegas, and with respect to Ms. Cunnison,
4 that dealer was Aithr. So, Aithr then sent a salesperson
5 who has been provided with sales and marketing material and
6 trained by First Street, as the marketing and advertising
7 experts, to give a presentation. At the conclusion of the
8 presentation, Ms. Cunnison wanted to buy this tub.

9 Ironically, the salesperson, Mr. Benson [phonetic], said to
10 her: You're a little large. This may not be a right fit
11 for you. But, again, she insisted and said: No, I'm going
12 to lose weight and I want to buy this tub. Mr. Benson even
13 had her sign the contract saying that she appeared to be a
14 little bit too large for this tub.

15 Ms. Cunnison never provided Mr. Benson with any
16 type of medical history, any type of history of falls, any
17 type of history of medications that may have caused anybody
18 to say: Hang on a second, you may not want to get this
19 tub. I'm not going to do that for you.

20 Further, dealing with the advertising and
21 marketing issues, though, that is what Aithr was
22 responsible for and, more importantly, First Street was
23 responsible for, marketing and advertising. Aithr would
24 then subcontract out the installation of the tub to a
25 subcontractor, a general contractor, who would then perform

1 the installation. Neither Aithr nor First Street would
2 ever see the tub until after it was installed, when
3 somebody did a follow-up with the customer.

4 So, the issues in this case, and as plaintiffs
5 have framed it in their Motion, deal exclusively with NRC
6 16.1 and the mandatory disclosure requirement. And
7 plaintiff, [indiscernible], you know, there's mandatory
8 disclosure requirement to disclose all evidence regarding
9 claims and defenses. Okay. Well, let's take a step back
10 because that is the only issue before this Court, 16.1
11 violations. There's never been a discovery order. There
12 has never been a discovery motion filed. And that is
13 significant.

14 In fact, plaintiff, even in the Reply, said:
15 Well, we were going to file a Motion. Your Honor, here's a
16 copy of the Motion we filed with the Discovery
17 Commissioner, but it was rejected because of a clerical
18 error. Rather than fix that clerical error and refile and
19 have it decided, nothing was ever done. Nothing. So, the
20 only issue before this Court is: What are the requirements
21 of 16.1?

22 Now, as the Court will recall, plaintiff's counsel
23 is very, very good at finding cases in other District Court
24 Judge's chambers that supports positions that he wants to
25 argue. I believe he cited two or three cases decided by

1 other judges in the Eighth Judicial District Court and
2 attached Orders from those judges when he was going through
3 Plaintiff's Motion to Strike Jacuzzi's Answer. So, one
4 would think that if a Court in the Eighth Judicial District
5 had ever struck an Answer, a terminating sanction, because
6 they did not comply or voluntarily disclose items, it would
7 be out there. But it's not.

8 Then, plaintiff, tries to cite some unpublished
9 decisions by the Nevada Supreme Court. What's important to
10 note, and as all the decisions cited by the plaintiff in
11 his brief, I think there were two or three of them, not one
12 of them did the Court strike the Answer. They all dealt
13 with limiting the evidentiary -- the evidence that was
14 going to be admitted at trial. Never was the Answer
15 stricken. The only times Answers have been stricken for
16 violations of 16.1 is where the plaintiff failed to comply
17 with a clear and unequivocal requirement to give a
18 computation of damages. Everybody knows what a computation
19 of damages is and looks like. In fact, there's a form in
20 Nevada Rules of Civil Procedure to do it.

21 Here, what are claims and defenses? Everybody has
22 a difference of opinion between claims and defenses. And,
23 because everybody has a difference of opinion between
24 claims and defenses, we have discovery, written discovery.
25 Plaintiff [indiscernible], I believe, over 200 Requests for

1 Production of Documents, over 60 or 70 interrogatories. I
2 have the numbers in my Opposition, and I apologize if I'm
3 not citing them correctly, and they were all responded to.
4 If plaintiff didn't like the responses, you have the
5 opportunity to file a Motion to Compel.

6 And I think the clearest example of this is the
7 911 Alert. And I made this argument in my Opposition and
8 I'll make it again. If a 911 Alert, according to Mr.
9 Cloward, was something that should have been voluntarily
10 disclosed at the onset of the litigation, then why in the
11 world would the Discovery Commissioner, who does this for a
12 living, very knowledgeable in discovery abuses, order
13 plaintiff to do a Request for Production of Documents to
14 get that information? He did it because she knows that
15 that type of disclosure is not mandated and required under
16 NRCP 16.1. It's that simple.

17 The plaintiffs want you to rewrite the rule and
18 basically eliminate written discovery completely and
19 require all parties, no matter who they are, to essentially
20 turn over everything that could be imaginably relevant or
21 necessary in a case, without any orders of the Court, any
22 disputes, any Rule 2.34 conferences whatsoever. In fact, I
23 have at least three 2.34 conferences with plaintiff's
24 counsel and I discussed my positions with him. He
25 discussed his positions with me. We agreed to disagree.

1 That's allowed. We're litigating a case where plaintiffs
2 are seeking tens of millions of dollars. We can agree to
3 disagree. Fortunately, we have a process where parties
4 disagree that we go through. It's called discovery motion.
5 Plaintiff is very, very familiar with those, going through
6 those with Jacuzzi.

7 So, now, with that in mind and what this case is
8 really about an NRCP 16.1 issue, we have to kind of take a
9 look at the Complaint and figure out what we're looking at
10 here. So, if you look at the Complaint, it's the Fourth
11 Amended Complaint. Now, I attached it as Exhibit 5 to the
12 Opposition. So, in that Complaint, at paragraph 15 and 16,
13 plaintiff understands the role of First Street and Aithr.
14 First Street does marketing and advertising, and Aithr does
15 sales. All right.

16 First cause of action begins on page 17 and it's a
17 negligence cause of action. So, what negligence claims are
18 plaintiff making against First Street and Aithr? Well, if
19 you look at paragraph 41 of page 8 of the Fourth Amended
20 Complaint, plaintiffs are making reference to First Street
21 and Aithr's duties relating to the marketing of the tub,
22 which is what First Street and Aithr did. But everything
23 else deals with product liability, manufacturing, improper
24 design, improper testing.

25 But, then, we have to figure out what else is

1 going on here and if you look at page 12 of the Fourth
2 Amended Complaint, under punitive damage allegation, you
3 look at paragraph 78 through 84. Each of those paragraphs
4 addressed advertising and marketing of the tub, which was
5 the exclusive and sole province of First Street and Aithr.
6 Read those together with the first cause of action for
7 negligence and it appears to me, and I think it -- Mr.
8 Cloward would agree that they're making a claim against
9 First Street and Aithr in that first cause of action for
10 improper advertising and marketing.

11 THE COURT: Yeah. But, Mr. Goodhart, --

12 MR. GOODHART: Yeah.

13 THE COURT: -- if I -- I just want to make sure I
14 understand where you're going with this. Essentially,
15 you're saying that First Street did not have a duty to
16 produce evidence that might have been relevant to claims
17 that the plaintiff had directly against and only against
18 Jacuzzi?

19 MR. GOODHART: Correct.

20 THE COURT: Even if -- and I'm not disagreeing
21 with you. I'm just making sure I understand your position.
22 That even if First Street knew that it had in its
23 possession some evidence critical to claims against
24 Jacuzzi, one of the co-defendants, you don't have a duty
25 under the discovery rules to produce that under 16.1?

1 MR. GOODHART: We did not know that we had
2 anything in our possession until we started producing
3 materials and that we were then asked to produce materials
4 by plaintiffs through written discovery.

5 THE COURT: Okay. All right.

6 MR. GOODHART: We produced every single relevant
7 piece of information relating to marketing and advertising,
8 which is the first cause of action for negligence in
9 plaintiff's Complaint against First Street and Aithr.

10 THE COURT: Okay.

11 MR. GOODHART: We limited that to pre-accident
12 marketing and advertising because we understand that Ms.
13 Cunnison could not have relied upon any marketing or
14 advertising that took place after she died. So, that's
15 what we produced. That claim is still out there. There's
16 still a negligent claim for advertising and marketing.

17 Mr. Cloward went through -- I counted eight
18 different major issues and I looked through his brief and
19 his Reply. His brief and Reply deal exclusively with
20 strict product liability or product defect claims. That
21 would be the second cause of action.

22 So, and I'm not -- I don't think the Court could
23 do this, but, even arguably, if the Court were to find that
24 First Street should have produced some materials under 16.1
25 that it did not produce on a product liability claim, then

1 the Court can only strike the Answer to the product
2 liability claim. It cannot strike the Answer to the
3 negligent advertising and marketing claim. Because that is
4 not an issue here because plaintiffs never brought it up
5 because First Street and Aithr produced everything that
6 they were required to produce in a 16.1 to the plaintiff.

7 When everything, and all of the e-mails have gone
8 through, yes it took time. And that was done in December
9 of 2018. And, again, there hasn't been a single motion
10 with respect to advertising and marketing materials.

11 Now, dealing with the second cause of action for
12 product liability, defective design, manufacture, and
13 failure to warn, it is undisputed that the exclusive
14 responsibility to manufacture and design the walk-in tub
15 was the responsibility of Jacuzzi and they are a named
16 defendant in the case.

17 So, with respect to the defective product claim,
18 as it currently stands with the Court striking Jacuzzi's
19 Answer, that claim is more or less resolved. So, I'm
20 puzzled by what, if any, prejudice plaintiffs claim they
21 could have suffered when the Court has already found that
22 Jacuzzi's Answer on liability for product defects has been
23 stricken. It's not like, you know, a jury awards plaintiff
24 \$500,000 for strict product liability and they get 500,000
25 from Jacuzzi and they get 500,000 from First Street.

1 Again, and as Mr. Cloward identified, First Street and
2 Aithr are on the second cause of action, and really the
3 third and the fourth as well, simply because they're in the
4 stream of commerce and everything will flow to Jacuzzi at
5 some point in time. Jacuzzi is not a fly by night
6 organization. They are a global manufacturing company with
7 hundreds, if not thousands, of products and product lines.

8 So, where is the prejudice on a product defect
9 claim, which First Street's exposure would simply be
10 because it was in the chain of commerce because it didn't
11 manufacture and design the product? So, -- and, again, I -
12 - but I want to reiterate that First Street has produced
13 everything that it has in its possession. Now, Mr. Cloward
14 may not like it, but that is the fact of the matter.

15 The e-mails all went through my office, through
16 paralegals and associates. It was 120 some thousand of
17 them. First Street, I must admit, did not have the best
18 record retention policy. My office still has this where
19 you double delete an e-mail, it is gone forever. That
20 could explain why there are e-mails showing up in Jacuzzi's
21 production that do not show up in my production. But they
22 showed up. Jacuzzi produced them. We've never sat here --
23 First Street and Aithr has never sat here and said: No,
24 there's never been a single problem with this tub, nobody's
25 ever slipped, nobody's ever fell. We've produced what we

1 have to the plaintiff. Jacuzzi has produced what they have
2 to this plaintiff. And this Court has stricken Jacuzzi's
3 Answer on liability on the product defect claim.

4 So, what I want to get into now is Nick Fox. He's
5 the smoking gun in this Motion to Strike First Street and
6 Aithr's Answer. Well, I've gone through, in my Opposition,
7 questioning many of Mr. Fox's assertions, but there's a
8 couple more to do. Most importantly, when you read through
9 the affidavit, which is Exhibit 21 in Plaintiff's Motion,
10 it's readily apparent that it's nothing more than a self-
11 serving, literally -- literally, Your Honor, fill in the
12 blank, affidavit prepared by Mr. Cloward. There's little,
13 if any, foundational basis for any of the comments or
14 allegations that Mr. Fox has made.

15 And what Mr. Cloward doesn't know is that there
16 are some falsehoods in that affidavit. Perhaps the largest
17 is in an affidavit, it has to be signed and sworn by
18 somebody in their legal name. I'm sure that Mr. Cloward
19 doesn't know that Nick Fox is not Nick Fox's legal name.
20 It's Jonathan Fox. That was conveniently omitted and left
21 out. So, it is not even signed legally by Mr. Fox.

22 He also claims that the general manager of Aihr
23 and First Street, this is paragraph 3 of his affidavit, but
24 we know for a fact he was never general manager of First
25 Street. He was never employed by First Street. He had no

1 employment whatsoever with First Street. Another falsity.
2 And, then, we go into the affidavit and several times it
3 makes reference to: He worked for Aihhr. But, honestly,
4 Your Honor, I do not know what Aihhr is. If you look at the
5 caption in this case, we have Aithr Dealer, Inc. as the
6 named defendant, as it should be.

7 So, there's falsities in this affidavit that are
8 readily apparent on its face. Mr. Fox has never been
9 placed under oath by a court reporter. Mr. Fox has never
10 undergone any type of cross-examination, yet plaintiff's
11 counsel just wants you to take this as full volume.

12 Then, to top it off, and this is a killer. I've
13 never seen this before. In the Reply, plaintiff, counsel,
14 Mr. Cloward, submits his own sworn declaration that he
15 talked to Mr. Fox about things I had brought up and how Mr.
16 Fox claims that they're not true. And Mr. Cloward wants
17 you to take that as evidence. That's hearsay, at its
18 worst, is an affidavit of the plaintiff's counsel. It's
19 not an affidavit of Mr. Fox.

20 Earlier today you heard Mr. Cloward say that --
21 let me get this. That Mr. Fox said he gave an affidavit or
22 gave a thumb drive to Mr. Modena. Mr. Fox did not put that
23 in his affidavit. You read the affidavit in Exhibit 21, I
24 dare you to find where he said he gave Mr. Modena a thumb
25 drive. No. That is coming from plaintiff's counsel. So

1 is plaintiff's counsel now a witness to this evidence to
2 this hearing or to this issue? Perhaps he is.

3 These comments are purely hearsay. But even when
4 you look at what Mr. Cloward's put in his declaration,
5 there's absolutely no foundation to any argument that Mr.
6 Fox, according to Mr. Cloward, through hearsay, claims that
7 you can make changes to Lead Perfection. If you read the
8 affidavit of Mr. Cloward, Mr. Cloward says that Mr. Fox, at
9 his current business, not at First Street or not at Aithr,
10 has Lead Perfection. And that, at his current business,
11 Mr. Fox just tried to make some changes to Lead Perfection
12 and he could. So, of course, because Mr. Fox, through
13 hearsay, can make changes at his current employment on Lead
14 Perfection, that must mean everyone, including First
15 Street, can make changes to Lead Perfection, even though
16 it's directly contrary to a sworn affidavit signed by Mr.
17 Modena.

18 Really, Mr. Fox cannot be trusted. Mr. Fox's
19 affidavit, the one he actually did sign, although it's Nick
20 Fox instead of Jonathan Fox, is disputed by the affidavit
21 of Annie Duback. And I pointed that out in my Opposition.
22 And, then, when you look at the affidavit of Annie Duback,
23 he was never shown a copy of the LP notes. There's no
24 evidence of that in the affidavit. There's no foundation
25 of it. He said that she had approximately six

1 conversations. But when you actually look at the LP notes,
2 which were attached as an exhibit to Mr. Fox's affidavit,
3 Exhibit 21, you can fully see she had more than an [sic]
4 conversation with Ms. Cunnison.

5 So, when you also read her affidavit on paragraph
6 13, she recalls customers having some concerns with
7 complaints, but slipperiness isn't one of those. But,
8 then, you go to paragraph 14, she says: One of the
9 complaints that was received was because it's too slippery.
10 Well, does that mean one person? Because it's in a
11 separate line. So, she received one complaint in the two
12 and a half years that she worked as a production assistant/
13 production manager about slipperiness. Because it read
14 that way. Again, without the cross-examination testimony,
15 that affidavit is simply a self-serving affidavit prepared
16 by counsel.

17 So, we have the issue of this video of a
18 recording. I have provided the Court with Mr. [inaudible]
19 affidavit and I've also provided the Court with -- I
20 believe it is Exhibit 8 to my Opposition. And Exhibit 8 is
21 an e-mail where First Street demanded and requested that
22 Mr. Fox produce everything they have. And, again, yes, we
23 included a request for any recordings because, yes, LP and
24 Five9 did record for 30 days. So, maybe it had been kept.
25 So, Mr. Fox was instructed to make everything and send it

1 over.

2 You have Mr. Modena's affidavit. That recording
3 of Ms. Cunnison was never sent over. Never. To this day,
4 my client is not in possession of that recording. So, how
5 can we be held to produce something we have never actually
6 had? And I just think it's very curious that a disgruntled
7 employee of Aithr, who was terminated, all of a sudden has
8 this recording and produces it. And, now, counsel wants to
9 use that recording to strike the disgruntled former
10 employer -- employee's employer, First Street.

11 So, one also has to ask, if my client had this
12 information, why in the world would he hide it? Again, one
13 of the causes of action in this case is for negligence. In
14 our Answer, we asserted affirmative defenses of comparative
15 fault and contributory negligence. Now, if Ms. Cunnison
16 had, in fact, used the tub, and had, in fact, become stuck
17 in it, well that would be evidence -- clear evidence that
18 Ms. Cunnison knew without a shadow of a doubt that she
19 could become stuck in the tub. And, in spite of this
20 knowledge, continued to use the tub. That would be
21 important evidence for us to have to establish our
22 contributory negligence/comparative fault defenses. She
23 was on notice, if you want to believe this. So, why in the
24 world would we hide this type of information?

25 And, so, Your Honor, plaintiff wants to take this

1 to the extreme of a 16.1 mandatory disclosure requirement
2 about evidence regarding claims and defenses. Well, let me
3 posit this to you, the Court, that -- you know, plaintiff
4 has a negligence claim and comparative fault defenses
5 asserted, wouldn't a plaintiff have to produce medical
6 records of the plaintiff, pre-accident medical records, so
7 that perhaps the defendant can determine whether or not the
8 plaintiff might have been on medications or had some other
9 issues -- medical issues with her which could have created
10 the fall, the issue of being stuck in the tub? On the
11 plaintiff's theory, that would be an affirmative obligation
12 on the plaintiffs to produce in a 16.1 production and never
13 would have to be asked for. Now, interestingly in this
14 case, even though we have a negligence claim and
15 comparative fault claim, plaintiff has never produced a
16 single pre-accident medical record of Ms. Cunnison.

17 Plaintiff also has damages claimed in this case by
18 Mike Smith, one of the heirs. Mike Smith, in his Responses
19 to Interrogatories, said he talked to his mother
20 frequently. Mike Smith passed away. We don't have
21 information anymore, that testimony anymore, his deposition
22 was not taken. They're making a claim of damages based
23 upon a connection he had with his mother, which he is to
24 get, wouldn't phone records be relevant to the claims? And
25 our defense is they didn't talk that much. So, shouldn't

1 under 16.1, under plaintiff's theory, have to produce on
2 their own, without us asking, all of the phone records that
3 support the claim they talked 6, 12, 14 times a month?

4 Plaintiff, in the advertising portion of it, infer
5 that they relied or that she relied upon First Street's
6 advertising and marketing campaign and sales presentation
7 to buy the tub and somehow conned her into buying it.
8 Well, if that is a claim that she is making, in order for
9 us to defend that claim, shouldn't plaintiff have
10 voluntarily, under 16.1, as plaintiff is arguing,
11 negligence claim, voluntarily have produced her laptop or
12 her computer so that we could find out what other websites
13 she visited and obtained information from and researched?
14 In fact, her daughter, Deborah Tamantini testified, very
15 clearly, that in her opinion, her mother was extremely
16 thorough and would have thoroughly researched everything on
17 this tub before buying it.

18 Where is the laptop? Why wasn't it produced?
19 Under plaintiff's theory of 16.1 , they had an affirmative
20 obligation to produce that without ever being asked. And
21 where are the phone call records to show how many calls she
22 made to First Street?

23 Plaintiffs are now advancing this theory that
24 we've deleted a note of a phone call. Well, certainly
25 evidence of that would clearly be established through phone

1 records. And, again, because it's dealing with evidence
2 regarding claims and defenses, under 16.1, that must have
3 been voluntarily produced by plaintiffs.

4 So, plaintiffs are not coming to this argument
5 with clean hands. If under their argument we have failed
6 to voluntarily produce records, then plaintiffs have
7 clearly also voluntarily failed to have produced records.

8 So, as I indicated, Your Honor, the biggest claim
9 in defending First Street and Aithr in this case is the
10 advertising claim in the negligence cause of action. The
11 focus has been on that claim, because that is an
12 independent claim to which Jacuzzi would not ultimately be
13 responsible for. There's nothing in this Motion
14 referencing that claim. So, even if this Court were to
15 somehow find that 16.1 required us to voluntarily produce
16 these items, and because we did not voluntarily produce
17 these items you're going to strike the Answer, the Answer
18 stricken has to be limited to the Answer to the second,
19 third, and fourth causes of action for product defect or
20 product liability, defective design, defective
21 manufacturing.

22 And, again, as I have pointed out, the Court has
23 already struck Jacuzzi's Answer with respect to those
24 causes of action and, therefore, what prejudice could
25 plaintiffs have possibly suffered because of any alleged

1 conduct of First Street and Aithr?

2 And I'm not saying this to tell the Court that
3 we've hidden things because we have not. First Street and
4 Aithr has produced things when they have been asked to
5 produce things. We have supplemented our 16.1s. We have
6 provided plaintiffs with the information they desire. We
7 have agreed to disagree with each other. Plaintiff never
8 filed a single Motion to Compel.

9 I don't know if the Court has any questions.

10 THE COURT: No. That was really helpful, Mr.
11 Goodhart.

12 So, before we continue with the Reply, usually
13 after about an hour and a half, I give my staff a break.
14 Let me ask, Mr. Cloward, how much time would you like to
15 have on reply?

16 MR. CLOWARD: Probably no more than maybe 10 or 15
17 minutes, pretty short.

18 THE COURT: All right. So, let me ask my staff.
19 Does anybody need a break at this time? I'll have no
20 problem with it if you want a break.

21 THE CLERK: We're good, Judge.

22 THE COURT RECORDER: We're good, Your Honor.

23 THE MARSHAL: Thanks, Judge.

24 THE COURT: You're okay? All right. Well, thank
25 you. All right.

1 Mr. Cloward, you may proceed.

2 MR. CLOWARD: Okay. So, I think the question that
3 the Court was drilling down on and it's apparent that the
4 response from First Street is that they don't have to
5 produce any documents that would be relevant to plaintiff's
6 claim against Jacuzzi for the manufacturing. That's the
7 position that they're taking. They're trying to reinvent
8 the Complaint and say: Hey, look, we only are responsible
9 for the advertising claims. We don't have any
10 responsibility on the manufacturing defect, product
11 liability claims. And, so, we never had a duty to produce
12 any of that information, because that's just Jacuzzi's
13 information.

14 Well, the problem with that argument, Judge, is
15 that the claims against First Street are identical to the
16 claims against Jacuzzi. So, therefore, the duties and
17 obligations are the same. So, not only does Jacuzzi or
18 does First Street have an obligation to produce documents
19 that would be helpful in plaintiff's claim against Jacuzzi,
20 but First Street also has an obligation to present and
21 produce documents that would be helpful for plaintiff's
22 claim against First Street and Aithr, which they have not
23 done. Clearly, that's been the excuse that they've used to
24 justify their nondisclosure and their misconduct. They've
25 said: Hey, look. We didn't have to do that and we're, you

1 know, -- we don't have to do that.

2 THE COURT: There is a little bit of a different
3 though. Right? I mean, under *Ribeiro*, I know state of
4 mind is relevant and, given their unique position as
5 handling the advertising and marketing, that would affect
6 their state of mind with respect to their discovery
7 obligations on the product defect issues. Something I
8 certainly have to consider.

9 MR. CLOWARD: Yeah. But I think the fact that we
10 have product defect claims directly against them in causes
11 of action, I think that their excuse is easily -- I guess,
12 is easily excused. I mean, they -- it's not a strong
13 excuse because we have active claims against them. We've
14 been seeking the same information.

15 All of the discovery has been the same. And, so,
16 how can they come and say: Hey, look, we're only focused
17 on the advertising, when our discovery has not been only
18 focused on the advertising? Our discovery has been focused
19 on the manufacturing. It's been focused on the warnings.
20 It's been focused on the incidents. Our 30(b)(6) notice,
21 the same thing. It's the -- you know, a lot of the
22 discovery is identical.

23 And, so, I don't think that that's a very strong
24 argument that they have. I think it's a terribly weak
25 argument. They have to produce this stuff because we have

1 active claims against them.

2 Regarding the, you know, -- they pose the question
3 of: Why would we hide information regarding Sherry
4 Cunnison, because that would help in our comparative
5 negligence claim? Well, you would hide that because it's
6 actual notice that this tub was not a good fit for this
7 individual. It's actual notice that more should have been
8 done to help her figure out whether this -- the tub was
9 appropriate. You know, it's actual notice, Judge. It's
10 not anything other than that.

11 The characterization that our Motion hinges on
12 Nick Fox's affidavit is not true. Nick Fox's involvement
13 in this is the small part of the years and years of
14 litigation abuse. You know, when you have -- when you look
15 at the information that's been produced by First Street,
16 they try to sound as though they voluntarily produced this
17 or, hey, we've produced this when we've been asked, or --
18 and that's not the case. They've been -- they produced the
19 information when we found it, period, end of story. When
20 we would stumble across something and we would send the
21 information, that's when it would be produced. And that is
22 not how discovery is supposed to happen.

23 For instance, a plaintiff, when they're asked,
24 give us all medical providers. We're talking about, you
25 know, an auto case, a personal injury case, when they say,

1 hey, give us all providers, that list should be complete.
2 It -- if the defendant stumbles upon 10 providers
3 throughout the process at various different times, that's
4 not how discovery works. And their argument is -- and I'm
5 -- I tried to quote this, but it's: Hey, Judge, you know,
6 we've never said that there were never any problems with
7 this tub. We've never said that there weren't, you know,
8 issues with the slipperiness. We've never this and that.
9 We've never tried to say that there are no incidents.
10 Horse hockey. That's exactly the position they've taken.

11 In written discovery, when we asked, provide us
12 the incidents, provide us the claims, provide us this
13 information, they would only list two. During Dave
14 Modena's deposition: Tell us the incidents that you're
15 aware of. Well, I only know of one, this incident where
16 I'm sitting in the deposition right now. Oh really? Well,
17 geez, that's odd. Well, maybe Stacey Hackney [phonetic]
18 might know something.

19 And, so, they go outside and she comes back in, or
20 they all come back in, and conveniently, they can only
21 remember two and it's the two that we found, one I was
22 litigating and one we found with Leonard Baize. So, for
23 First Street to say, hey, we've never said that there's
24 anything wrong with the tub, or we've never tried to deny
25 that, we've always been up front and honest, that is not

1 true. That is the exact position they've taken the entire
2 time. And that's why it's been so, so prejudicial.

3 Further, if they knew that the product that they
4 were distributing was defective, okay, with respect to
5 either Ms. Cunnison or any of the other plaintiffs, but if
6 they knew that the product was defective, that's an
7 independent basis for punitive damages against them. So,
8 if they're receiving information that Jacuzzi is not, for
9 instance, if you have the First Street or the Aging in the
10 Home -- let's say the Aging in the Home, the installers
11 that are going and they're finding out that there are big
12 problems with the tub, they're finding out that people are
13 getting stuck, they're finding out that people are falling
14 down, and they're not sharing that information with
15 Jacuzzi, well, that right there is an independent basis of
16 punitive damages, an independent basis of notice,
17 independent basis of knowledge that doesn't have anything
18 to do with Jacuzzi. So that's another reason of why their
19 argument of, hey, we didn't turn this over because it
20 doesn't have anything to do with Jacuzzi, is improper.
21 There are independent arguments; there are independent
22 pieces of evidence that would apply only to them.

23 And let me see. I'm just going through my notes
24 here, Your Honor. I want to be as succinct as possible and
25 not regurgitate arguments. Let's see.

1 Oh, First Street says, you know, we never had the
2 recording of Sherry Cunnison. That's not true because Nick
3 Fox and Annie Duback are your employees. They are First
4 Street, Aging in the Home employees. So, you, by and
5 through your employees, did have possession of this
6 document. You can claim that you didn't. Maybe Dave
7 Modena didn't know about it, if you don't believe Nick
8 Fox's affidavit, but the fact of the matter is these
9 employees were employed at the time in their respective
10 positions and they did have this information.

11 With respect to the e-mails, you know, Mr.
12 Goodhart has said: Hey, you know, we have these e-mails
13 and there's, you know, 120,000. I've heard estimates of
14 200,000. I've heard estimates of, you know, 50 or 60,000.
15 Who knows what the actual number of e-mails are. Number
16 one, no privilege log has ever been produced, which is
17 required by the rules. It's a Discovery Commissioner
18 formal opinion that's been given. It has to be produced to
19 privilege log. They've never produced a privilege log and
20 I think with respect to the fifth prong of *Young*, I think
21 the Court would need to know when the e-mails were received
22 by First Street and if they were actually produced by First
23 Street. And this whole claim that, hey, we couldn't search
24 these e-mails and it took a long time, you know, I don't
25 know how they do things over at the firm -- Thorndal

1 Armstrong. I don't know how they do things, but I can tell
2 you what. You can OCR documents by a PDF. It converts the
3 documents. It's a process that would take maybe, with that
4 volume of documents, to OCR it, you can send it over to
5 Litigation Services. They can OCR it so that you can
6 electronically search all of the e-mails --

7 THE COURT: I've done that. I'm familiar with
8 that and, you know, how it works and the extent to which
9 it's reliable. It's pretty costly to do that. Right? OCR
10 everything, especially if you have 120,000 e-mails. And I
11 don't know how long each e-mail is, but I'm familiar with
12 that.

13 MR. CLOWARD: It's not very costly. We had about
14 -- I think in the trial I had in February, approximately
15 40,000 documents. We used a company to actually create an
16 index of the documents, summarize the documents, and create
17 a hot link within the documents that you click on one and
18 it takes you to the document, and I want to say it was less
19 than \$10,000 to do that. So, it's not something that's --

20 THE COURT: All right.

21 MR. CLOWARD: -- impractical at all.

22 THE COURT: You said 40,000 pages. Here, if it is
23 120, that's three times that. So then we're talking about
24 something less than 30,000, but --

25 MR. CLOWARD: Yeah.

1 THE COURT: Okay. Okay.

2 MR. CLOWARD: The documents that have been
3 produced -- one thing that counsel says is: Hey, we've
4 turned over the marketing and advertising. They filed a
5 Motion. The Motion was unsuccessful or, you know, it was
6 kicked back. Well, the reason the documents were turned
7 over, Judge, is because I e-mailed the Motion to Phil
8 Goodhart and said: Hey, we're filing this Motion. When he
9 saw that the Motion had been drafted and prepared and sent
10 down, then the documents came. Okay? So that's how
11 discovery has been.

12 I find out about the 911, ask him about it: No,
13 we don't have anything to do with it. Hand him the
14 document: Oh, it looks like you've got the goods. Oh,
15 yeah, I guess -- I never said that we didn't sell that to
16 them. You know, the story changes. That's not how
17 discovery should work.

18 Regarding the dealers, they said that -- Mr.
19 Goodhart said that: Look, you only asked for the dealer
20 with respect to Ms. Cunnison. Well, I would like to read
21 for the Court, for the record, the interrogatory regarding
22 the dealer. And I quote, it says -- this is Interrogatory
23 Number 1. The very first interrogatory that we requested.
24 Quote:

25 In the Manufacturing Agreement between First

1 Street and Jacuzzi, Bates stamped as JACUZZI001588
2 through JACUZZI001606, the document indicates that
3 First Street desired Jacuzzi to manufacture walk-in
4 tubs and other bath products for First Street and its
5 network of dealers and distributors - please list all
6 dealers and distributors within the network of First
7 Street.

8 We didn't say: Hey, give us just the dealer with
9 respect to Ms. Cunnison. That's not what it was limited
10 to. Their response didn't limit it to that. Instead,
11 here's their response:

12 Question: -- or excuse me. Answer, quote:

13 Objection. This interrogatory is overbroad with
14 respect to time frame. Without waiving said
15 objections, the only dealer or distributor within the
16 network of First Street is Aithr. As First Street's
17 discovery on this issue is ongoing, defendant reserves
18 the right to amend and/or supplement this response as
19 additional information becomes known, end quote.

20 What they did is when we, you know, I guess,
21 caught them on that, then they tried to come into court and
22 explain away this nondisclosure and said: Oh, well, we
23 thought that that -- that what they meant was only with
24 respect to Ms. Cunnison. That's how they justified it,
25 Judge. And that's what they've done from day one, is

1 they've -- when they get caught, they come in and they try
2 to justify and explain away to the Court their misbehavior.
3 Oh, well we didn't produce thousands of pages of relevant
4 documents because plaintiff doesn't -- you know, because we
5 weren't the manufacturer of the product, even though and
6 ignoring the fact that plaintiff has claims against them
7 for product liability, which are identical -- the elements
8 are identical for them as they are with Jacuzzi. So,
9 plaintiff has to prove the exact same thing.

10 Regarding the Guild Surveys, the -- it's important
11 for the Court to understand the survey issue because First
12 Street sits there and says: Hey, look, you know, Judge,
13 when we were asked this, we turned it over and we gave them
14 the information when they asked. Well, how did we find out
15 about it? How did we find out that there were even these
16 surveys that were important in the case? Well, we find out
17 after Mr. Lee Roberts got involved. And, after Lee
18 Roberts, before the deposition of Kurt Bachmeyer, realized,
19 hey, there's been some things that should have been turned
20 over but they weren't turned over, so, Ben, here you go,
21 I'm going to turn over a lot of documents, thousands of
22 documents.

23 Oh, well, guess what. Guess what were in those
24 documents. And that was in July of 2019, Judge. Some
25 surveys. And guess what the surveys talked about. The

1 slipperiness issue. And, so, what did plaintiff do?
2 Plaintiff said, in specific discovery: Hey, First Street,
3 these are your documents. Why haven't you turned them
4 over? Give us all the documents. That's the only reason
5 that they produced this information.

6 And what if we wouldn't have -- you know, what if
7 Mr. Roberts hadn't gotten involved and those documents
8 hadn't been turned over? Well, guess what. Plaintiff
9 wouldn't have had any of that information and that's the
10 way that discovery is supposed to work, especially when
11 we've asked about that. We have specifically -- we have
12 specific discovery requests that are on point for those
13 issues.

14 Same thing with the StepCote and the LiquiGuard.
15 Those things came out because of productions by Jacuzzi and
16 they were not produced by First Street, even though First
17 Street was in the thick of things and was involved during
18 all of that development.

19 And, finally, you know, Your Honor, with regard to
20 the 911 Alert, how can you be more clear in the text
21 message and on the record that First Street didn't have
22 involvement? But they gloss over that. They gloss over
23 the fact that they flatly misrepresented their involvement
24 with that product and, until they're going to get caught,
25 they're just simply not going to turn anything over,

1 period. That's the way that it works.

2 And the Court should be quite concerned when it's
3 represented in open court, yeah, we've had maybe 200,000 e-
4 mails and we've been kind of just sitting on them and going
5 through them, or 120,000, however many there are. We have
6 just been sitting -- you know, sifting through them.
7 They've had them for a long time, apparently, and there's
8 no privilege log and I can tell you this. They haven't
9 produced 100,000 e-mails. If anything, they've produced
10 maybe, maybe -- I would estimate maybe 1,000 e-mails. I
11 don't even think that many.

12 And when you look at the e-mails that have been
13 produced by Jacuzzi, Jacuzzi has produced significant e-
14 mails that have never been produced by First Street. That
15 should be concerning. You know, you can't have your cake
16 and eat it too. If you're First Street, you can't say:
17 Well, Judge, we lost -- maybe lost some e-mails, and the
18 system is really poor, and we don't know what the system
19 is, and it's really cumbersome, and so this -- that
20 probably explains the nondisclosure of these e-mails, but
21 then in the next breath say: Well, I've been in possession
22 of 200,000 or 120,000 e-mails. Either you have the e-mails
23 or you don't. I mean, you can't say: Hey, look, we might
24 not have relevant information because maybe it was deleted.
25 But then be in possession of the relevant e-mails.

1 And, so, you know, at a very minimum, Your Honor,
2 I think that our request would be that there would be a
3 one-day evidentiary hearing regarding the e-mails,
4 regarding these issues, regarding the other documents that
5 were produced to find out when those were obtained by
6 outside counsel so that the Court can make a proper
7 assessment under the fifth prong of *Young*. And, at a very
8 minimum, because the position has been, well, you know, we
9 don't have to turn it over until the Court orders us, we
10 would like an order today ordering that all relevant
11 information with respect to the advertising, with respect
12 to the marketing, with respect to the manufacturing, with
13 respect to the slipperiness, with respect to other
14 incidents, regardless of time, and regardless of, you know,
15 any other limitation they want to make, that that -- they
16 need to produce that information within 30 days. And that
17 they pay for us to continue Dave Modena's deposition on all
18 of those issues.

19 But we feel like there are so many other issues
20 that simply there's not time to address, that we've been
21 prejudiced in such a way that the Court -- the only fair
22 way to handle this is to strike the Answer. And I'd --
23 16.13(c)(3) is therefore a reason. And their position of,
24 look, we don't have to turn it over until there's an order,
25 that is really thumbing the nose at that rule and is

1 basically saying, look, Judge, we're never going to produce
2 documents pursuant to this rule. And until there's an
3 order, we're not going to do anything and we don't really
4 care what the order's -- or what the rule says.

5 I mean, the rule is there for a reason, Judge.
6 This behavior in this case with these two defendants is
7 exactly what the rule envisioned to protect. The defendant
8 has relevant documents, they know they're relevant, they
9 know they're important, yet they sit there and hold on to
10 them and it's only when a party stumbles upon the documents
11 are they produced. When the Court looks at the documents
12 that we've stumbled upon, it's the surveys, it was the bath
13 mat, it's the StepCote, the LiquiGuard, it's the Alert 911,
14 it's the -- I mean, the only reason they produced the
15 advertising and marketing information was because Mike
16 Dominguez was untruthful in his deposition and said Jacuzzi
17 didn't have anything to do with the product.

18 If you read my affidavit from the Motion that we
19 submitted that the Court sent back -- that the Discovery
20 Commissioner sent back, you know, the only reason that they
21 turned that information over was because Mike Dominguez was
22 not truthful about it. And, so, they were like: Well, no.
23 That's not true. You know, and they called me up on the
24 phone. Well, if you know that these claims are relevant,
25 produce them. Don't only produce them when a witness is

1 not truthful about it or we stumble upon it. That's not
2 fair.

3 And the other question, I guess, the concern that
4 I have is these are just the issues that we've stumbled
5 upon. What other issues are there out there that we don't
6 even know about?

7 And, so, you know, the ability of plaintiff to
8 have a fair trial in this case is gone. And, you know,
9 Judge, I don't like to do -- have cases decided like this.
10 I would prefer to be in a jury trial. I think that -- you
11 know, I hope that my reputation is such that people don't
12 think that that's the way I like to resolve cases. I'm a
13 trial lawyer. I like to be in trial. But it's awfully
14 scary for me to go to trial when I think that I only have
15 half of the information or a portion of the information.
16 And, unfortunately, that's the position that I am in
17 because there has not been good faith participation in the
18 discovery process.

19 And, so, with that, Your Honor, unless the Court
20 has some other issues that it would like -- or answers that
21 it would like me to address, I will rest.

22 THE COURT: Let me ask, is Mr. Roberts still on
23 the line or Ms. Llewellyn?

24 MR. ROBERTS: Yes, Your Honor. I'm still on the
25 line.

1 THE COURT: All right. So, not as to substance,
2 but is there anything that you feel compelled, at this
3 point, that you would need to say as to, you know,
4 procedure or logistics? Or if you need to make a couple of
5 sentences for any reason to preserve Jacuzzi's record on
6 anything. I'm not saying that you do. I'm just simply
7 giving you the floor if you want to make a very brief
8 statement on anything.

9 MR. ROBERTS: The only thing that I would like to
10 add, Your Honor, is there was some discussion of the
11 product defect claim against Jacuzzi having already been
12 decided as a result of this Court's sanction. And, while
13 that's true, I don't see how a sanction against Jacuzzi
14 could have decided the product defect claim against First
15 Street, and, therefore, I think that is still something
16 that the plaintiffs would have to prove independently of
17 the sanction against my client.

18 THE COURT: Understood. I understand that. Thank
19 you.

20 MR. ROBERTS: Thank you, Your Honor.

21 THE COURT: we had, at one point, Mr. Henriod on
22 the line as well. I don't know if he's on the line or if
23 he needs to say anything very briefly.

24 All right. So, a couple of things. Given the
25 history of this case, the volume of material presented, the

1 affidavits, and all of the exhibits, I don't believe that
2 an evidentiary hearing is necessary for me at this time to
3 resolve this. So, I'm not going to order an evidentiary
4 hearing.

5 As to the request by Mr. Cloward for an additional
6 discovery order, I'm not going to do that either. I think
7 the discovery obligations of each of the parties are mostly
8 clear and the rule and the prior orders and outstanding
9 written discovery is sufficient to make it clear to
10 everybody what they were obligated to do or not obligated
11 to do. And if I -- it would confuse things. If I were to
12 issue a new Order now for certain discovery to be
13 conducted, then that would suggest that there's some period
14 in which to comply with the Court Order. And that would
15 also be viewed as opening up discovery and I don't want
16 there to be any confusion on those issues in this case
17 going farther down the road here. I need to resolve what's
18 in front of me now and I intend to do that.

19 I'm going to take this under advisement and have a
20 decision -- there's a lot of material here and I
21 anticipate, because I already started doing this, having a
22 detailed opinion rather than, you know, simply cutting or
23 pasting, or asking one party to prepare an Order. So I
24 will need a little bit more time to do that here.

25 Let's see. Thanksgiving is next Thursday. Most

1 likely, I'll have something right after Thanksgiving. That
2 should give everybody enough time, but it shouldn't impact
3 this case in any way, given that trial is not set until
4 March 1.

5 Now I understand -- let's talk about that for a
6 moment. First, is there anything anyone else needs to say
7 before we discuss scheduling?

8 MR. GOODHART: Your Honor, this is Philip Goodhart
9 for First Street and Aithr.

10 THE COURT: Yes.

11 MR. GOODHART: I believe plaintiffs did provide
12 you with a searchable Excel spreadsheet of the Guild
13 Surveys. Plaintiff had made an issue about that in his
14 response.

15 THE COURT: Yes.

16 MR. GOODHART: I would urge the Court to search
17 that searchable spreadsheet for the words injure, injury,
18 injured, or hazard. And the Court will find that there are
19 zero hits for any of those terms.

20 THE COURT: All right. Well, I'll do that then
21 and take into consideration the significance of whatever I
22 find there.

23 MR. GOODHART: [Indiscernible].

24 THE COURT: I see Mr. Henriod back on the line.
25 I'll give you an opportunity to make a short, three or

1 four, please keep it to that, statement, on any, you know,
2 procedural or logistical issues that we must discuss from
3 your perspective or to make any statement to preserve any
4 record.

5 MR. HENRIOD: Thank you, Your Honor. And I
6 apologize. My cable went out.

7 THE COURT: Oh, no problem.

8 MR. HENRIOD: Yeah, I just wanted to raise what
9 Your Honor does with this Motion I think may affect the
10 jury instructions and the phasing of trial. So, timing
11 wise, I just want to make sure that we don't get the cart
12 before the horse, because when we had brought up the
13 phasing issue, in light of the sanction against us, one of
14 the arguments made by plaintiff was that they would have to
15 prove certain things against First Street. We had
16 suggested that maybe then the trial needed to not just be
17 phased as to us, but be broken between the parties. And,
18 so, if this issue were decided before the jury instruction
19 issue and the phasing question, that might be most
20 efficient.

21 THE COURT: All right. Not a problem. When's the
22 next hearing in this case? It looks like the Motion
23 Regarding Jury Instructions is December 7th. So that won't
24 be a problem here.

25 MR. HENRIOD: Very good. Thank you, Your Honor.

1 THE COURT: I'm planning on having this decision
2 done right after Thanksgiving.

3 All right. So, I think -- are you guys still up
4 against the Five-Year Rule or did you determine if any of
5 the Governor's directives or the Chief Judge directives
6 have extended that? Mr. Cloward?

7 MR. CLOWARD: I think that they did extend that.
8 I think, technically, our Five-Year Rule would have been --
9 I want to say January or February of 2021, but with the --
10 those extensions, that's why I think we felt safe in
11 setting it in March or that the directives did extend that.

12 THE COURT: Mr. Goodhart, so I was -- and Mr.
13 Roberts, I was planning on keeping that March date, unless
14 the parties were going to stipulate to move it to a later
15 date. Obviously, guys, I don't know what -- you know,
16 there's going to be so much reshuffling of each judge's
17 docket. I think that's taking place sometime in the middle
18 of December. And, so, nobody's going to know which judge
19 has which case and everything is going to get moved around.
20 So, you can't know, at this point, which judge is going to
21 hear this case.

22 MR. ROBERTS: Your Honor, --

23 THE COURT: And nobody's going to know. Sorry,
24 Mr. Roberts. Nobody is going to know either whether
25 whatever judge gets this case is going to be able to hear

1 it on March 1st either. But, go ahead, Mr. Roberts.

2 MR. ROBERTS: I was just going to say that we
3 agree that we're within the Five-Year Rule if we try it by
4 the current date and, therefore, you know, we're okay
5 keeping it on that calendar.

6 The one question that I did have is it seems clear
7 that the Chief Judge issued an Administrative Order tolling
8 the Five-Year Rule and, then, the -- there were Orders for
9 jury trials to resume, but there was never an order which
10 specifically rescinded the tolling. And I was wondering if
11 the Court was aware of a general interpretation as to how
12 long the Five-Year Rule was actually tolled after that
13 initial Order tolling it was entered.

14 THE COURT: I -- at least my department hasn't
15 received any instruction on that. So, I can't help you
16 there. No, but you know what I can do is I can have my law
17 clerk contact the Chief Judge and see if the Chief Judge is
18 planning to issue to the public some clarification on that.

19 MR. ROBERTS: Great. But I think we're okay with
20 the current date and --

21 THE COURT: All right.

22 MR. ROBERTS: -- we're not going to move to
23 dismiss, as long as we get trial started as it's currently
24 set.

25 THE COURT: All right. Very good. Anything else

1 from anybody? I'm going to take this under advisement.
2 Does anybody want to say anything?

3 MR. GOODHART: Your Honor, this is Phil Goodhart
4 again. And I don't mean to be sort of wrenching to
5 everything, and I understand and appreciate everybody's
6 opinions on the Five-Year Rule. My question is, which I
7 don't have an answer, is: Does the Senior Judge have the
8 ability to toll a statute? Or is that the province of the
9 Legislature?

10 THE COURT: Yeah, I'm not going to give an
11 advisory opinion on that one. I'll have to leave that to
12 you to decide and --

13 MR. GOODHART: That very well could be -- there
14 could very well be constitutional issues involved here over
15 whether or not the judge -- a judge, an elected official,
16 has the ability to essentially rewrite a statute that was
17 enacted by the Legislature.

18 THE COURT: Mr. Goodhart, did you want to take a
19 position on the record on whether the March 1, 2021 trial
20 date would be beyond the Five-Year Rule? I'll leave it up
21 to you if you want to make a position on the --

22 MR. GOODHART: You know, at this point, Your
23 Honor, I really don't know if I can. If, for example, it
24 is unconstitutional and the Five-Year Rule does run and it
25 runs in January, that would be a disservice to my client by

1 me stipulating or agreeing to extend it beyond March the 1st
2 and I don't think that's an issue that's going to be
3 decided by the end of the Five-Year Rule.

4 THE COURT: So, the record will reflect that
5 you're reserving the right to contend that the Five-Year
6 Rule expires or the five-year period of time in which a
7 case must be tried expires before the current set trial
8 date of March 1, 2021. And, I gather that you're reserving
9 your right on that issue then.

10 MR. GOODHART: Yeah, I think I have to, Your
11 Honor, to protect my client. I don't know what Your
12 Honor's ruling is going to be on this particular Motion to
13 Strike and how it's going to come down, but I'm not sure
14 whether I can put anything else on the record.

15 THE COURT: Well, regardless of what I do on the
16 Motion to Strike, there's always damages. So, --

17 MR. GOODHART: I understand that and there will be
18 a motion that I will be filing in the very near future on
19 the damages issue.

20 THE COURT: Okay. Very good. Very good.

21 Well, I -- all I was trying to connote here is
22 regardless of how I decide this, there's still possibly a
23 Five-Year Rule issue.

24 MR. CLOWARD: Well, if that's the position of the
25 parties and -- I guess would the Court have the ability to

1 set this before March 1st? I mean, if the position of the
2 defendant is that we think even with the Administrative
3 Orders the Five-Year Rule is going to run, I think to
4 protect my client, I think we need a setting before March
5 1st, unfortunately. Or --

6 THE COURT: Didn't we --

7 MR. CLOWARD: -- if the Court wanted, I could file
8 a motion. I've seen motions -- Motions to Determine the
9 Five-Year Rule and we could brief the issues as to whether
10 the Administrative Orders apply to stay and toll that
11 deadline, and we could brief it for the Court, and the
12 Court could rule. That would provide us at least with a
13 little bit of more certainty that the issue has been
14 brought before the Court, it's been briefed, the parties
15 have set forth their positions, and the Court can rule at
16 that time whether it's necessary to move the trial up or
17 whether the current setting is most appropriate.

18 THE COURT: I don't know that my position on it
19 matters. It's -- that wouldn't affect how the Supreme
20 Court would rule because it's -- it would be an issue of
21 error of law and it -- and whether the Five-Year Rule is
22 running or not possibly running, either way, I think the
23 District Court has to proceed with the trial. I guess, the
24 only circumstance under which the judge, the trial judge,
25 would have to approach the issue is if the judge was going

1 to determine that five-year had expired and then dismiss
2 the case. And, then, I guess there would be an appeal from
3 the dismissal. But that wasn't my intent here. My intent
4 was to go forward with the trial.

5 In terms of moving it up, Mr. Cloward, didn't we
6 discuss all of this at the last hearing and I thought you
7 were comfortable with going forward on March 1st, knowing
8 that -- you know, that not all the parties were willing to
9 stipulate to move the Five-Year Rule? Didn't -- because I
10 don't want to have to tinker with the schedule --

11 MR. CLOWARD: Sure.

12 THE COURT: -- or make substantial changes to the
13 schedule, Mr. Cloward.

14 MR. CLOWARD: Sure. My understanding was that
15 while the parties were not willing to stipulate to extend
16 the Five-Year Rule, at that point, and maybe I'm mistaken,
17 but, at that point, I didn't think that anyone was
18 contending that the Administrative Order was not effective
19 in extending the order. So, I felt comfortable moving it,
20 believing that we had an agreement at least that the
21 Administrative Order was effective in tolling the Five-Year
22 Rule for this period of time set out in the Administrative
23 Order. But if Mr. Goodhart is now expressing that it is
24 his position or -- I guess, he's not taking a position, or
25 he's unable to agree whether the Administrative Order is

1 sufficient or not, that's concerning.

2 But maybe what we could do, Your Honor, rather
3 than monkey with that right now, if the Court would
4 entertain a Motion, you know, on OST, maybe we could take a
5 look at it, do some research, and if we feel that it's
6 necessary to move that up, we can file a Motion for an
7 expedited -- or accelerated trial scheduling order with the
8 briefing with the Administrative Orders and so forth --

9 THE COURT: I think we -- this is the way I would
10 prefer to do it is --

11 MR. CLOWARD: Okay.

12 THE COURT: -- I don't anticipate, and I don't
13 want to, and I don't think it would be proper for me to
14 make a ruling on whether the Five-Year Rule has expired or
15 not expired. The proper procedural --

16 MR. CLOWARD: Okay.

17 THE COURT: -- vehicle for the issue to be brought
18 to me with what to do with a trial date would be a motion
19 on order shortening time to advance the trial date based
20 upon an argument that you might present that the Five-Year
21 Rule could be expiring. And if you had -- then had a
22 legitimate, good faith belief that there is some doubt as
23 to the expiration of the Five-Year Rule, perhaps I would be
24 able to advance it.

25 But what I'm going to ask you to do is to look at

1 this issue a little bit closer, Mr. Cloward, check your
2 sources, check the directives, see if there's anything out
3 of the Chief Judge, and then you decide on your own, and
4 maybe talk to other counsel in this case, and then you
5 decide on your own if you think the trial needs to be
6 advanced in order to protect your client's rights. I'll
7 give you leave to file an order shortening time and I would
8 resolve that issue forthwith on whether to advance the
9 trial date in chambers.

10 MR. CLOWARD: Thank you, Judge.

11 THE COURT: That's how I would prefer to do it,
12 but I think I would request -- I'd request that the parties
13 at least have a telephonic meet and confer on the issue
14 before any additional motion is filed.

15 MR. CLOWARD: Understood. Will do.

16 MR. GOODHART: Okay. Your Honor, Phil Goodhart
17 here. I agree with that. I think I do not know as I stand
18 here whether there are constitutional issues. I'm just
19 trying to think ahead and I would be happy to converse with
20 other counsel to find out if this is even an issue. So,
21 I'm very agreeable to having a conference with Mike or with
22 Ben and Lee to figure this out.

23 THE COURT: Great. No, I appreciate that. And I
24 -- well, let me say this. I'm concerned that, given the
25 complexity of this case and the history of the discovery

1 disputes in this case, I wouldn't want the timing of
2 resolution of those discovery disputes to prejudice any
3 party in presenting their claims or defenses in this case.
4 So, I think that we ought to try to work it out to get this
5 case heard as soon as possible, without violating the Five-
6 Year Rule, as long as we can do that. But I'm not going to
7 make any ruling on whether the Five-Year Rule is going to
8 be expired or not at any point in time.

9 All right?

10 MR. CLOWARD: Understood.

11 THE COURT: All right. Thank you, counsel. The
12 Court will issue -- I will be issuing an actual detailed
13 minute order shortly after Thanksgiving.

14 MR. CLOWARD: Thank you, Your Honor.

15 THE COURT: Thank you, counsel.

16 MR. GOODHART: Thank you, Your Honor.

17 MR. ROBERTS: Thank you, Your Honor. Have a nice
18 holiday, Your Honor. Don't work all of it.

19 MR. GOODHART: Enjoy your holidays, everybody.
20 Thank you.

21 MR. ROBERTS: Thanks. Thanks, Phil.

22

23 PROCEEDING CONCLUDED AT 11:24 A.M.

24 * * * * *

25

1 **CERTIFICATION**

2

3

4 I certify that the foregoing is a correct transcript from

5 the audio-visual recording of the proceedings in the

6 above-entitled matter.

7

8 **AFFIRMATION**

9

10 I affirm that this transcript does not contain the social

11 security or tax identification number of any person or

12 entity.

13

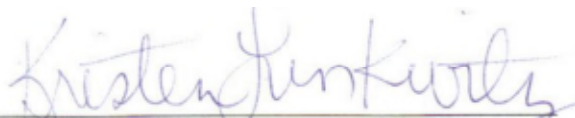
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PETITIONERS' APPENDIX TAB 9

A-16-731244-C

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Product Liability

COURT MINUTES

December 28, 2020

A-16-731244-C Robert Ansara, Plaintiff(s)
vs.
First Street for Boomers & Beyond Inc, Defendant(s)

December 28, 2020

Minute Order

HEARD BY: Scotti, Richard F.

COURTROOM: Chambers

COURT CLERK: Keri Cromer

JOURNAL ENTRIES

- The Court GRANTS Plaintiffs' Renewed Motion to Strike Defendant First Street For Boomers & Beyond, Inc.'s (First Street) Answer to Fourth Amended Complaint. First Street willfully and repeatedly concealed very relevant evidence with the intent to harm and severely prejudice the Plaintiff's ability to pursue its claims, in violation of its discovery obligations under NRCP 16.1. This Court has considered each of the factors set forth in Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88 (1990) before reaching its conclusion. Accordingly, pursuant to NRCP 16.1(e)(3), the Court strikes First Street's Answer as to liability, thereby leaving damages as the remaining issues in this case to be tried.

Defendant First Street was an entity that worked closely with Defendant Jacuzzi in marketing, advertising and selling the Jacuzzi tub that is the subject of this action. Defendant AITHR and other dealers installed the Jacuzzi tubs. Defendant Jacuzzi was the designer and manufacturer of the tub that is the subject of this action.

Some relevant dates involved here include the following: the tub was installed in Ms. Cunnison's home on January 27, 2014. Ms. Cunnison was found stuck in her tub on February 21, 2014, and ultimately died of injuries related to the incident on February 25, 2014. The original Complaint was filed in this action on February 3, 2016. By the time of Plaintiff's Fourth Amended Complaint, but certainly no later than February 2018 when Plaintiff identified slip as one of the email search terms to use in discovery, it was crystal clear that one of Plaintiff's main theories of the case was that the slipperiness of the Jacuzzi tub led to Ms. Cunnison slipping and becoming stuck, injured, and deceased. Further, First Street was aware at least as early as September 19, 2018, as a result of a Discovery Commissioner Hearing, that documents pertaining to all injury claims related to the Jacuzzi tub were discoverable and relevant. Then, on March 4, 2019, this Court ordered the

PRINT DATE: 12/28/2020

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Minutes Date: December 28, 2020

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defendants to produce all documents relating to any slip incident in a Jacuzzi tub whether or not there was any injury.

This is the list of the most critical evidence that First Street concealed: (1) Plaintiff Cunnison recording of a phone call to Defendant First Street about getting stuck at least once before she died; (2) the so-called Guild Surveys containing numerous complaints about customers slipping and/or falling while using the Jacuzzi walk-in tubs; (3) documents about and the existence of the Alert 911 system; (4) the anti-slip bathmat; (5) documents and information about dozens of incidents of customers who had slipped and/or got stuck in the relevant Jacuzzi tub, and were either injured or had been at risk of being injured due to the slipperiness or being stuck; and (6) the so-called Lead Perfection notes prepared by First Street and/or Aithr documenting repeated customer complaints about the slipperiness of the Jacuzzi tubs, of which First Street had possession.

Throughout its opposition to the Plaintiff's Motion to Strike, First Street advances the arguments that it did not violate any Court Order, that it did not violate any Discovery Commissioner Order, and that it timely responded to Plaintiff Cunnison's written discovery requests. These things have all been considered by this Court in the analysis of the degree of willfulness of First Street's actions. But First Street substantially ignores and overlooks its obligations under NRCP 16.1, which triggered the duty to disclose all relevant evidence when the relevance should have been known no later than February 2018. First Street repeatedly violated this duty.

The Cunnison Phone Call Recording: On January 31, 2014 Plaintiff Cunnison apparently called and left a voicemail message on the cell phone of Annie Doubek, an employee of AITHR. In the voicemail message Ms. Cunnison reports that she had gotten stuck in the tub. Somehow the voicemail became in the possession of Nick Fawkes Aithr's General Manager. First Street, in its defense, argues that AITHR had directed Mr. Fawkes to retain all relevant evidence; that he supposedly produced everything to corporate counsel on May 1, 2014; that such production did not include the voicemail; and that First Street did not learn of the voicemail until Plaintiff filed its Motion to Strike. The fact remains that Aithr's General Manager did have a copy of the voicemail, and none of the Defendants ever turned it over to Plaintiff. Plaintiff's counsel obtained a copy of the voicemail when Mr. Hawkes ended his employment with Aithr, and turned it over to Mr. Cloward, counsel for Plaintiff.

The Guild Surveys: The Guild Surveys are written surveys prepared by the company GuildQuality based on customer complaints of products, including the subject Jacuzzi tub. Guild Surveys involving the subject Jacuzzi tub have existed for at least the years 2015-2019. First Street possessed these Guild Surveys, yet failed to produce them until August 2019. First Street failed to produce the Guild Surveys in time for Plaintiff to use them in the preparation for the deposition Dave Modena. First Street argued that it had no duty to produce them prior to Plaintiff serving an official document request in July 2019. But First Street is wrong because it had a duty to produce them no later than the time it first should have realized that the slipperiness of the tub was an issue in the case.

The Alert 911 System: The Alert 911 was a safety system for the Jacuzzi tub described in First Street

advertising material. First Street failed to produce documents regarding the Alert 911 until about August 2019. First Street misrepresented and concealed from Plaintiff that it was involved with the Alert 911, until Ruth Curnutte found and gave to Plaintiff a First Street invoice given to her specifically listing the Alert 911 system as being provided by them. First Street argues that Plaintiff was directed by the Discovery Commissioner on September 19, 2018, to seek the information by a written discovery request, which Plaintiff did not do until July 3, 2019. Even so, that does not excuse First Street's failure to produce the evidence earlier in accordance with NRCP 16.1.

The Anti-Slip Bathmat: Plaintiff discovered the existence of the anti-slip bathmat when it deposed Noreen Rouillard. Prior to that deposition First Street had never produced any evidence of the bathmat. First Street obviously knew about the bathmat because in Jacuzzi's response to Request for Production No. 129, Jacuzzi declared that the model 5229 walk-in tub has been shipped with a bathmat for optional use since approximately March of 2016. Ms. Rouillard herself testified about the bathmat: it came with the tub.

Other Customer Complaints Regarding Slipperiness: As extensively detailed in Plaintiff's briefs and exhibits, First Street had evidence of and concealed numerous incidents of customers slipping and falling and/or getting stuck and/or injured in the subject Jacuzzi tub. Plaintiff learned of many of these incidents from a large document production, several hundred pages of emails, by Jacuzzi just days before the deposition of the Director of Jacuzzi's Customer Service, Kurt Bachmeyer July 26, 2019. First Street had failed to produce these documents, even though, as detailed in Plaintiff's briefs, First Street had documents pertaining to at least 63 relevant incidents.

The Court finds that First Street's discovery abuses were willful with the intent to harm Plaintiff. At any turns First Street hid evidence that the Jacuzzi tub was slippery, that it had documents about the slipperiness of the tub, that customers had complained about the slipperiness of the tub, that some customers had been injured due to the slipperiness of the tub, that the Plaintiff herself had called about the slipperiness of the tub, and that steps existed and were contemplated and/or used to try to mitigate the harm from the slipperiness of the tub. Such abuses were repeated and involved highly relevant pieces of evidence, within the possession of First Street, readily identifiable and locatable by First Street within its own records, and often withheld by First Street until First Street's concealment was caught by Plaintiff through some other discovery in the case (or by Jacuzzi's own production of the evidence first). Further, the degree of willfulness is augmented because First Street, without justification, has blamed Plaintiff for the delay in discovery in this case.

Plaintiff has been substantially prejudiced by First Street's concealment of the evidence. First Street deprived Plaintiff of the opportunity to use the concealed documents in its several sessions of deposition of the Jacuzzi 30(b)(6) and other witnesses. First Street also caused substantial delay in the taking of its own deposition. First Street concealed a substantial number of similar incidents until after the close of discovery in this case. Plaintiff have not been able to adequately use the concealed evidence with their own experts, or to use it in time to prepare to examine Defendant's experts. First Street was a substantial cause of the very disjointed discovery outlined in Plaintiff's Timeline for

Reply , exhibit 41, as well as pp. 36-41 of its Reply Brief. Further, Plaintiff has been prevented from taking any further depositions regarding any of the new evidence because discovery closed August 2019. Plaintiff's trial preparations, and ability to present its case has been drastically and irreparably compromised. A further extension of the discovery deadline, considering the age of this case, the time that the Plaintiff has been waiting for a proper day in Court, and considering the numerous prior extensions necessitated by First Street's misconduct and the discovery misconduct of the other defendants, would be unfair to impose upon the Plaintiff.

Any sanction less than the striking of First Street's Answer would be grossly inadequate to remedy the harm that First Street inflicted upon Plaintiff. The First Street discovery abuses destroyed Plaintiff's ability to attempt to persuade the jury on its claims; on balance then, and in fairness, Plaintiff should no longer have to prove First street s liability. Further, based on the substantial evidence presented already by the parties to this Court, viewed in the light most favorable to the defendants, and using a burden on Plaintiff of proof on preponderance of the evidence, proves to this Court that Plaintiff is entirely justified in the claims it brought against First Street. Of course, this Court is not the trier of fact; but the level of proof already given does demonstrate that it would not be unreasonable to impose liability on First street for its discovery abuses. It is not like liability is being imposed on what would otherwise be a completely innocent party.

Evidence has been irreparably lost in this sense. Everything concealed and untimely disclosed by First Street has prevented Plaintiff from using in deposition of the many witnesses in this case. This testimony about the concealed evidence has been lost because First Street prevented it from coming into existence, and it cannot now come into existence because discovery has closed, and this case has reached the so-called five-year-rule (except as stayed due to special emergency Covid-19 rules).

There is no less feasible and fair sanction. The Plaintiff should not have to further endure litigation that has already gone on for five (5) years so the re-opening of discovery would not be fair. Besides, the facts and circumstance in this case show this Court that First Street will continue to withhold relevant evidence, and that this case would continue ad nauseum to the administration of justice absent the sanction.

The sanction of striking the answer of First Street will not unfairly operate to penalize First Street for the conduct of its counsel. In its opposition to the instant motion First Street did not attempt to excuse its discovery abuses based on advice of counsel. Nor did First Street identify any discovery conduct that was done at the direction of its counsel.

The sanction imposed here is necessary to deter First Street, as well as litigants in future cases, from abusive litigation tactics and discovery abuses. In a case of this magnitude, where a person has suffered and died while using a product, discovery of all relevant facts and circumstances surrounding the design, manufacturing, marketing, advertising, and customer use of the product should be done in a full and fair and timely manner to get to the truth of what happened and why. First Street interfered with this process, so a proper message must be sent.

In sum, First Street prevented Plaintiff from getting a fair trial; and the only fair remedy is to strike First Street's Answer, establish liability as a matter of law, and permit Plaintiff to proceed to prove up its damages.

The Plaintiff shall prepare and submit the proposed Order forthwith, consistent herewith, correcting for any scrivener errors, and adding appropriate context and authorities, consistent with the Plaintiff's briefs. Further, the Order shall be submitted pursuant to the electronic submission provisions of AOs 20-17 and 20-24. If the Court does not receive the proposed Order by 4 p.m. Wednesday, December 30, 2021, then this Minute Order shall be signed by this Court and shall become the official Court Order in this matter.

CLERK'S NOTE: The above minute order has been distributed to counsel by the Court Clerk via electronic service. kc//12-28-20



**THORNDAL
ARMSTRONG**
DELK BALKENBUSH & EISINGER

A PROFESSIONAL CORPORATION

ATTORNEYS

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PETITIONERS' APPENDIX TAB 10

Heather S. Harris
CLERK OF THE COURT

ORDR

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Nevada Bar No. 11087

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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 I through 20; DOE
CONTRACTORS 1 through 20; and DOE 21
SUBCONTRACTORS 1 through 20, inclusive,

Defendants.

AND ALL RELATED MATTERS

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

ORDER STRIKING
DEFENDANTS FIRST STREET
FOR BOOMERS & BEYOND,
INC. AND AITHR DEALER,
INC.'S ANSWER AS TO
LIABILITY ONLY





1 Plaintiffs’ Renewed Motion to Strike Defendant First Street for Boomers & Beyond,
2 Inc.’s and AITHR Dealer, Inc.’s Answer to Plaintiffs’ Fourth Amended Complaint came on for
3 hearing before this Honorable Court on November 19, 2020.

4 Benjamin P. Cloward, Esq. and Ian C. Estrada, Esq. of Richard Harris Law Firm and
5 Charles H. Allen, Esq., of Allen & Scofield appeared on behalf of Plaintiffs.

6 Philip Goodhart, Esq. of Thorndal Armstrong Delk Balkenbush & Eisinger appeared on
7 behalf of Defendants First Street for Boomers & Beyond, Inc., AITHR Dealer, Inc., and Hale
8 Benton.

9 D. Lee Roberts, Esq., Johnathan T. Krawcheck, Esq., and Brittany M. Llewellyn, Esq. of
10 Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC and Joel D. Henriod, Esq. of Lewis Roca
11 Rothgerber Christie, LLP appeared on behalf of Defendant Jacuzzi, Inc.

12 After full, thorough, and careful consideration of papers and pleadings on file herein,
13 and the briefs and oral argument of the parties, with good cause appearing:

14 The Court GRANTS Plaintiffs’ Renewed Motion to Strike Defendant First Street for
15 Boomers & Beyond, Inc. (“First Street”) and AITHR Dealer, Inc.’s (“AITHR”) (collectively
16 hereafter, “First Street Defendants”) Answer to Fourth Amended Complaint. First Street
17 willfully and repeatedly concealed very relevant evidence with the intent to harm and severely
18 prejudice the Plaintiffs’ ability to pursue its claims, in violation of their discovery obligations
19 under NRCP 16.1. This Court has considered each of the factors set forth in Young v. Johnny
20 Ribeiro Bldg., Inc., 106 Nev. 88 (1990) before reaching its conclusion. Accordingly, pursuant to
21 NRCP 16.1(e)(3) and NRCP 26, the Court strikes First Street and AITHR’s Answer as to
22 liability, thereby leaving damages as the remaining issues in this case to be tried. This Order is
23 based on the following Findings of Fact and Conclusions of Law.

24 **I. FINDINGS OF FACT**

25 Defendant Jacuzzi, Inc., dba Jacuzzi Luxury Bath (“Jacuzzi”) was the designer and
26 manufacturer of the model 5229 tub that is the subject of this action. Defendant First Street was
27 an entity that worked closely with Defendant Jacuzzi in marketing, advertising and selling the
28 Jacuzzi tub that is the subject of this action. Defendant AITHR and other dealers installed the



1 Jacuzzi tubs. AITHR is fully owned by First Street. First Street and AITHR have been
2 represented by the same counsel throughout this entire litigation and the Court finds that the
3 discovery misconduct described herein is applicable to both First Street and AITHR and,
4 therefore, the sanctions herein apply to both First Street and AITHR.

5 Some relevant dates involved here include the following: the tub was installed in Ms.
6 Cunnison's home on January 27, 2014. Ms. Cunnison was found stuck in her tub on February
7 21, 2014, and ultimately died of injuries related to the incident on February 25, 2014. The
8 original Complaint was filed in this action on February 3, 2016. By the time of Plaintiff's
9 Fourth Amended Complaint, but certainly no later than February 2018 when Plaintiff identified
10 slip as one of the email search terms to use in discovery, it was crystal clear that one of
11 Plaintiff's main theories of the case was that the slipperiness of the Jacuzzi tub led to Ms.
12 Cunnison slipping and becoming stuck, injured, and deceased. Further, First Street was aware
13 at least as early as September 19, 2018, as a result of a Discovery Commissioner Hearing,
14 involving Defendant Jacuzzi, that documents pertaining to all injury claims related to the
15 Jacuzzi tub were discoverable and relevant. Then, on March 4, 2019, this Court ordered the
16 defendants (which included First Street and AITHR) to produce all documents relating to any
17 slip incident in a Jacuzzi tub whether or not there was any injury.

18 This is the list of the most critical evidence that First Street Defendants concealed: (1)
19 Plaintiff Cunnison's recordings of phone calls to Defendant First Street wherein on at least one
20 occasion she complained about getting stuck once before she died, where she had to "dive
21 underneath" the water to drain the tub; (2) the so-called Guild Surveys containing numerous
22 complaints about customers slipping and/or falling while using the Jacuzzi walk-in tubs; (3)
23 documents about and the existence of the Alert 911 system; (4) the anti-slip bathmat; (5)
24 documents and information about dozens of incidents of customers who had slipped and/or got
25 stuck in the relevant Jacuzzi tub, and were either injured or had been at risk of being injured due
26 to the slipperiness or being stuck; and (6) the so-called Lead Perfection notes prepared by First
27 Street and/or Aithr documenting repeated customer complaints about the slipperiness of the
28 Jacuzzi tubs, of which First Street Defendants had possession.



1 Throughout its opposition to the Plaintiff's Renewed Motion to Strike, First Street
2 Defendants advance the arguments that they did not violate any Court Order, that they did not
3 violate any Discovery Commissioner Order, and that they timely responded to Plaintiff
4 Cunnison's written discovery requests. These things have all been considered by this Court in
5 the analysis of the degree of willfulness of the First Street Defendants' actions. But the First
6 Street Defendants substantially ignore and overlook their obligations under NRCP 16.1 and
7 NRCP 26, which triggered the duty to disclose and supplement prior discovery responses with
8 all relevant evidence when the relevance should have been known no later than February 2018.
9 The First Street Defendants repeatedly violated these duties.

10 The Cunnison Phone Call Recordings: On January 31, 2014, Plaintiff Cunnison
11 apparently called and left a voicemail message on the cell phone of Annie Doubek, an employee
12 of AITHR. In the voicemail message Ms. Cunnison reports that she was having problems
13 installing a part (drain handle extension) that had been sent to her as a result of a prior call
14 where she had called and reported she had gotten stuck in the tub and had to "dive underneath"
15 the water to get the tub to drain. Somehow the voicemails became in the possession of Nick
16 Fawkes, AITHR's General Manager. The First Street Defendants, in their defense, argue that
17 AITHR had directed Mr. Fawkes to retain all relevant evidence; that he supposedly produced
18 everything to corporate counsel on May 1, 2014; that such production did not include the
19 voicemails; and that First Street did not learn of the voicemail until Plaintiffs filed their Motion
20 to Strike. The fact remains that AITHR's General Manager, Nick Fawkes did have a copy of
21 the voicemails, and none of the Defendants ever turned the voicemails over to Plaintiffs. In
22 2015, Mr. Fawkes ended his employment with AITHR. Prior to ending his employment with
23 AITHR, Mr. Fawkes retained a copy of some of the voicemails AITHR and First Street had for
24 Ms. Cunnison's file. In late 2019, Jacuzzi produced multiple documents which included an
25 email from AITHR employee, Mr. Fawkes, wherein his identity was made known. Prior to that
26 time, neither First Street nor AITHR had ever identified Mr. Fawkes. In 2020, after learning Mr.
27 Fawkes' identity, Plaintiffs contacted him to discuss an email he had authored that had been
28 turned over by Jacuzzi. It was then that Plaintiffs learned of voicemails that had not been turned



1 over. Plaintiffs were provided a copy of at least one voicemail of Ms. Cunnison herself. See,
2 Pls.’ Motion, at 12:20-19:16; see also, Pls.’ Reply Br., at 2:6-11:19.

3 The Guild Surveys: The Guild Surveys are written surveys prepared by the company
4 Guild Quality based on customer complaints of products, including the subject Jacuzzi tub.
5 Guild Surveys involving the subject Jacuzzi tub have existed for at least the years 2015-2019.
6 First Street possessed these Guild Surveys yet failed to produce them until August 2019. First
7 Street failed to produce the Guild Surveys in time for Plaintiffs to use them in the preparation
8 for the deposition of Dave Modena, the NRCP 30(b)(6) designee of the First Street Defendants.
9 First Street argued that it had no duty to produce them prior to Plaintiffs serving an official
10 document request in July 2019. But First Street is wrong because it had a duty to produce them
11 no later than the time it first should have realized that the slipperiness of the tub was an issue in
12 the case. See, Pls.’ Motion, at 2:19-4:8; see also, Pls.’ Reply Br., at 11:20-18:16.

13 The Alert 911 System: The Alert 911 was a safety system for the Jacuzzi tub described
14 in First Street advertising material. The First Street Defendants failed to produce documents
15 regarding the Alert 911 until about August 2019. The First Street Defendants misrepresented
16 and concealed from Plaintiffs that it was involved with the Alert 911, until Ruth Curnutte, a
17 non-party Jacuzzi walk-in tub customer, found and gave to Plaintiffs a First Street invoice given
18 to her specifically listing the Alert 911 system as being provided by them. The First Street
19 Defendants argue that Plaintiffs were directed by the Discovery Commissioner on September
20 19, 2018, to seek the information by a written discovery request, which Plaintiffs did not do
21 until July 3, 2019. Even so, that does not excuse First Street’s failure to produce the evidence
22 earlier in accordance with NRCP 16.1. See, Pls.’ Motion, at 4:9-7:5; see also, Pls.’ Reply Br., at
23 19:19:20-26:20.

24 The Anti-Slip Bathmat: Plaintiff discovered the existence of the anti-slip bathmat when
25 it deposed Noreen Rouillard. Prior to that deposition, the First Street Defendants had never
26 produced any evidence of the bathmat. The First Street Defendants obviously knew about the
27 bathmat because in Jacuzzi s response to Request for Production No. 129, Exhibit 15 to
28 Plaintiffs’ Renewed Motion, Jacuzzi declared that the model 5229 walk-in tub has been shipped



1 with a bathmat for optional use since approximately March of 2016. Ms. Rouillard herself
2 testified about the bathmat: it came with the tub. See, Pls.' Motion, at 7:6-9:26; see also, Pls.'
3 Reply Br., at 26:21-31:14.

4 Other Customer Complaints Regarding Slipperiness: As extensively detailed in
5 Plaintiffs' briefs and exhibits, the First Street Defendants had evidence of, and concealed
6 numerous incidents of, customers slipping and falling and/or getting stuck and/or injured in the
7 subject Jacuzzi tub. Plaintiffs learned of many of these incidents from a large document
8 production, consisting of several hundred pages of emails, by Jacuzzi just days before the
9 deposition of the Director of Jacuzzi's Customer Service, Kurt Bachmeyer on July 26, 2019.
10 The First Street Defendants had failed to produce these documents, even though, as detailed in
11 Plaintiffs' briefs, the First Street Defendants had notice of at least 63 relevant incidents. See,
12 Pls.' Motion, at 10:1-12:19; see also, Pls.' Reply Br., at 31:15-32:21.

13 **II. APPLICABLE STANDARDS**

14 The First Street Defendants are in violation of NRCP 16.1 and NRCP 26 because they
15 have not produced significant portions of the above-mentioned evidence. Accordingly,
16 sanctions under NRCP 16.1(e)(3) and NRCP 37 are appropriate.

17 This Court is invested with authority to issue sanctions for discovery violations.¹ Under
18 16.1(e)(3), sanctions can be imposed upon motion or the court's own initiative for failure to
19 reasonably comply with any provision of NRCP 16.1 without prior entry of a court order
20 compelling the discovery in question. NRCP 16.1(e)(3) provides:

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

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

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

27 ¹ Nevada Power v. Fluor Illinois, 108 Nev. 638, 644, 837 P.2d 1354, 1358-59 (1992); Young v.
28 Johnny Ribiero Building, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

(B) An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).²

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

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

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

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
...

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.⁴

This Court is also granted authority under other Nevada statutes to ensure compliance with its orders and to impose sanctions upon those who fail to do so.⁵ EDCR 7.60 permits a

² NRCP 16.1(e)(3).

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

⁴ NRCP 37(b)(2).

⁵ See, NRS 22.010 (defining contempt as, "disobedience or resistance to any lawful writ, order, rule or process issued by the court or judge at chambers."); see also, EDCR 7.60 (if, without excuse, a party fails to comply with the rules, the Court may dismiss the answer or impose fines or other sanctions.)

1 court to impose all of the sanctions provided under NRCP 37(b).⁶ Thus, a district court may
2 impose sanctions, including striking pleadings, when there has been willful noncompliance with
3 a discovery order or willful failure to produce documents as required under NRCP 16.1. In this
4 case, the First Street Defendants have repeatedly, willfully withheld crucial, discoverable
5 evidence in noncompliance of both NRCP 16.1 and NRCP 26.

6 Additionally, in Young v. Johnny Ribeiro Bldg., Inc., 106 Nev. 88, 787 P.2d 777 (1990),
7 the Supreme Court of Nevada held that courts have “inherent equitable powers to dismiss
8 actions or enter default judgments for ... abusive litigation practices. Litigants and attorneys
9 alike should be aware that these powers may permit sanctions for discovery and other litigation
10 abuses not specifically proscribed by statute.”⁷ The Supreme Court further stated, “while
11 dismissal need not be preceded by other less severe sanctions, it should be imposed only after
12 thoughtful consideration of all the factors involved in a particular case.” Id. at 92, 787 P.2d at
13 780. In discussing the legal basis for dismissal, the Supreme Court held:

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

21 An analysis of the aforementioned Young factors, which the Court has carefully,
22 thoughtfully, and fully considered, reveals that striking the First Street Defendants’ Answer is
23

24 ⁶ See, Nevada Power Co. v. Fluor Illinois, 108 Nev. 638, 837 P.2d 1354 (1992); see
25 also, Temora Trading Co. Ltd v. Perry, 98 Nev. 229, 645 P.2d 436 (1982) (affirming the district
26 court's order striking the defendant's **answer** and entering judgment in favor of the plaintiff for
violating court orders); Skeen v. Valley Bank of Nevada, 89 Nev. 301, 511 P.2d 1053
(1973) (striking the defendant's **answer** and awarding attorney's fees pursuant to NRCP 37).

27 ⁷ Id., 106 Nev. at 92, 787 P.2d at 779. (Internal quotation and citation omitted).

28 ⁸ Id. at 93, 787 P.2d at 780.

appropriate.

III. ANALYSIS OF THE YOUNG FACTORS

A. Factor One: Degree of Willfulness of the Offending Party

The Court finds that the First Street Defendants' discovery abuses were willful with the intent to harm Plaintiffs. At many turns, the First Street Defendants hid evidence that the Jacuzzi tub was slippery, that it had documents about the slipperiness of the tub, that customers had complained about the slipperiness of the tub, that some customers had been injured due to the slipperiness of the tub, that the Plaintiff herself had called and complained about getting stuck once before she died where she had to "dive underneath" the water to drain the tub, and that steps existed and were contemplated and/or used to try to mitigate the harm from the slipperiness of the tub. Such abuses were repeated and involved highly relevant pieces of evidence, within the possession of the First Street Defendants, readily identifiable and locatable by the First Street Defendants within its own records, and often withheld by the First Street Defendants until their concealment was caught by Plaintiffs through some other discovery in the case (or by Jacuzzi's own production of the evidence first). Further, the degree of willfulness is augmented because the First Street Defendants, without justification, have blamed Plaintiffs for the delay in discovery in this case.

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

Plaintiffs have been substantially prejudiced by the First Street Defendants' concealment of the evidence. The First Street Defendants deprived Plaintiffs of the opportunity to use the concealed documents in their several sessions of deposition of the Jacuzzi 30(b)(6) and other witnesses. The First Street Defendants also caused substantial delay in the taking of their own deposition. The First Street Defendants concealed a substantial number of similar incidents until after the close of discovery in this case. Plaintiffs have not been able to adequately use the concealed evidence with their own experts, or to use it in time to prepare to examine





1 Defendants' experts. The First Street Defendants were a substantial cause of the very disjointed
2 discovery outlined in Plaintiff's Timeline for Reply, exhibit 41, as well as pp. 36-41 of
3 Plaintiffs' Reply Brief. Further, Plaintiffs have been prevented from taking any further
4 depositions regarding any of the new evidence because discovery closed in August of 2019.
5 Plaintiffs' trial preparations, and ability to present their case has been drastically and irreparably
6 compromised. A further extension of the discovery deadline, considering the age of this case,
7 the time that the Plaintiffs have been waiting for a proper day in Court, and considering the
8 numerous prior extensions necessitated by the First Street Defendants' misconduct and the
9 discovery misconduct of the other defendants, would be unfair to impose upon the Plaintiffs.

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

12 Any sanction less than the striking of the First Street Defendants' Answer would be
13 grossly inadequate to remedy the harm that the First Street Defendants inflicted upon Plaintiffs.
14 The First Street Defendants' discovery abuses destroyed Plaintiffs' ability to attempt to
15 persuade the jury on its claims; on balance then, and in fairness, Plaintiffs should no longer have
16 to prove the First Street Defendants' liability. Further, based on the substantial evidence
17 presented already by the parties to this Court, viewed in the light most favorable to the
18 defendants, and using a burden on Plaintiff of proof on preponderance of the evidence, proves
19 to this Court that Plaintiff is entirely justified in the claims it brought against the First Street
20 Defendants. Of course, this Court is not the trier of fact; but the level of proof already given
21 does demonstrate that it would not be unreasonable to impose liability on the First Street
22 Defendants for their discovery abuses. It is not like liability is being imposed on what would
23 otherwise be a completely innocent party.

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

25 Evidence has been irreparably lost in this sense: everything concealed and untimely
26 disclosed by the First Street Defendants has prevented Plaintiffs from being used in the
27 deposition of the many witnesses in this case. This testimony about the concealed evidence has
28 been lost because the First Street Defendants prevented it from coming into existence, and it



1 cannot now come into existence because discovery has closed, and this case has reached the so-
2 called five-year-rule (except as stayed due to special emergency Covid-19 rules). Further,
3 because of the untimely and late disclosure of documents, so much time has passed that
4 potential witnesses have passed away, memories have faded, and dealers have gone out of
5 business. This is evidence that has been lost forever.

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

7 There is no less feasible and fair sanction. The Plaintiffs should not have to further
8 endure litigation that has already gone on for five (5) years so the re-opening of discovery
9 would not be fair. Besides, the facts and circumstance in this case show this Court that the First
10 Street Defendants will continue to withhold relevant evidence, and that this case would continue
11 ad nauseum to the administration of justice absent the sanction.

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

13 The sanction of striking the Answer of the First Street Defendants will not unfairly
14 operate to penalize the First Street Defendants for the conduct of their counsel. In their
15 opposition to the instant motion, the First Street Defendants did not attempt to excuse its
16 discovery abuses based on advice of counsel. Nor did the First Street Defendants identify any
17 discovery conduct that was done at the direction of its counsel.

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

19 The sanction imposed here is necessary to deter the First Street Defendants, as well as
20 litigants in future cases, from abusive litigation tactics and discovery abuses. In a case of this
21 magnitude, where a person has suffered and died while using a product, discovery of all
22 relevant facts and circumstances surrounding the design, manufacturing, marketing, advertising,
23 and customer use of the product should be done in a full and fair and timely manner to get to the
24 truth of what happened and why. The First Street Defendants interfered with this process, so a
25 proper message must be sent.
26

27 **III. CONCLUSIONS OF LAW**

1 In sum, the First Street Defendants prevented Plaintiffs from getting a fair trial; and the
2 only fair remedy is to strike the First Street Defendants' Answer, establish liability as a matter
3 of law, and permit Plaintiffs to proceed to prove up its damages.
4
5

6 **ORDER**

7 **IT IS HEREBY ORDERED** that Renewed Motion to Strike Defendant First Street for
8 Boomers & Beyond, Inc.'s and AITHR Dealer, Inc.'s Answer to Plaintiffs' Fourth Amended
9 Complaint is GRANTED. Defendants First Street for Boomers & Beyond, Inc.'s and AITHR
10 Dealer, Inc.'s Answer is stricken as to liability only. Liability is hereby established as to
11 Plaintiffs' claims against First Street and AITHR for (1) negligence, (2) strict product liability,
12 (3) breach of express warranties, (4) breach of implied warranty of fitness for a particular
13 purpose, and (5) breach of implied warranty of merchantability. The only remaining issue to be
14 tried as to First Street and AITHR is the nature and quantum of damages for which they are
15 liable. First Street and AITHR are precluded from presenting any evidence to show that they
16 are not liable for Plaintiffs' harms as to any of Plaintiffs' causes of action against them.

Dated this 31st day of December, 2020

17 IT IS SO ORDERED.

18 
19 _____
DISTRICT COURT JUDGE

20 Prepared and Submitted by:
21 **RICHARD HARRIS LAW FIRM**
22 /s/ Benjamin P. Cloward
23 BENJAMIN P. CLOWARD, ESQ.
24 Nevada Bar No. 11087
25 801 South Fourth Street
26 Las Vegas, Nevada 89101
27 Attorneys for Plaintiffs
28

AC8 E5B 581B 6EA6
Richard F. Scotti
District Court Judge



1 **CSERV**

2
3 DISTRICT COURT
4 CLARK COUNTY, NEVADA

5
6 Robert Ansara, Plaintiff(s)

CASE NO: A-16-731244-C

7 vs.

DEPT. NO. Department 2

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

10
11 **AUTOMATED CERTIFICATE OF SERVICE**

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

14 Service Date: 12/31/2020

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If indicated below, a copy of the above mentioned filings were also served by mail via United States Postal Service, postage prepaid, to the parties listed below at their last known addresses on 1/4/2021

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